IN THE MATTER OF AN ARBITRATION

BETWEEN: GARDA SECURITY SCREENING INC.

("GARDA")

- AND -

UNITED FOOD AND COMMERCIAL WORKERS
UNION LOCAL 175

(THE "UNION")

RE: INDIVIDUAL GRIEVANCES OF FELICE CICCONNE

BEFORE: SYDNEY BAXTER SOLE ARBITRATOR

HEARING AT: THUNDER BAY, ONTARIO

ON BEHALF OF THE UNION: MR. BILLEH HAMUD
DATES OF HEARING: MARCH 26, 27 & 28, 2014

ON BEHALF OF THE UNION: MS. GEORGINA WATTS
DATES OF HEARING: JULY 30, 31 & AUGUST 1, 2014
NOVEMBER 4, 5 & 6, 2014

ON BEHALF OF GARDA: MR. ERIC BOUCHER

These proceedings were convened to deal with the discharge of Mr. Felice Ciccone (the "Grievor") from his employment as a Screening Officer with Garda Security Screening Inc. ("Garda") at the Thunder Bay Airport. The Grievor was represented throughout by the United Food and Commercial Workers Union Local 175 (the "Union").

BACKGROUND

At the time of his discharge, the Grievor had been a Screening Officer for 10 years. During the Grievor's 10 year tenure, the contract for security screening at the Thunder Bay Airport was held first by Paragon Protection Services, then by Aeroguard and finally in 2011, it was assumed by Garda.

Garda is a security company which provides, amongst other things, pre-board screening ("PBS") at a number of airports in Canada, including the Thunder Bay airport. PBS is the screening of passengers, their carry on baggage and their personal belongings prior to boarding an aircraft. The Canadian Airport Transport Security Authority ("CATSA") is a Canadian Crown Corporation responsible for security screening in eighty-nine designated airports in Canada. CATSA was created as part of the government of Canada's response to the events of September 11, 2001; it reports to the government of Canada through Transport Canada. CATSA has contracted with Garda to provide PBS services at a number of airports throughout Canada and since 2011 Garda holds a contract with CATSA to provide the screening services at the Thunder Bay airport.

The various job duties of a screening officer are as follows:

i) Boarding pass security scanning: The Screening Officer scans the passengers' boarding passes outside the security checkpoint by using a hand held scanner;

ii) Entry/access position: the Screening Officer stands next to a table and conveyor belt. He puts baggage and plastic bins containing items such as lap top computers, keys, coins, etc., onto the conveyor, which is equipped with rollers. The baggage and plastic bins are then conveyed through the X-Ray machine;

iii) X-Ray position: the Screening Officer views the screen which reveals the contents of the baggage and the personal belongings of the passengers which have been placed in the plastic bins, in order to determine if prohibited objects are contained in the baggage or personal items;

iv) Bag search position: the screening officer has to physically search the bags that have been identified by the Screening Officer at the X-Ray position as possibly containing prohibited objects;

v) Walk-through metal detector: The Screening Officer requests each passenger to walk through the metal detector. If the passenger triggers the detector alarm, the Screening Officer must perform further screening procedures such as:

(a) The use of a hand-wand device to detect metal objects ("hand held metal detector");

(b) A partial or full physical search, commonly known as a "pat down";

(c) A scan of the body using a full-body scanner ("FBS");

(d) A trace of a passenger's hands, using explosive detection technology.

The duties and responsibilities of each security company, including Garda, that has been contracted by CATSA to provide airport security are governed by CATSA's Screening Contractor Manual ("SCM"). In accordance with the SCM, Garda is responsible for managing the recruitment of staff, and co-operating with CATSA to ensure the use of staff that are trained, designated and certified within the CATSA training certification program.

Garda is also responsible for maintaining a record of Screening Officers who have been certified and for ensuring that only designated Screening Officers are certified to work on a screening line. Further, Garda is responsible for ensuring that the Screening Officers are certified to operate X-Ray equipment (in accordance with Health Canada requirements) and ensuring that only certified Screening Officers operate X-Ray equipment. To that end, Garda must comply with the Designation Standards for Screening Officers ("DSSO") as outlined in the SCM, when hiring and re-certifying its Screening Officers, in accordance with Transport Canada Security and Emergency Preparedness. The DSSO, therefore,

provides that every Screening Officer must meet certain requirements, prior to being hired and every two years thereafter.

In particular, each Screening Officer must be certified by a medical doctor to be in good general physical health in accordance with the following criteria:

a) having vision not less than 6/9, (20-30); with or without correction;

b) exhibiting normal colour perception;

c) having normal hearing without hearing aid(s), based on a whisper test 3 meters (9 feet); and

d) being in good general health.

In addition, and in accordance with the SCM, it is Garda's responsibility to ensure that its staff are trained, designated and certified within the CATSA national training and certification program.

The relevant sections of the DSSO and the SCM, to which the parties made reference are as follows:

SCREENING CONTRACTOR MANUAL

1.1 General Responsibilities

Screening personnel	- Manage the recruitment of staff. - Cooperate with CATSA to ensure the use of staff that are trained, designated, and certified within the CATSA National Training and Certification Program. - Maintain a record of Screening Officers who — have been designated, and ensure that only designated Screening Officers who are certified are working on line, and — are certified to operate X-ray equipment (in accordance with

Health Canada requirements) and ensure that only certified Screening Officers operate X-ray equipment.

Accommodating screening personnel

Manage requests for accommodation in line with CATSA's Accommodation for Screening Officers Policy (see Section 1.6 of this chapter).

Checkpoint

- Implement CATSA's interpretations and policies for operating equipment and managing screening operations.
- At applicable airports, ensure that CATSA Regional Management is promptly informed when there is an issue in the service-level quality of CATSA's bin and line cleaning providers (e.g., poor cleaning of metal tables, divestiture bins, WTMDs, X-ray machines and floor mats).
- Ensure that printed material provided by CATSA is available for display at the screening checkpoint (e.g., information on signs, notices, and insignias) at bilingual-designated sites in both of Canada's official languages with equal prominence.
- Maintain a BPSS Log Binder at each checkpoint, with 10 or so copies of the Problem Log Sheet at the front of the binder.
- When persons are passing through the screening checkpoint, watch for items that could set off the walk-through alarm, with the goal of reducing the activation of the alarm and the inconvenience to other persons.
- Ensure that the persons do not access the sterile area until the screening process is completed.

1.5 Screening Officer Accommodation

Background

Screening Contractors are required to follow CATSA's *Accommodation for Screening Officers Policy*.

Note: CATSA recognizes that Screening Contractors, as employers, have processes to address accommodation requests from Screening Officers. The information that follows refers specifically to accommodation requests that fall under CATSA's areas of responsibility.

Who can request an accommodation

- Screening Officers
- Screening Officer Recruits

Grounds for accommodation requests

Under the *Canadian Human Rights Act*, Screening Officers are entitled to request accommodation if they are at a disadvantage in the workplace because of their

- race
- national or ethnic origin
- colour
- religion
- age
- sex (including pregnancy)
- sexual orientation
- marital status
- family status
- disability, or
- conviction for which a pardon has been granted.

Duty to accommodate

Depending on the situation, CATSA or the Screening Contractor (or both) may have a duty to accommodate, which means taking whatever measures necessary, up to the point of undue hardship, to allow Screening Officers to work to the best of their ability.

Areas of responsibility for accommodation

Depending on the situation, either CATSA or the Screening Contractor may be responsible for decisions concerning Screening Officer accommodation.
The areas that each is responsible for a listed below:

Screening Contractor	CATSA
- scheduling and flexible work arrangements - collective agreements - hiring and selection process - employment-related policies (e.g. vacation accrual, leave requests), procedures, practices.	- operations (SOPs directives etc.) - training (learning disabilities etc.) - certification - uniform requirements - *Designation Standards for Screening Officers* (DSSO)

Note: While the areas of responsibility for decisions on accommodation requests are distinct, in some situations both CATSA and the Screening Contractor may be required to take measure to accommodate.

CATSA responsibilities

CATSA's responsibilities with respect to accommodation requests are to
- exercise good faith when evaluating accommodation requests
- ensure that accommodation requests are processed in a timely, respectful and confidential manner
- minimize the need for individual accommodation by ensuring that policies, procedures, practices and decisions are not discriminatory, and
- establish, implement and monitor a Screening Officer accommadation policy and communicate it to Screening Contractors.

1.5 Screening Officer Accommodation, Continued

Medical report

When an accommodation request is made for medical reasons, the Screening Officer's limitations and the possible accommodations must be described in a report completed by a physician. Screening Contractors must ensure that the following information is included:
- prognosis
- description of limitations or restrictions to regular functions, and
- if possible, an estimate of how long the limitation or restriction will last (i.e., when is the Screening Officer likely to return to regular functions?).

Appealing CATSA's decision

If a request for accommodation is denied on the grounds of undue hardship or any other grounds, CATSA recognizes the continuing right of Screening Officers or Screening Officers Recruits to make a complaint under the *Canadian Human Rights Act*.

9.2 Designation Standards for Screening Officers

Designation

Designation, the authority to conduct "authorized searches" as defined in the *Aeronautics Act* and the *Canadian Aviation Security Regulations*, is authorized by the Minister of Transport.

Note: Screening Officer Recruits must be designated before they may conduct screening at a live line at a Canadian designated airport.

Designation Standards for Screening Officers (prior

For a Screening Officer to be designated, the following must be met. Prior to being hired a Recruit must be:
- 18 years of age, and

to being hired)

- a Canadian citizen or permanent resident as defined in the Immigration Act with an employment authorization document

hold a valid
- Screening Officer Medical Examination Report (section 9.2) and
- Transportation Security Clearance (see section 9.1 of this Chapter)

understand, speak and write one or both of Canada's official languages.

Designation Standards for Screening Officers (upon being hired)

Upon being hired, a Recruit must
- successfully complete CATSA's training program as required
- meet the criteria required to obtain Screening Officer certification, and
- continue to meet the Designation Standards identified above.

Screening Officer Medical Examination Report

Recruits and Screening Officers must meet the requirements set out in the *Screening Officer Medical Examination Report.*

The report is used to confirm that a Screening Officer is fit for duty. Screening Contractors must ensure the Report is completed
- prior to hiring a new Screening Officer Recruit
- prior to a Screening Officer's returning from medical leave, and
- every two years after a Screening Officer is hired.

Note: If there are concerns about the Report's validity, the Screening Contractor must take necessary steps to ensure that the information is accurate.

Note: The Report is a Protected B document when completed, and must be treated in accordance with the security requirements in Chapter 6 of this manual.

Revoked Designation

Designation may be revoked when a Screening Officer
- is voluntarily or involuntarily terminated by the employer

- is decertified, or
- does not meet Designation Standards

Designation transfer and employment termination

The Screening Contractor must inform CATSA's Training and Certification Coordinator when a Screening Officer
- transfers to another airport as Transport Canada may need to reissue the designation, or
- has their employment terminated

Note: See Section 10.3 of this Manual for details

10.1 Certification

Overview

Certification is part of the NTCP and consists of a formal process of evaluation and validation of a Screening Officer Recruit's competencies.
Under the *CATSA Act*, CATSA has authority to
- establish criteria that outlines the qualifications, training and competency expectations of Screening Officers
- certify Screening Officers against this criteria, and
- vary, suspend or cancel a Screening Officer's certification if it determines that the Screening Officer no longer meets the criteria.

Screening Officer Recruits become certified by successfully completing the Screening Officer Foundations (SOF) Program. Once certified, a Screening Officer is authorized to screen passengers, non passengers and their belongings at designated Canadian airports.

Decertification

If a Screening Officer does not meet or maintain certification criteria, CATSA's Local Decision Board (LDB) may recommend to CATSA's National Decision Board (NDB) to decertify the Screening Officer.

Note: When a Screening Officer's employment is terminated, their certification is revoked.

How to maintain certification

Screening Contractors are responsible for providing Screening Officers with an environment that supports continuous learning and maintaining screening skills through coaching and mentoring.

To maintain their certification, Screening Officers must:
- meet the certification requirements listed in the Training Manual
- meet the requirements of the Recurrent Learning Program (RLP), and
- work a minimum of sixteen hours per month at pre-board screening (PBS) as follows:

  – 8 hours on X-ray and physical search of baggage, and
  – 8 hours on any other pre-board screening (PBS) function.

Should a Screening Officer **not** demonstrate screening competency, immediate corrective actions must be taken by the Screening Contractor.

Note: Additional information on the RLP is available in the Training Manual.

Screening Contractor responsibilities

Screening Contractors must ensure that Screening Officers
- conduct screening in accordance with certification criteria
- work the minimum hours required to maintain certification, and
- meet RLP requirements.

Screening Contractors must also
- inform CATSA when a Screening Officer takes a leave of absence
- ensure that the procedures are followed when a Screening Officer returns from a leave of absence (see Chapter 2 of the Training Manual)
- appropriately manage performance events
- maintain documentation on certification in a Screening Officer's training file (see Section 10.3, Program Administration, of this Manual), and
- Inform CATSA when a Screening Officer's employment is terminated (see Section 10.3 of this Manual).

DESIGNATION STANDARDS FOR SCREENING OFFICERS

4. ***HEALTH***

Applicants must be certified initially and every two years thereafter by a medical doctor to be in good general physical health, according to the following criteria:

(a) having vision not less than 6/9 (20/30) with or without correction;
(b) exhibiting normal colour perception;

(c) having normal hearing with or without hearing aid(s), based on a whisper test from 3 metres (9 feet); and
(d) being in good general health.

THE EVIDENCE

Testimony of Mr. Joe Burcul

Mr. Burcul, the General Manager of Operations for Garda, began his career with Garda on November 15, 2011. Prior to 2011, he worked for Aerogard, the previous service provider. Mr Burcul oversees security at eleven of the regional airports in Ontario. He testified that a Screening Officer must have normal colour vision and if a Screening Officer has a colour vision problem, he longer meets the DSSO Standard. Therefore unless he is accommodated, the Screening Officer would lose his certification and could no longer work as a Screening Officer.

Mr. Burcul testified that he became aware of the Grievor's condition, known as colour blindness, at the end of April 2013. As a result, he contacted Ms. Angiolina Vindetti, Garda's Site Security Manager at the Thunder Bay Airport, and requested that she review the Grievor's most recent medical report.

Mr. Burcul said that some time later, Ms. Vindetti telephoned him to advise that she had reviewed the Grievor's medical report and it did indicate that the Grievor had a colour vision deficiency. Mr. Burcul said that he then instructed Ms. Vindetti to tell the Grievor, on his next scheduled shift, that he needed to have a new medical completed. He further asked Ms. Vindetti to give the Grievor a blank medical form to have it completed by his doctor. Mr. Burcul told Ms. Vindetti that in the interim, the Grievor must not perform any work on the X-Ray machine.

Mr. Burcul said that around the beginning of May, 2013, the Grievor provided Garda with a new medical report which revealed that he did not have normal colour vision. Mr. Burcul

forwarded the Grievor's medical report to Mr. Israel Morin, Garda's Regional Human Resources Manager. Mr. Burcul said that Mr. Morin then sent a request for accommodation form to Ms. Vindetti for the Grievor to complete. Mr. Burcul explained that Section 1.5 of the SCM contains the accommodation procedure, in the event there is a need to accommodate a Screening Officer. He said that Section 1.5 provides that in order for the accommodation process to be triggered, the Screening Officer must sign the request for accommodation.

It was Mr. Burcul's understanding that Mr. Morin had set May 15, 2013, as the deadline for the Grievor to sign the request for accommodation form. On May 15, 2013, Mr. Burcul travelled to Thunder Bay for a staff appreciation luncheon. After the luncheon had ended, Mr Burcul met with Ms. Colby-Flank, the union representative, the Grievor and Ms. Vindetti. At the meeting, Ms. Flank and the Grievor asked why the accommodation request form needed the Grievor's signature. Mr. Burcul said that he produced a copy of the DSSO and explained that under the DSSO, CATSA not Garda, required the Grievor's signature. He said that he explained the provisions of the DSSO, in particular the medical section. The Grievor asked, "How did you come to the point of picking on me? Why are you having me do a medical?" and "How did you find out?" According to Mr. Burcul, at one point during the meeting, Ms. Flank told the Grievor, "If I were you I would sign the document, it doesn't mean you have to drop the fight, you can keep fighting but at least it means you still have a job."

At the end of the meeting, the Grievor requested to speak to Mr. Morin and also requested an extension of time to allow him to consider the accommodation request form. The Grievor was given an extension until Friday May 17, 2013.

On May 17, 2013, Mr. Burcul received the following email from the Grievor:

Dear Mr. Burcul,

I have considered my options and utilized any available resources to the best

of my abilities within the given time frame set out by Mr. Morin. My deadline is today at 12 pm but I will be occupied between 11 am and 4 pm today, so I will respond in this e-mail. As you know, I have worked with CATSA since 2002. My colour vision deficiency was always known, yet I have passed all official CATSA, Paragon, Aeroguard, Garda and Transport Canada tests, as well as trained new screeners on the x-ray position on behalf of CATSA, and passed all XRT requirements, while assisting several other screeners in doing the same. (In the Garda Employee Manual, on page 41, it stated that "individual certification is XRT performance based...") My colour deficiency has never been an issue in regards to my job, and the test results in your possession speak to that fact. It is my understanding that if I do not sign the request for accommodation form I will be without a valid CATSA medical. This is untrue. My medical does not expire for another year, and is filled out according to CATSA requirements. My medical was reviewed and accepted when it was competed*(sic)*, as well as the other medicals I have completed throughout the years. Why my colour deficiency now poses a problem is still a mystery to me. While speaking with you on May 14, 2013, I asked for any kind of additional proficiency test to prove to you my abilities. I was told there was no testing available. Your basis for accommodation is flawed, and your accommodation of permanently removing me from all x-ray positions is not based on any real knowledge of my individual disability other than the results of a Farnsworth test.

One of the x-ray units that you wish to permanently remove me from displays the primary image only in black and white. You said the reason the company requested the accommodation was for health and safety purposes, yet I am held to the same standards as all other individuals who work for you. If there is a health and safety issue with me, then there should be health and safety issues with everyone. I will also state, as I have before to you and Mr. Morin, that I can see all the colours that appear on the x-ray screen, and that all people see colours differently, but it does not mean that I cannot see them at all. I will clearly state that because colourblindness *(sic)* is a disability, which is a prohibited ground of discrimination, and because the Canadian Human Rights Act states that:

7. It is a discrimination practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual

or

(b) in the course of employment, to differentiate adversely in relation to an employee

on a prohibited ground of discrimination

> I feel that I am being discriminated against by Garda/CATSA by being forced to permanently cease to operate all x-ray equipment and being banned from returning to work until I sign the request for accommodation, even though I have passed all testing requirements that any able bodied individual who works on those machines would have to pass. It is for this reason that I will not be signing the request for accommodation, and I have begun to file a complaint with the Canadian Human Rights Commission via the Canadian Human Rights Act with myself as my representative. At this time I will simultaneously be filing a grievance with the UFCW. As I am aware this is also in violation of the '*CODE OF ETHICS, CONDUCT AND CONFLICT OF INTEREST FOR THE EMPLOYEES* OF CATSA' and I feel the Office of Primary Interest should be made aware. As per our last conversation, I will attempt to follow the appropriate chain of command, so I ask you to please forward this to Mr. John Stroud, Vice-President, Human Resources and Corporate Affairs of CATSA, and let me know he has been made aware. Since I will be representing myself within regards to the Human Rights Act violation, I respectfully ask you to keep me informed throughout this entire process directly. If you have any questions please feel free to contact me by e-mail, or if you choose you may call me at 807-476-7621 and leave a message, and I will get back to you as soon as possible. Thank you.
>
> Felice Ciccone

Subsequent to receiving the Grievor's email, Mr. Burcul spoke to Ms. Flank about the Grievor's emailed statement that he was refusing to sign the accommodation request. Ms. Flank said that she would speak to the Grievor. Mr. Burcul said that he left it at that. He then spoke to Mr. Morin and they decided to give the Grievor another opportunity to sign the accommodation request form. As a result, a letter was sent to the Grievor dated May 22, 2013, requesting that he sign the form and warning him of the consequences should he fail to do so.

In cross-examination, Mr. Burcul agreed that he did not contact CATSA with regard to the Grievor's accommodation. He further agreed that nowhere in the accommodation process does it state that the Screening Contractor can impose accommodation on someone.

Asked if April 2013 was the month that the Grievor had taken issue with entering the FBS? Mr. Burcul agreed that it was April. When he was asked to explain the circumstances of the issue with the FBS, he said that the Grievor had concerns about going into the FBS because of exposure to radiation. The Grievor, therefore, refused to enter the unit citing health and safety reasons. Mr. Burcul said that when he was informed that there was an issue with the FBS, he contacted the health and safety committee at the Thunder Bay Airport, which consisted of Ms. Vindetti and Ms. Flank and another union representative whose name Mr. Burcul could not recall.

Mr. Burcul was asked if the Grievor, at the meeting on May 15, 2013, asked if he [Mr. Burcul] would conduct a functional individual assessment on the Grievor to determine if he could perform his duties? Mr. Burcul replied that the Grievor did make such a request. He said that he told the Grievor that he would make that request to CATSA, as such a decision was not one for Garda to make. Asked if during the meeting of May 15, 2013 he started to yell at the Grievor? He denied yelling and said he was not one to yell.

Mr. Burcul agreed that he did not provide the Grievor with any contact information for CATSA nor did he forward the Grievor's email, dated May 17, 2013, to CATSA. He further agreed that, to his knowledge, the Grievor had always passed his yearly certification with Garda and with the previous security employers at the Thunder Bay Airport. Mr. Burcul agreed that there was a testing component for the X-Ray machine but denied any knowledge that there are black and white X-Ray monitors. To his knowledge, he said, they are all colour.

Mr. Burcul was pressed in cross-examination, by Union Counsel, Mr. Hamud, about the qualifications of Dr. Ulakovic (the physician who completed the medical report concerning the Grievor's colour vision on May of 2013). Counsel for Garda objected to this line of questioning and in the absence of the witness [Mr. Burcul], I asked Counsel for the Union to explain his reasons for this line of questioning. Counsel informed me that the Union was taking the position that Dr. Ulakovic, unlike Dr. Yesovitch, whom the Grievor had attended

for his 2012 check-up, was not properly qualified to administer the Farnsworth colour blindness test. Therefore, Counsel maintained, it was incumbent on Garda to inquire and to satisfy itself that when an employee is required to have a medical test performed, that it is performed by a qualified practitioner. Counsel provided me with a College and Physicians and Surgeons of Ontario site search, with respect to Dr. Yesovitch, which confirmed, in his view, that she was qualified to perform the Farnsworth test. The document further provided, which in my view is noteworthy for reasons that I will touch on later, that Dr. Yesovitch was still in medical practice at the exact same location as when the Grievor visited her in 2012. After a short discussion on the topic, Counsel decided not to continue this line of questioning.

Testimony of Mr. Israel Morin

Mr. Israel Morin testified that he is very familiar with the Screening Officer's accommodation process. When he assumed the responsibility for Human Resources with Garda in 2012, CATSA personnel contacted him and asked if he would review the entire accommodation process.

Mr. Morin explained that in order for a Screening Officer to retain his certification from CATSA he must work a minimum of 16 hours per month on the following duties:

1) 8 hours of Personal Search of Person and the X-Ray machine.

2) 8 hours of any other Pre-Boarding Screening, for example: Personal Search of Bag or Walk through Metal Detector.

If a Screening Officer is not able to maintain the required hours, on any of these positions, he must be accommodated in order for him to retain his certification.

Mr. Morin said that when he received the information that the Grievor was colour blind he prepared the accommodation request form for the Grievor's signature. On it he wrote, "This Screening Officer has not a normal colour vision". He sent it to Ms. Vindetti and instructed her to give it to the Grievor. Further, he spoke with the Grievor, by phone, on May 10, 2013, and explained the need for the accommodation request due the Grievor's latest medical signed by Dr. Ulakovic confirming that he did not have normal colour vision.

Mr. Morin explained that an employee with a disability can still work as a Screening Officer once CATSA approves an accommodation, be it temporary or permanent. The accommodated employee would continue to work his regular shift and receive the same rate of pay. All other employment conditions would remain as per usual, save that the employee would not be required to perform the exempted duties.

Mr. Morin said that he spoke to the Grievor by telephone on May 10, 2013 and during the conversation he explained to him the need for accommodation in order for the Grievor to retain his position as a Screening Officer. Mr. Morin further explained that the accommodation would exempt the Grievor from working on the X-Ray machine. Mr. Morin said that he also told the Grievor that in order for the accommodation process to commence, the Grievor was required to sign the accommodation request form. Mr. Morin said that the Grievor informed him that he needed some time to think about it and Mr. Morin granted him more time. After their conversation Mr. Morin sent the Grievor the following email:

> "I agree to extend your time frame. For this reason, the employer request *(sic)* to you that you provide the request for accommodation before Friday May 17th, 2013 before 12:00
>
> Obviously, during this period you are not allowed to work
>
> If you cannot contact Angie [Ms. Venditti] at this moment you can contact Mr.

Joe Burcul. He is aware of your situation

Mr. Morin, subsequently, received a copy of the email from the Grievor which was sent to Mr. Burcul, dated May 17, 2013, advising Mr. Burcul that he [the Grievor] was refusing to sign the accommodation request.

Mr. Morin also received a copy of the following email, from the Grievor, dated May 22, 2013, which was addressed to Ms. Venditti:

> Hello Angie,
>
> As per our conversation yesterday I am sending you this email to get the answers to a few questions and to make it clear that I wish to be involved at every step of this situation. Please forward this to the appropriate person(s) so that my questions can be answers *(sic)* as accurately and truthfully as possible. Thank you.
>
> To whom it may concern:
>
> I would like to ask, in the future, would the company please directly respond to my questions in relation to this discrimination complaint regarding all matters involved. The union is also to be informed in all matters but since I will also be representing myself I wish to be contacted and directly informed. I was never told I was terminated. I was never responded to when I sent an email to mr. *(sic)* Burcul on Friday May 17, and I received no communication since then from the company. To my surprise, I called Angie Venditti yesterday and I was told that she was informed my shifts were to be given away. This is no way to treat an individual in a matter such as this. Please keep me informed as this incident continues. That being said I would like to know:
>
> 1. What is the status of my employment/vacation pay/ all monies owed?
>
> 2. Who would be the respondant *(sic)* in a Human Rights Violation? Would it be CATSA, or Garda? I will also need the name and telephone number of the CEO of the respondant, as well as the mailing address.
>
> 3. I would like copies of all of my past medicals as well as results from all of my testing.

> Thank you for you *(sic)* time. Please let me know the answers to these questions as soon as possible.

Ms. Venditti forwarded the email to Mr. Burcul, who passed it on to Mr. Morin.

After receiving the Grievor's email of May 22, 2013, Mr. Morin spoke to Mr. Burcul and they decided to give the Grievor one last chance to comply with the accommodation process. Mr. Morin prepared a letter and sent it to Mr. Burcul for his signature. The letter reiterated the attempts taken to date to have the Grievor participate in the accommodation process and concluded by informing the Grievor that, without his co-operation in the accommodation process, Garda would not be able to proceed alone. Therefore, Garda would have no alternative but to terminate his employment.

The Grievor responded with the following e-mail dated June 3, 2013:

> It has been since May 10, 2013 that Garda has wrongfully removed me from my duties as a screener. I do not feel that this situation has been handled appropriately by Garda management. Since our conversation on May 15, 2013 I have respected your request of not speaking with anyone other than you, or Angie Venditti, in Garda or CATSA, regarding this matter. On May 17th, 2013 I had asked that CATSA be made aware of this situation, and for the names and contact information of those who I would submit as the respondents in a Human Right complaint. You have not given me this information and I have not been made aware that CATSA has been contacted. I feel the need to speak with CATSA directly regarding this matter, as I feel there is a fair amount of confusion and misinformation regarding this matter. I will state again, as I have before, that my colour deficiency does not, in any way, affect my performance on any x-ray function. This is well known by my employer and can be seen by reviewing my testing results. I have not been asked if it does, or been given any chance to prove my skills. In fact, in my May 10th conversation with Isreal *(sic)*, I was told that "(my) competency (on the x-ray position) is not important for this case". If competency isn't the issue, then what is? Am I being unfairly targeted for something that I have lived with my whole life that I cannot control, even if it has nothing to do with the real issue of public safety? During this entire ordeal I have been threatened with the loss of my job, if I do not sign your request for accommodation, multiple times. The truth is that I do not require accommodation, and I am still at a loss as to why

something like this would come up after 10 years of flawless operation. You stated in your letter dated May 27th, 2013 that on May 7, 2013 I presented you a form which showed I did not have normal colour vision. This is not true, since Garda and CATSA knew of my colour deficiency well before hand. Garda would have known since they won the contract and took over, and CATSA has known for many years. I have also revealed this information to all of my previous managers and co-workers. You stated that my CATSA medical form is not up to date. This is also not true. I have attached a copy of my most recent medical. This medical is dated April 27, 2012. This medical was filled out by a medical doctor, specifically to the standards set out by CATSA on that medical form. This is the same form which is being used as the current medical form. It is valid for two years from the date of examination. It also shows that the doctor performed the required CATSA testing under the section asking if the screener has normal colour vision. The doctor had a choice, as determined by CATSA, of performing the Isharia test OR the Fansworth D15 test, as is clearly stated on the CATSA medical document. The doctor performed the Isharia test, and stated that I did not have normal colour vision, as I was Red/Green deficient. She attached those results to the medical exam report and the medical was turned into Garda. The medical was filled out according to CATSA requirements. I took part in the colour testing, the results were noted, and the examination was accepted as it has been for the past 10 years that I have worked for CATSA. I feel this situation is not only discriminatory but through it I have been made to look incompetent as a screener, and as a person, in the eyes of my employer, my co-workers and peers. As well, I am being financially burdened by the spontaneous suspension of my duties, and the denial of my banked vacation pay by yourself. As I have passed all required testing, and proven myself on the x-ray function repeatedly, I feel that my colour deficiency does not play any role in the health and safety of other individuals including the travelling public, and that my x-ray threat detection skills are an asset to CATSA, not a danger. I feel that normal colour vision does not stand as a bonafide work requirement, since I am colour deficient and I am very skilled at all x-ray functions. I have no issue, as I have stated before, in taking any extra testing that Garda or CATSA would like, but I do not feel that I should have been removed from my duties until I have been proven incompetent in the same way any able bodied screener would be. I will not sign your form requesting accommodation, Mr. Burcul, because I do not require any accommodation to perform my job duties. I have no problem returning to work and resuming my full duties, and I will gladly do so when you allow me, but I will not sign your request for accommodation if that is the only way I can 'actively participate'. In my opinion, that is not active participation. What you want me to do is sign a document that means I am admitting to CATSA that I need to be removed permanently from all x-ray functions, the best parts of my job, and all of this for no reason. You have attempted to restrain me from speaking to anyone regarding this matter, and

> I have not been able to get a hold of my union representative since you sent me that letter, so this is the best decision I can make under these current circumstances. It is unfortunate that after giving a decade of my life to CATSA I am being told that I cannot do my job because something that was well known, documented, and does not affect job performance in any way. On top of that I have not been given any chance is disprove the perceived incompetence you have painted me with. That, however, is something which I cannot control. What I do know is that if I ever have to prove my x-ray skills to a third party, the question of colour deficiency will hold no weight in relation to my abilities. Please inform me to what the next steps in this process are as soon as possible.

After receiving this email, Mr. Morin prepared the Grievor's termination letter, dated June 13, 2013, for Mr. Burcul's signature and it was subsequently sent to the Grievor. Mr. Morin explained that the Grievor was terminated from his employment because he was unable to maintain his certification as a Screening Officer due to his refusal to participate in the accommodation process. Mr. Morin stated that in the previous year Garda had, through CATSA, accommodated two employees with colour blindness, one in Toronto and one in Ottawa.

Under cross-examination, Mr. Morin admitted that the Grievor's prior medical, dated April 27, 2012, indicated that the Grievor had a vision problem, yet he was still certified for all his duties. He said he raised this matter with Mr. Burcul, in 2013, when he learned of the 2012 medical. Mr. Burcul, he said, told him that the failure to catch the issue of the Grievor's colour blindness was negligence on the part of the Screening Point Manager at the time, who has since been terminated. Mr. Morin agreed that he did not inform CATSA that a Screening Officer [the Grievor], known to be colour blind, had been working for Garda for one and one half years. He said he did not want Garda to look bad.

Mr. Morin agreed that due to the Grievor's colour blindness the proposed accommodation would be permanent. He agreed that the Grievor would no longer be able to work on the X-Ray machine. Mr. Morin further agreed that at the conclusion of the meeting on May 10, 2013, he told the Grievor that he would no longer be allowed to work. When asked why not leave the Grievor at work while he considered the accommodation request, Mr. Morin

replied that it was because the Grievor did not co-operate. It was put to him that the Grievor had 30 days left on his current 2 month Screening Officer certificate, so why not let the Grievor work for the 30 days while he considered the accommodation? Mr. Morin answered, "You are right, I could have."

Mr. Morin said that he did not respond to the Grievor's request in his email for a competency test on the X-Ray because, as he explained to the Grievor on May 10, 2013, it was not a matter of competency. The DSSO requires screeners who operate the X-Ray machine to have normal colour vision, therefore, he was not interested in exploring accommodation that would allow him to operate the X-Ray machine. Mr. Morin said that he did not forward the Grievor's correspondence to CATSA.

When Mr. Morin said that when he received the Grievor's medical, he informed Mark Duda of CATSA that the Grievor had been performing the Screening Officer job for the last year and a half while colour blind. Mr. Duda suggested an audit be conducted of all medicals of Screening Officers across the country. The audit revealed that four employees in Toronto and one in Ottawa should not have been certified as Screening Officers, without accommodation.

Mr. Morin was asked a number of questions about X-Ray training. He replied that he was not a training expert. He agreed that the testing is to test one's ability to identify threats.

Testimony of Ms. Angiolina Venditti

Ms. Venditti testified that she has been Garda's site manager at the Thunder Bay Airport since June, 2012. She said she was hired as a Screening Officer and shortly afterwards became a supervisor. She said that she knew the Grievor not only because they work together, but that he is her cousin's son. She said that she has known about the Grievor's colour vision problem issue since 2010. At that time, she noticed that the medical form he submitted did not have all the boxes "ticked". Armed with that knowledge, Ms. Venditti

approached Andrew Lorch, the Site Manager at the time, and asked him if she should input the Grievor's medical information into the system. He said it was fine and to just input the Grievor's dates for certification.

In 2012, when the Grievor gave Ms. Venditti his medical report dated April 27, 2012, there being no Site Manager at the Thunder Bay Airport, she asked Mr. Burko how to input the information into the computer system? He told her to ask Mr. Josef, the Site Manager in Hamilton and ask him to input the information. Ms. Venditti explained that at the time Mr. Josef was covering for Thunder Bay until the vacant position in Thunder Bay was staffed. Ms. Venditti further explained that she was unable to input the information into the CATSA system, because only Site Managers, who had an account with CATSA, were able to perform that function.

Ms. Venditti said that prior to April 29, 2013, she was not aware that a Screening Officer could not be certified if he was colour blind. Her words were, "I was not aware this was a requirement for CATSA". She said that her boss, Andrew Lorch, had told her it was okay to input the Grievor's medical results and she had no reason to question him. "He was my superior," she said.

In cross-examination, Ms. Venditti said that when she was a Screening Officer she worked a number of shifts with the Grievor. She agreed that she did not observe him having any problems with the X-Ray machine. Nor did anyone complain to her of any problems.

The Grievor's Testimony

The Grievor testified that he was first hired to work as a Screening Officer at the Thunder Bay Airport on September 17, 2001 by Paragon Protection Services. He said that he was continually employed as a Screening Officer until his termination. At the time of his termination, he was a Screening Officer, Team Leader ("TL"). In his role as a TL he would

supervise staff, train staff and observe that the staff were doing their jobs correctly. He would also schedule breaks and perform other administrative duties.

The Grievor said that when Garda assumed the responsibilities for pre-board screening at the Thunder Bay Airport, there was a shift in the TL functions from performing training functions and working at screening duties, to not working screening duties at all, then back to performing Screening Officer duties. At the time of his termination, the Grievor said he was performing both Screening Officer and TL functions. Half of his shifts were TL shifts and the other half were Screening Officer shifts. He said that when he was a TL, he was not permitted to work on the X-Ray machine because a TL could not watch the workers on the floor, if he was performing X-Ray functions.

The Grievor said that he was part of a "grand-fathered" group of TLs that were receiving $2.25 an hour extra when performing TL functions. Whereas, newly hired Screening Officers would receive $1.00 per hour extra, when performing TL functions.

The Grievor said that prior to Garda assuming the security contract, the TL functions were called Point Lead ("PL"). As a PL, he trained Screening officers who were having difficulty passing the XRT regimen. He said this was because he was good at X-Ray and had an educational, teacher background. The Grievor testified that the first time he had a vision test was 2002. He recalled the colour testing involved his ability to identify coloured objects placed on a table. He said that he believed that he passed that test. The Farnsworth or Isharia tests, he said, were not administered in 2002.

The Grievor described the various tests that were given by both Garda and CATSA which Screening Officers were required to pass. In his words, he passed all screening tests with "flying colours". The Grievor said that the tests are administered to determine a Screening Officer's ability to identify threats. He said that, unlike other employees, he never had occasion to "redo" a test because of failure. After being certified as a Screening Officer in 2002 the Grievor said that he was required to be re-certified every two years. He was

always re-certified. He never failed once. The Grievor then explained the various forms of testing that were administered as part of the re-certification process. He identified a number of his tests results and, suffice it to say, they indicated that on each and every occasion he passed and indeed on occasion "exceeded expectations".

The Grievor said that the testing is conducted by a qualified CATSA trainer and on successful completion he [the Grievor] is qualified to use the various threat detection machines which would enable him to identify a threat. The Grievor said that at no time did a CATSA representative ever raise a concern about him not being able to identify a threat on an X-Ray machine. To the contrary, on both false alarm testing and explosive detection, which according to the Grievor had a high failure rate, he received a 100% rating. Both of these, he said, are X-Ray functions.

The Grievor gave an example of a penetration test, which is when someone from CATSA or Transport Canada attempts to infiltrate the airport with explosives. He said that he was subjected to such a test once, when he was screening on the CTX machine, and he immediately initiated emergency procedures and passed the test.

The Grievor described some of the X-Ray machines that he was required to use whilst performing his duties as a Screening Officer. The Grievor said that he was trained on all of the X-Ray machines, including the CTX 2000 which has a dual monitor and is used for checked luggage, located away from the screening area. It shows mostly in black and white but does show colour to help identify explosives.

The Grievor testified that he told Mr. Sido Quard a CATSA representative, in 2008 or 2010 that he was colour blind. According to the Grievor's testimony, Mr. Quard told him that he was exceptional despite his colour blindness. The Grievor said that he has told every supervisor, colleague, and CATSA representative that he had a colour deficiency. If the subject arose he said, he would say so. It was not a secret. He said he told Andrew Lorch and Ken Irvine, the General Manager for Garda, at the Thunder Bay Airport. He added

that Mr. Irvine had been terminated and Mr. Lorch no longer worked for Garda.

The Grievor said that he told Ms. Venditti. According to the Grievor, it was a common occurrence with colleagues to discuss colour blindness. He said that it often came up with CATSA representatives. When then asked, by Counsel, "Did you ever tell anyone else?" He modified his testimony and offered "I can't say definitively if I even did tell anyone from CATSA." He agreed that he did not tell Mr. Burcul.

The Grievor said he has been colour blind all his life and was first medically diagnosed when he was in the army. The Grievor said that he can see colour but not a specific strand of red and green. Any colour that comprises these colours he said he cannot see. He said that, to his knowledge, it has never impacted his ability to detect threats using the X-Ray machine. In the past, he has detected threats and was unaware of any threat he may have missed that someone else detected.

The Grievor said that he has never been disciplined for his performance nor for making a mistake when using an X-Ray machine. He related an incident where he detected, by use of the X-Ray machine, something suspicious in a passenger's luggage which turned out to be a can of frozen paint containing $15,000.00 in cash and a quantity of oxycontin pills.

At this point in his testimony, Counsel for the Union asked the Grievor to relate the events that led to his termination. The Grievor said that on April 11, 2013 a group of employees, himself included, were being re-certified on the FBS machine by a CATSA representative. He described the FBS as a machine that looks like a phone booth. He said that the machine uses radiation similar to that used in a micro-wave oven. There was a requirement to test the machine each shift to ensure that it was working properly. Unlike CATSA's previous testing method to ensure the machine was properly functioning, a Screening Officer was now required to strap various objects to his body and enter the machine to be screened 15 to 30 times a shift.

The Grievor said that, based on his knowledge of the machine and its potential health hazards, he refused to enter the FBS to be scanned. When he refused, Mr. Sochan, the CATSA representative, told him he would be fired if he did not enter the FBS machine.

The Grievor said that he asked for clarification and after Mr. Sochan spoke to Ms. Venditti, the Grievor was told that he would not be re-certified on the machine. According to the Grievor, another employee, Mr. Mayo, also refused.

The Grievor said he contacted and met with Mr. Jason Sands of Health Canada and filed a health and safety concern report. Mr. Sands recommended that the joint union management health and safety committee conduct an investigation. The Grievor said that an investigation was initiated by the health and safety committee but before it was completed Mr. Burcul took over. The Grievor stated that Mr. Burcul printed something from the internet which indicated that the PBS machine was safe. This, according to the Grievor, was not satisfactory to him or the health and safety committee.

In view of the fact that Mr. Sands had told the Grievor to contact him if any problems arose with the health and safety investigation, the Grievor did just that. Mr. Sands advised the Grievor to request that the health and safety committee issue a report of its findings on completion of its investigation. The Grievor said that he asked Ms. Venditti, the Garda Health and Safety person and Mr. Jeff Suback, the Union Health and Safety person for a report. He did not receive one. Rather, he was given another variation of the article previously produced by Mr. Burcul. At a later point in time, according to the Grievor, CATSA issued a Canada wide bulletin which stated that in order to test the machine's functioning ability, a Screening Officer had only to enter the machine once not the 15 to 30 times as he had been asked to do, which he refused. After CATSA's bulletin was issued, the Grievor was again asked to enter the machine to complete his testing and again he refused.

On April 29, 2013 the Grievor said he received a call from Ms. Venditti to inform him that there was a problem with his medical. She said it was something to do with his vision. He met with Ms. Venditti, in her office, and she told him that he would have to have a new Farnsworth test administered and to schedule an appointment with an Optometrist. The Grievor said that when he asked Ms. Venditti how this all came about, she said that Mr. Burcul had contacted her to request that he provide a new medical.

The Grievor visited Dr. Ulakovic who administered both the Isharia and the Farnsworth tests which indicated that he was red/green deficient. The Grievor provided the test results to Garda. As a result, from May 2, 2013 onwards he was not permitted to work at the X-Ray machine. He was, however, permitted to work all the other functions and he suffered no loss of wages as a result.

The Grievor said that he was called into Ms. Venditti's office on May 10, 2013 to sign a request for accommodation form. He asked to speak to Mr. Morin as he had questions he wished answered. He said that Ms. Venditti called Mr. Morin by phone while he [the Grievor] was present in her office. On her first attempt she could not reach Mr. Morin so she left him a voice message. Ms. Venditti called Mr. Morin a little later and he answered. The Grievor asked Mr. Morin why his medical was selected. Mr. Morin replied that he had received information that the Grievor had a colour vision deficiency. The Grievor said he specifically asked Mr. Morin if he received the information about his deficiency from Ms. Venditti. Mr. Morin replied in the affirmative. The Grievor said that Ms. Venditti had told him, prior to May 10, 2013, that she was not the source of the information about his colour vision deficiency.

The Grievor said he was confused. He had also heard that the information was discovered by CATSA performing a random review of the employees' medicals and now he was hearing that Ms. Venditti had offered the information. Yet, Ms. Venditti told him that she was not the one who had given Mr. Burcul that information and she had added that it may have come from Ms. Flanks, the Union Representative. The Grievor said that the

conflicting stories caused him to be suspicious. This was not the first time, he said, that CATSA had reprimanded him for a health and safety issue.

The Grievor said he asked Mr. Morin, when colour blindness become an issue for operations? Mr. Morin replied that it was always an issue but CATSA changed the [medical] form. Mr. Morin added that now, if an employee had an issue [colour vision issue], he needs to take the Farnsworth test. The Grievor said that at the end of the conversation with Mr. Morin his suspicion increased. He asked Mr. Morin for more time to consider matters. Mr. Morin agreed to give him until Wednesday but that the Grievor would have to go home without pay until then.

The Grievor said he was given several opportunities to sign the form and each time he refused. His suspicion was aroused and he wanted to talk to CATSA to get a better understanding of what was happening and to express his concerns. He also disagreed with the way the accommodation was presented. In the Grievor's mind, he believed it to be a violation of his human rights. He said he did not agree that he could not perform the functions listed on the accommodation request form.

The Grievor said that he attended a meeting on the May15, 2013, with Ms. Flank, Ms. Venditti and Mr. Burcul. He said he asked Mr. Burcul where the information about his colour blindness came from? Mr. Burcul replied that it came to Garda's attention as a result of CATSA checking all medicals, after an issue arose concerning a Screening Officer at a different airport.

The Grievor said that at one point during the meeting, Mr. Burcul closed the door then told him he was not to carbon copy people on his correspondence. The Grievor said Mr. Burcul appeared angry and was shouting.

The Grievor said that Mr. Burcul explained that accommodation was a normal CATSA process and he reviewed the DSSO standards with the Grievor. Ms. Flanks asked, "If he

signs the form can he still fight with CATSA?". Mr. Burcul replied, "Yes, if he signs the form he can still fight with CATSA". The Grievor said that he didn't like the atmosphere in the room.

When asked by Union Counsel, "Why not sign and grieve?" the Grievor said that he felt that this was an attempt to remove him from his position. Nothing was guaranteeing that he would have a job if he signed. He said that he knew that if he signed the form he would be admitting that he could not work the X-Ray functions.

In cross-examination, Counsel for Garda put to the Grievor that he had never passed a colour vision test in his entire career as a Screening Officer at the Thunder Bay Airport. The Grievor answered, "That is not true," When pressed, he said he remembered one physician saying that he had failed but he could not recall anyone saying that he passed.

The Grievor agreed that he now realizes that all the requirements in the yearly medical testing including vision have to be met. He said that prior to 2013 he had no idea this [normal colour vision] was a requirement. He said, "Knowing that, yes, I was not a *bona fide* Screening Officer in the past".

The Grievor agreed that after Garda assumed the security contract at the Thunder Bay Airport the TL no longer had a training function. He added that in an unofficial capacity he continued to coach people. When pressed he said he believed he was asked by Ms. Venditti to coach people but on no more than two occasions.

The Grievor said he was not 100% sure that he spoke to Mr. Sido Quaid from CATSA about his colour blindness. His exact words were, "I am sure I spoke to a CATSA official but I am not sure it was Sido I talked to". The Grievor was reminded that in his evidence in chief he said he told everyone about his colour blindness and that people at Garda and CATSA knew. He said, "As far as I know, CATSA knew".

The Grievor's attention was directed to the meeting of May 15, 2013. He agreed that the issue that was most important to him was to find the source of the information about his colour blindness. He said he wanted to speak to that person. He said his colour blindness had not been an issue until two weeks after he refused to enter the FBS machine.

Asked, whether Ms. Flank, at the meeting of May 15, 2013, asked Mr. Burcul that if he [the Grievor] signed the accommodation request document could he continue working as a Screening Officer, the Grievor replied, "Yes and Mr. Burcul's answer was, Yes". He added that both Ms. Flank and Ms. Venditti seemed nervous and Mr. Burcul seemed agitated. He said that at the conclusion of the meeting he asked Ms. Flank for her notes of the meeting. She initially agreed to give them to him but later refused, furthering his suspicions that he could not trust anyone and that Ms. Frank might be working with Garda to remove him from his position.

In re-examination, the Grievor said he was never taken out of service after his initial medical examination in 2002.

The Grievor said that it was his understanding that even if he signed the accommodation form, CATSA would still have to approve the accommodation. In any event, he did not agree with the following assertion in the form, "This Screening Officer cannot perform these positions."

Statutes and Regulations Cited

Canadian Air Transport Security Authority Act s, c, 2002, c.9, s.2

> 5. (1) There is hereby established a body corporate to be the *Canadian Air Transport Security Authority.*
>
> 6. (1) The mandate of the Authority is to take actions, either directly or through a screening contractor, for the effective and efficient screening of persons who access aircraft or restricted areas through screening points, the

property in their possession or control and the belongings or baggage that they give to an air carrier for transport. Restricted areas are those established under the *Aeronautics Act* at an aerodrome designated by the regulations or at any other place that the Minister may designate.

7. (1) The Authority may authorize the operator of an aerodrome designated by the regulations to deliver screening on its behalf at the aerodrome, either directly or through a screening contractor, subject to any terms and conditions that the Authority may establish.

8. (1) The Authority must establish criteria respecting the qualifications, training and performance of screening contractors and screening officers, that are as stringent as or more stringent than the standards established in the aviation security regulations made under the *Aeronautics Act*.

(2) The Authority must certify all screening contractors and officers against the criteria established under subsection (1).

(3) If the Authority determines that a screening contractor or officer no longer meets the criteria in respect of which they were certified, the Authority may vary, suspend or cancel their certification.

(4) The Authority may establish contracting policies specifying minimum requirements respecting wages and terms and conditions of employment that persons must meet in order to be awarded a contract by or on behalf of the Authority for the delivery of screening. The Authority must establish such policies if required to do so by the Minister.

(5) The Authority must establish policies and procedures for contracts for service and for procurement that ensure that the Authority's operational requirements are always met and that promote transparency, openness, fairness and value for money in purchasing.

(27) The provision of screening at an aerodrome is conclusively deemed for all purposes to be a service that is necessary to prevent immediate and serious danger to the safety of the public.

Canadian Aviation Security Regulations 2012 SOR/2011-318

Screening Officers

5. (1) A screening officer must not screen persons or goods unless the screening officer

(a) is at least 18 years of age;

(b) is a Canadian citizen or permanent resident as defined in subsection 2 (1) of the *Immigration and Refugee Protection Act*;

(c) is able to communicate effectively both orally and in writing in one or both official languages;

(d) has a security clearance; and

(e) meets the minimum standards set out in the *Designation Standards for Screening Officers*, published by the Department of Transport in January 2004, as amended from time to time.

(2) A screening authority must ensure that any person who acts or will act as a screening officer for it or on its behalf meets the requirements set out in subsection (1).

The Constitution Act, 1982, Part I Canadian Charter of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in the subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Equality Rights

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Application of Charter

32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Canadian Human Rights Act, RSC 1985 C H-6

Purpose of the Act

Prohibited grounds of discrimination

Section **3**. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

Employment

7. It is a discriminatory practice, directly or indirectly.
(*a*) to refuse to employ or continue to employ any individual, or

(*b*) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

S. 25 In this Act, "disability" means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug.

UNION'S ARGUMENT

The Union's argument is two fold:

1. That Garda's actions in terminating the Grievor constituted an infringement of S.15

of the *Charter of Rights and Freedoms* (the "*Charter*").

2. That Garda's actions in terminating the Grievor were contrary to the provisions of the *Canadian Human Rights Code* (the *"Code"*).

The Union's *Charter* Argument

The first issue the Union addressed in its argument concerning the *Charter* was whether Garda's actions are subject to Charter scrutiny?

The Union argued that there are three levels of enforcement of the DSSO.

Level 1 Transport Canada

Level 2 CATSA. Created under the CATSA Act. A Federal Crown Corporation

Level 3 Garda, as a result of its contract with CATSA

CATSA, the Union argued, delegates authority to Garda. As such, Garda, as the Screening Authority, is required to apply Transport Canada's DSSO in certifying its employees as Screening Officers. This, the Union argued, is clearly set out in s.9.2 of CATSA's SCM.

The SCM, the Union argued, further states that Screening Authorities must ensure that Screening Officers meet the requirements of CATSA's Screening Officer Medical Examination, which is to be confirmed prior to hiring and every two (2) years after being hired.

As a result of the Grievor's medical examination, which Garda required him to undergo on May 7, 2014, Dr. William Ulakovic confirmed that the Grievor did not have normal colour vision.

Therefore, Garda completed a Screening Officer's accommodation request form regarding the Grievor, in accordance with CATSA's SCM. The form indicated that the Grievor did not have normal colour vision and that as a result of his colour vision deficiency the Grievor could not perform the X-Ray functions for a Screening Officer.

Mr. Morin, the Union said, testified that the role of Garda is to apply all the Transport Canada regulations with respect to Screening Officers. CATSA is responsible in collaboration with Transport Canada to set rules and regulations with respect to the Screening Officers. However, CATSA grants the certification of Screening Officers on the recommendation of Garda. Therefore, if an employee needs accommodation it is Garda he approaches not CATSA.

It was the Union's position that Garda's impugned actions are subject to the Charter. The Supreme Court, the Union stated, has confirmed that a private entity may be subject to the Charter insofar as it is engaged in inherently governmental actions and/or in the furtherance of a specific governmental program or policy.

In the circumstances of this case, the Union argued Garda is a private entity responsible for implementing government programs and policies set out by Transport Canada, as the Department of the Government of Canada responsible for the security of Canadian transportation systems, as well as CATSA, a Federal Crown corporation responsible for air transportation security.

Garda is a private security company that is certified by CATSA as a Security Authority and thus authorized to act under direct contract with CATSA to provide services in furtherance of the governmental and broad public interest objective of maintaining security at airports

throughout Canada. Garda's actions as a Security Authority, and specifically in designating its employees as Screening Officers, is in furtherance of Transport Canada and CATSA's governmental mandates and specific guidelines regarding the requirement for obtaining and maintaining such a position. This is evident through the Employer's direct application of Transport Canada's DSSO, CATSA's SCM and the Screening Officer Medical Examination Report.

Garda's actions, in this case, in subjecting the Grievor to a medical review and revoking his certification as a Screening Officer, on the basis of his colour blindness, represent the exercise of delegated authority from Transport Canada and CATSA. It also constitutes the direct application of these governmental authorities' explicit edicts regarding what is required for an employee to be certified in such a position.

In these particular circumstances, the Union argued, Garda works in concert with CATSA in enforcing the Screening Officer standards set by a CATSA. It plays a significant role in implementing the safety policies of the Government. The Union made it clear, however, that its position was that only the implementation of the standards by Garda, and not every aspect of Garda's work, was subject to the *Charter*, or put another way, it was in Garda's actions in implementing the DSSO, on behalf of CATSA, that it acted as an agent for the Government. The Union submitted that Garda's termination of the Grievor as a result of the revocation of his certification as a Screening Officer is similarly a direct extension of the same exercise of governmental authority.

In support of its argument that Garda's actions are subject to the *Charter*, the Union relied on the following cases: *Slaight Communications Inc. v. Davidson*, [1989] 1 SCR 1038; *McKinney v. University of Guelph*, [1990] 3 SCR 229; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624

The Union next considered the application of S 15 (1) to Garda's actions.

The Union submitted that Garda's actions in removing the Grievor from the X-Ray machine duties because of his colour blindness constitute a violation of Section 15(1) of the *Charter* because it constitutes differential treatment on the basis of the enumerated ground of physical disability and that amounts to discrimination prohibited by the *Charter*.

The Supreme Court of Canada, the Union submitted, has outlined and clarified the central elements required to establish a violation of the *Charter's* Section 15(1). These elements, the Union submitted, have been expressed generally through the following two questions:

1. Does the law create a distinction based on an enumerated or analogous ground?

2. Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

With respect to question 1., the Union argued that Garda's actions, in the application of the government guidelines, represent a clear example of differential treatment on the basis of an enumerated ground; the Employer treated the Grievor differently on the basis of a physical disability by revoking his certification as a Screening Officer, due to his visual impairment of colour blindness. Garda's position, the Union argued is, if you are colour blind you are flawed. To the contrary, the Union argued, there was no evidence that the Grievor's colour blindness impacted on his ability to do the job.

With respect to question 2., the Union argued that Garda's actions further created a disadvantage by perpetuating prejudice and stereotyping. This was done through the application of a blanket exclusion of individuals with anything less than "normal colour vision" from certification because they are "less than competent" when it comes to stopping bombs getting on a plane. This, the Union argued, has the effect of perpetuating prejudice against persons with visual impairments and suggesting that they are less capable than people without such disabilities. A blanket exclusion of this nature is based on stereotypes, which ignores the various ways and degrees by which a person may have less than

"normal colour vision" and also unreasonably disregards the possibility of individualized assessments of a person's ability to perform the duties of a Screening Officer, despite the existence of such a visual impairment.

In support of its argument the Union referred to the following cases; *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1988] 1 S.C.R. 143; *Law v. Canada (Minister of Employment and Immigration)*, 1999 Can LII 675 (SCC), [1999] 1 S.C.R. 497; *R. v. Kapp*, 2008 SCC 41 [1008] 2 SCR 483.

Finally, the Union considered the application of S (1) of the *Charter* to Garda's actions.

The Union argued that once a *prima facie* case of discrimination has been established the onus shifts to the Government to attempt to justify its actions under S (1) of the *Charter*.

The question then, the Union argued, is whether Garda's actions can be justified in a free and democratic society.

It was the Union's position that S. 1 does not save Garda's actions. Nothing, the Union argued, was presented to justify the restriction on Screening Officers. Only a stereotypical assumption made on the part of the Government that people with colour blindness cannot do the job.

Garda or CATSA, the Union argued, have failed to demonstrate any rational connection between the DSSO and performing the duties of a Screening Officer. There was no evidence to justify the blanket prohibition. Normal colour vision, the Union argued, does not further the objectives of the DSSO. Further, Garda or CATSA failed to demonstrate any rational connection between the DSSO and performing the duties of a Screening Officer. Rather, the evidence was that the Grievor was good at his job. He passed all his tests and trained some 30 other Screening Officers. Here was a young man, the Union

contended, who was demonstrating that he can do the job without a problem. Garda's actions does nothing more than promote the notion that he was less capable or less worthy as a human being.

In support of this argument, the Union relied on the following cases; *Eldrige supra, Douglas College v. Douglas Kwantlen Faculty Association*; *Attorney General of Canada et al*, (1990) 77 D.L.R. (4th) 94. *Slought supra; McKinney v. University of Guelph*, [1990] 3 SCR 229; *Andrews v. Law Society of British Columbia*, 1989 Can LII (SCC), [1989] 1 SCR 143; *Law v. Canada (Minister of Employment and Immigration)*, 1999 Can LII 675 (SCC), [1999] 1 SCR 497.

The Union's Human Rights Argument

The Union's argument that Garda's actions were a violation of the Grievor's rights under the *Code* were, in part, similar to its *Charter* argument.

The existence of the DSSO, the Union argued, establishes a *prima facie* case of discrimination. Once a *prima facie* case is established the onus shifts to Garda to justify the standards.

Garda has not, the Union maintained, demonstrated that the DSSO on vision is reasonably necessary. The evidence in the case before me, the Union argued, is based on assumption or rather that the DSSO standard is based on the impressionistic assumption that colour blind people cannot do the job.

The only evidence before me, the Union argued, is the 10 years good service of the Grievor: superior test results, good employment record and ability to perform the X-ray function during the view. Garda, the Union submitted, has failed to justify the standard with any evidence. The Grievor was left in an impossible position. If he had signed the accommodation request form he would be agreeing to an untruth, that he could not

perform the X-ray functions. His shifts would have been limited and he would no longer be able to perform his TL duties. His job would have been significantly diminished.

The Union argued that the case law clearly provides that one is not permitted to say colour blind people need not apply. There needs to be an individual assessment. The Grievor is not colour blind, he just sees colours differently. The Union conceded that the purpose

of the standard, is rationally connected to safety. However, what Garda failed to demonstrate is that it is reasonably necessary for the performance of the job.

Garda, the Union argued, failed to contact CATSA and communicate the salient facts and give them a reasonable analysis of the Grievor. If Garda had done so, the Union maintained, the matter would never have reached arbitration.

In summary, the Union argued that the Grievor was left in an impossible situation, to sign the accommodation he would be admitting he could not do the X-Ray part of the job. He would no longer be able to perform his TL functions and his shifts would be limited. The job would be significantly diminished. Garda's actions clearly were discriminatory and an infringement of his human rights.

In support of this argument the Union relied on the following cases: *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employee's Union (BCGSEU) (Meiorin Grievance)*, [1999] 3 SCR 3; *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 (*The Grismer case*); *Bernard v. Waycobah Board of Education*, 1999 Can LII 1914 (CHRT); *Re Canadian Pacific Railway Company v. Teamsters Canada Rail Conference*, 2014 Can LII 15953 (CA LA); *Canadian Pacific Ltd and Brotherhood of Maintenance of Way Employees* (1989), 7 LAC (4th) 1 (M.G. Picher); *Re Marine Atlantic Inc and CBRT & G.W.* (1989), 8 LAC (4th) 211 (Outhouse).

GARDA'S ARGUMENT

Garda's *Charter* Argument

Garda argued that contrary to the Union's submission, its impugned actions are not subject to the *Charter*. Garda, Counsel argued, is no more than the contractor of Security Screening services for CATSA. CATSA and Transport Canada issued the DSSO which sets out the minimal requirements for designation of a Screening Officer. CATSA and Transport Canada also issued the SCM which sets out the obligations and directions for the Screening Contractor, which is Garda, in this case.

The SCM is specifically clear that the decision to certify or decertify a Screening Officer does not belong to Garda but is the sole decision of CATSA. In this regard, Counsel argued that under Section 10.1 of the SCM it clearly states that under the CATSA Act, CATSA has the authority to establish criteria that outlines the qualifications, training and competency expectations of Screening Officers, to certify Screening Officers against this criteria, and to vary, suspend or cancel a Screening Officer's certification if it determines that the Screening Officer no longer meets the criteria. Further, Counsel argued that Section 10.1 of the SCM provides that if a Screening Officer does not meet or maintain certification criteria, CATSA's Local Decision Board may recommend to CATSA's National Decision board to decertify the Screening Officer.

Counsel argued that, with regard to the Grievor's accommodation, Garda had no power under the SCM, and thus no discretion, to take decisions in regards to the accommodation. Under the SCM, Garda's sole responsibility was to advise the Grievor of an accommodation process and to collaborate with CATSA if required. Counsel directed my attention in this regard to Sections 1.1 and 1.5 of the SCM:

Thus, Garda does not exercise a delegated authority from Transport Canada and CATSA, as Transport Canada and CATSA apply the DSSO and the decisions in regards to

certification and a major part of the accommodation requests.

The decision to decertify the Grievor because of his colour blindness, as set out in the DSSO and the SCM, was at the sole decision of CATSA and Transport Canada. CATSA and Transport Canada, Counsel argued, maintain the authority for decisions in regards to the DSSO, certifications, and accommodation process. The DSSO and the decertification of the Employee are the issues in the present matter, therefore, it cannot be asserted that Garda's actions are subject to the *Charter*.

Alternatively, Garda argued that if I were to find that Garda is subject to the *Charter*, its impugned actions are justified under Section 1. Garda conceded that once the Union has established a *prima facie* case of discrimination, the onus shifts to Garda, in this case to establish that the violation is justified.

In this regard, Counsel for Garda argued that the tests, as set out by the Supreme Court of Canada in *R. v. Oakes* [1986] 1 SCR 703, must be applied in considering an argument under Section (1) that there is a justification for the limitation of a *Charter* right. The tests, Counsel argued, are as follows:

1) The objective must be pressing and substantial
2) The means must be proportional to the objective

Garda conceded that as soon as it was made aware of the fact that the Grievor had a colour deficiency, that could jeopardize the public safety in airports and aircrafts, it decided to remove the Grievor from X-Ray duties and to send him for a medical evaluation in order to confirm or deny the colour deficiency.

Following receipt of the medical evaluation completed by Dr. William Ulakovic, which confirmed the Grievor's colour deficiency, Garda applied the accommodation requirements as set out in Section 1.5 of the SCM.

Therefore, Garda argued, its actions must be analysed with regard to the duty to accommodate the Grievor with regard to the criterion of "minimal impairment".

1. The objective must be pressing and substantial

Garda argued that the purpose of the accommodation, upon discovery of a physical impairment, is justified and reasonably necessary by the fact that the job of a Screening Officer relies on high public safety standards. The objective of the DSSO is the public safety in airport and flights. As such, Screening Officers, employees of Garda, are responsible for the screening of passengers at different airports in Canada, more specifically, the Thunder Bay airport.

It is common knowledge that airports and airplanes have for many years been subject to high risk and the screening of passengers and luggage is of major importance in order to assess the public safety in airports and airplanes. Therefore, Garda submitted that the objective of public safety in airports and aircrafts is pressing and substantial in a free and democratic society.

2. The means must be proportional to the objective

Garda submitted that its impugned actions are rationally connected to the objective as set out above, public safety in airports and airplanes. The actions of Garda, in line with the guidelines set out by CATSA and Transport Canada, to remove the Grievor from the X-Ray position were due to the fact that public safety in airports and aircrafts is of major importance for the government.

Garda submitted that the operation of X-Ray screening equipment requires a normal colour perception as different colours expose potential threats contained in the luggage of passengers and must be identified without flaws or omissions by the Screening Officers. The measure that Garda took was proportional to the objective because it impaired the

Grievor's equality rights "as little as possible".

CATSA reminded me that a Screening Officer does not automatically lose his right to maintain his designation or his certification once CATSA is informed of a physical deficiency. There is a duty, which both CATSA and Garda acknowledge to assess the possible ways to accommodate an employee in order to maintain the employee in his job, while ensuring that the employee's physical deficiency does not put at risk the objective set out by CATSA, public safety.

Therefore, as CATSA's and Transport Canada's policies state that certification or designation may be revoked when a Screening Officer does not meet the designated standards, it cannot be said that the government, or Garda applied a blanket exclusion based on stereotypes that would ignore the various ways and degrees by which a person may have less than "normal colour vision". The evidence points to the contrary.

Due to the fact that the Grievor did not meet the standard of having a "normal colour perception", Garda, in conformity with CATSA's policies started the accommodation process required by the government's policy. The Grievor was not, as alleged by the Union, decertified as a Screening Officer before the commencement of the accommodation process. In this particular case, Garda tried to accommodate the Grievor in order for him to maintain his certification and to find reasonable solutions in regard to his duties by balancing public safety and his right to accommodation.

However, the Grievor's refusal to participate in the accommodation process precluded any accommodation, leaving Garda with no choice but to terminate his employment.

By putting in place an effective accommodation process, the Government ensures that employees with physical deficiencies may maintain their certification and designation once an accommodation process has effectively been started between CATSA and the employee, ensuring that the designation standards of "having a normal colour perception"

as set out in Section 4 of the DSSO is proportional to the objective because it impairs the Employee's equality rights "as little as possible".

In regard to the last criterion of the proportionality test, Garda submitted that since the impairment of the Grievor's equality rights is a minimal one, the pressing and substantial legislative objective is not outweighed by it. Garda is therefore, justified, it argued in terminating the employment of the Grievor given his refusal to participate in the accommodation process.

In support of its *Charter* argument Garda relied on the following cases: *Re Oakes, supra; Bahlsen v. Canada (Minister of Transport)*, [1997]1 FC 800.

Garda's Human Rights Argument

Counsel for Garda asserted that every authority relied on by the Union dealt with a situation where the Grievor had been denied accommodation because of his or her disability. In the instant case, Counsel reminded me, accommodation was never denied to the Grievor. To the contrary, an accommodation process was in place. The Grievor simply, for reasons of his own, refused the offer of participating in the accommodation process, an accommodation process that is open to both existing Screening Officers and Screening Officer Recruits.

Before the accommodation request form is signed, however, CATSA cannot act. Once the accommodation form is signed the accommodation process is triggered and CATSA must then exercise good faith in the accommodation process. The evidence revealed that not one Screening Officer who had a colour vision deficiency was refused accommodation.

Everything was in place, at all times, to protect the Grievor's rights. Apart from the DSSO there was the accommodation process. He was given four opportunities to comply and sign the accommodation form and each time he refused. The possible accommodation

could have taken many forms, Counsel argued, depending on the circumstances. By signing the accommodation form the Grievor could have made his representations whilst working with CATSA officials on his accommodation.

Further, there was no evidence that it would in any way affect his salary, income, the scheduling of his shifts, or for that matter his ability to continue on an as needed basis, as a TL. Apart from being unable to work at the X-Ray machine, he would still be able to perform all of the other functions of a Screening Officer.

As such, Garda argued, the Grievor's human rights were not violated.

Garda relied on the following cases in support of its *human rights* argument: *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970; *Dunlop v. Alter Moneta* 2010 Can LII 651 (HRTO); *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 RCS 489; *Star Choice Television Network Inc. v. Tatulea* 2012 Carswell Nat 293 (J.-Maurice Cantin Adjud.)

DECISION

Prior to considering the well reasoned arguments of the parties, I have carefully reviewed the testimony of the witnesses called to give evidence, and the exhibits presented and, have reached the following conclusions.

From the moment the Union gave its opening statement, it became abundantly clear that the Grievor believed that Garda's act in removing him from his X-Ray functions was related to his refusal to enter the FBS and his efforts to involve Health Canada. When asked by his Counsel to relate the circumstances leading to his termination, the Grievor began by relating the events surrounding the FBS incident. He said this was not the first time he had been reprimanded for a Health and Safety issue. Further, he said in cross-examination that his colour blindness had not been an issue until two weeks after the FBS incident.

The Grievor, I have no doubt, was upset that Mr. Burcul had, in the his view, attempted to usurp the Health and Safety Committees' investigation of the FBS event, and I am convinced that the Grievor believed Mr. Burcul and person or persons unknown were out to get him.

The Grievor's actions in visiting Dr. Ulakovic for his 2013 medical examination rather than Dr. Rose Yesovitch, who was still practising medicine at the exact same location as when the Grievor visited her in 2012, are worthy of note.

The cross-examination on this point was nothing more than an effort, through his Counsel, to somehow embarrass Mr. Burcul whom the Grievor perceived to be his "nemesis" if you will.

A further attempt by the Grievor to paint Mr. Burcul as the "bad guy" is illustrated by his testimony that at the meeting of May 15, 2013, Mr. Burcul shouted at him. An allegation Mr. Burcul denied, saying instead that he may have raised his voice. Mr. Burcul's version of what happened is in my view to be preferred. I find this because Ms. Flanks the Union representative was present at the meeting of May 15, 2013 and was present throughout the arbitration hearing. The Union chose not to call Ms. Flanks to confirm the Grievor's testimony, leaving me with little doubt that her testimony would not have supported the Grievor's version of events.

The Grievor's correspondence when viewed together with his testimony and his actions throughout, illustrate what, in my view, can be described as nothing short of contempt for Mr. Burcul. He was not interested in what Mr. Burcul or for that matter what Mr. Morin had to say. No one at Garda, especially Burcul, was going to tell him what functions he could or could not perform.

He insisted on dealing directly with CATSA and not just anyone at CATSA. On one occasion, he wished Mr. John Stroud CATSA'S Vice-President of Human Resources to be

made aware of his situation, on another he wanted to be provided with the name, telephone number and mailing address of the Chief Executive Officer of CATSA.

Further, I do not accept the Grievor's assertion that everyone knew of his colour blindness, including representatives of CATSA. If such were the case, the Grievor would not have attempted, at every turn, to reveal the identify of the person who had alerted Mr. Burcul. In examination in chief, the Grievor was adamant that he told Mr. Quard from CATSA about his colour blindness then later said that it often came up with CATSA. But when asked by Union Counsel, "Did you ever tell anyone else?" offered the following, "I can't say definitely if I ever did tell anyone from CATSA." In cross-examination the Grievor said he spoke to a CATSA official about his condition but it may not have been Mr. Sido.

The Grievor's testimony, on this point, when viewed in the context of the circumstances of the case, just does not make any sense. I would be astonished that any CATSA representative, on learning that a certified Screening Officer was colour blind, in light of the DSSO would not have reported it to the appropriate authority to be actioned. To do otherwise and simply ignore that information may well have led to discipline or indeed discharge of the individual, if the matter later came to light. What is clear is that Mr. Burcul had no knowledge of the Grievor's vision condition until he was made aware in 2013. What is of consequence is that when Mr. Burcul was made aware of the Grievor's colour deficit, he immediately took what he considered to be appropriate action. The source of the information, in my view, is of no relevance to my deliberations save to say that for professional reasons and out of courtesy to that person, Mr. Burcul and Mr. Morin sought to protect the source and I am prepared to leave it at that.

I do not, for one moment, question the Grievor's ability to perform his job as a Screening Officer in a more than exemplary fashion. This is clearly evidenced by his tests results. However, it is not, in my view, what occurred in the past that is at issue but what may happen were the Grievor allowed to continue with his duties at the X-Ray machine into the future. Further, when it was confirmed by Dr Ulakovic, that the Grievor had a colour vision

deficiency, Garda, in accordance with CATSA policy merely removed him from working at the X-Ray function of the Screener's job. Nothing else changed regarding his shifts, duties, classification or salary.

Finally, of significant import and what needs to be made perfectly clear at this juncture is that the Grievor was not discharged because he was colour blind. Rather, the evidence revealed that every attempt was made to involve him in an accommodation process. His discharge was a result, in my view, of his obstinance, despite what I find to be sound advice from his Union Representative to sign the accommodation to ensure his continued employment and continue to raise his objections through the grievance process.

I now turn to the consideration of the *Charter*.

Do I Have Jurisdiction To Deal With The Union's *Charter* Argument?

This question of jurisdiction, in my view, was clearly answered in the affirmative in *Weber v. Ontario Hydro, supra*. In that case Mr. Weber was an employee of Ontario Hydro, whom the employer suspected of malingering. He had been off on sick leave for an extended period of time due to back problems. Private investigators, were hired by Hydro, who went to Mr. Weber's home, on the pretext of being someone else, to conduct surveillance.

As a result of the surveillance findings, Hydro suspended Mr. Weber. Mr. Weber's Union filed grievances on his behalf, which were settled. As well, Mr. Weber commenced a court action based on an alleged violation of his s. 7 & 8 *Charter* rights.

Hydro applied to have the court action dismissed on the grounds that this was a dispute that arose out of the Collective Agreement and therefore, not a matter for the courts.

The Supreme Court of Canada, in concluding that an arbitrator is a court of competent

jurisdiction, considered s. 45(1) of the *Ontario Labour Relations Act*, and found it conferred an exclusive jurisdiction on labour tribunals to deal with disputes between the parties arising from the Collective Agreement.

In considering the argument by Mr. Weber that an arbitrator could not deal with his *Charter* claim, Chief Justice McLachlin speaking for the majority, offered the following analysis of the law at paragraph 59, page 959:

> In so far as this argument turns on policy considerations, it is answered by the comments of the majority of this Court in *Douglas/Kawantlen Faculty Assn. v. Douglas College, supra*. That case, like this, involved a grievance before a labour arbitrator. In that case, as in this, *Charter* issues were raised. It was argued, *inter alia,* that a labour arbitration was not the appropriate place to argue *Charter* issues. After a thorough review of the advantages and disadvantages of having such issues decided before labour tribunals. La Forest J. concluded that while the informal processes of such tribunals might not be entirely suited to dealing with constitutional issues, clear advantages to the practice exist. Citizens are permitted to assert their *Charter* rights in a prompt, inexpensive, informal way. The parties are not required to duplicate submissions on the case in two different fora, for determination of two different legal issues. A specialized tribunal can quickly sift the facts and compile a record for the reviewing court. And the specialized competence of the tribunal may provide assistance to the reviewing court. *Douglas/Kwantien Faculty Assn v. Douglas College* also answers the concern of the Court of Appeal below that the *Charter* takes the issue out of the labour context and puts it in the state context. While the *Charter* issue may raise broad policy concerns, it is nonetheless a component of the labour dispute, and hence within the jurisdiction of the labour arbitrator. The existence of broad policy concerns with respect to a given issue cannot preclude the labour arbitrator from deciding all facets of the labour dispute.
>
> This brings us to the question of whether a labour arbitrator in this case has the power to grant *Charter* remedies. The remedies claimed are damages and a declaration. The power and duty of arbitrators to apply the law extends to the *Charter*, an essential part of the law of Canada; *Douglas/Kwantlen Faculty Assn. v. Douglas College, supra; Cuddy Chicks Ltd. v. Ontario (Labour Relations Board),* [1991] 2 S.C.R. 5; *Re Ontario Council of Regents for Colleges of Applied Arts & Technology and Ontario*

> *Public Service Employees Union* (1986), 24 L.A.C. (3d) 144. In applying the law of the land to the disputes before them, be it the common law, statute law or the *Charter*, arbitrators may grant such remedies as the Legislature or Parliament has empowered them to grant in the circumstances. For example, a labour arbitrator can consider the *Charter*, find laws inoperative for conflict with it, and go on to grant remedies in the exercise of his powers under the *Labour Code*: *Douglas/Kwantlen Faculty Assn. v. Douglas College, supra*. If an arbitrator can find a law violative of the *Charter*, it would seem he or she can determine whether conduct in the administration of the collective agreement violates the *Charter* and likewise grant remedies.

Since the decision in *Weber*, arbitrators have consistently applied its reasoning and concluded that they do have jurisdiction to hear and determine *Charter* issues that are a component of the labour dispute before them, see for example. *Re British Columbia Maritime Employer's Assn. v. International Longshore and Warehouse Union-Canada* (2007), 168 L.A.C. (4th) 418 (Munroe); *Re Sunrise Poultry Processors Ltd. v. United Food and Commercial Workers, Local 1518 (B.R. Grievance)* (2012), 237 L.A.C. (4th) 215 (Lanyon).

Further, the Saskatchewan Court of Queens Bench had reason to revisit the issue recently in 2012, in *Saskatchewan v. Saskatchewan Government and General Employees Union*, 2012 SKQB 263 Can LII.

In that case, the Government of Saskatchewan brought an order for judicial review in an effort to quash an arbitrator's preliminary decision in a discharge case of a First Nations Correctional Worker. The Government argued that the arbitrator erred in law when she ruled that she had jurisdiction to hear and determine issues raised in the Notice pursuant to *The Constructional Questions Act* R.S.S. 1978 c. C-29, involving the *Charter* and that the arbitrator erred in law in holding that she had jurisdiction to order production of documents relating to the *Charter* issues.

At paragraph 20 Mr. Justice Chicoine relying on the rational in *Weber* stated at paragraphs 20 and 21:

> In this regard, I have no difficulty concluding that the arbitrator in this case does have jurisdiction to decide questions of law under s.25 of *The Trade Union Act*. It is also evident that there is not any provision in the Act which expressly withdraws the arbitrator's *Charter* jurisdiction. I also find it unnecessary to proceed with the type of inquiry which the Government suggests is required to determine whether there was a "legislative intention" to endow a labour arbitrator with the tools necessary to fashion a remedy under s.24 of the Charter as it is clearly the case that an arbitrator under s.25 of *The Trade Union Act* has many of the institutional characteristics of a court, including the fact that the proceedings before it are judicial or quasi-judicial; the role of counsel; the applicability of traditional rules of proof and evidence; whether the tribunal can issue subpoenas; whether evidence is offered under oath; the expertise and training of the decision maker; the ability of the tribunal to compile an adequate record for a reviewing court; and other such operational factor
>
> It is now well established in our jurisprudence that a labour arbitrator has the power to grant *Charter* remedies.

From the foregoing it is quite clear that an arbitrator has jurisdiction to deal with a *Charter* complaint when three conditions are met:

1) That the arbitrator has jurisdiction over the parties.

2) That the matter arises out of the Collective Agreement.

3) That the legislation empowers the arbitrator to hear the dispute and grant the remedies claimed.

In the case before me, the parties agreed to my appointment to hear the matter of the grievances filed by the Union on behalf of the Grievor, by email dated September 6, 2013. Neither party is disputing my jurisdiction to hear the matter of the Grievor's discharge.

The essential character of this dispute arises from the application of the Collective Agreement between the parties which provides that a claim by an employee that he has been discharged will be treated as a special grievance commencing at step 3 (the final step) of the Grievance Procedure.

The Collective Agreement further provides the following:

> **8.01** Request for Arbitration

(a) Should the parties fail to reach agreement in the final step of the grievance procedure, the grievance may be referred to arbitration within twenty (20) full working days of the third step grievance answer, upon written request of either the Company or the Full-Time Union Representative or his designate, otherwise the grievance shall be considered settled.

(b) The issue to be arbitrated shall be the written statement of the grievance and the answer of the various management officials who have dealt with the matter. It is agreed that any issue to be arbitrated shall be submitted to a single arbitrator that is satisfactory to both parties.

(c) The Arbitrator shall not have the right or power to add to, take away, amend, modify, change or disregard any of the provisions of this Agreement, and it may consider and decide only the particular grievance presented.

(d) The Arbitrator, however in respect to a grievance involving a penalty shall be entitled to modify such penalty as in the opinion of the Arbitrator, is just.

(e) The decision of the Arbitrator shall be final and binding upon both parties.

Finally, the *Canadian Labour Code,* R.S.O 1985, c.L-2 provides:

60. (1) Powers of arbitrator, etc.

(a.1) the power to interpret, apply and give relief in accordance with a statute relating to employment matters, whether or not there is conflict between the statute and the collective agreement.

(2) Idem – Where an arbitrator or arbitration board determines that an employee has been discharged or disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction that is the subject of the arbitration, the arbitrator or arbitration board has power to substitute for the discharge or discipline such other penalty as to the arbitrator or arbitration seems just and reasonable in the circumstances.

There can be no doubt that the *Canada Labour Code* and the Collective Agreement confer jurisdiction on me to hear the dispute between the parties. This matter arises out of the Collective Agreement, a discharge, grievance and the legislation clearly empowers me to hear the matter and grant the remedy requested.

Therefore, all three conditions set out above having been met, I conclude that I do have jurisdiction to determine and grant any remedy flowing from the *Charter* that concerns the grievance before me and Garda's actions pursuant thereto.

My conclusions on this point are, of course, subject to the caveat that I must first determine that the actions of Garda, concerning the subject matter of this grievance, are subject to *Charter* scrutiny.

Are Garda's Actions Subject To *Charter* Scrutiny?

Accordingly, I now will consider whether, in the Implementation of the DSSO and in particular the standard that a Screening Officer must have normal colour vision, Garda is implementing or applying Federal Legislation.

The Union alleged that the grievance concerning the Grievor's discharge is a direct result of the application of CATSA's DSSO concerning a Screening Officer's vision. In order for the grievance to succeed I must, the Union argued, find that standard discriminatory in its application to the Grievor. Therefore, I must consider the application of the *Charter* in my deliberations concerning the standard.

Garda argued that the DSSO standards are issued by Transport Canada and CATSA. Therefore, the decision to certify a Screening Officer in accordance with the standards is

that of CATSA. Further, only CATSA, Garda says, can decide whether or not to accommodate a disabled Screening Officer. In essence, Garda argued that it is nothing more than a mere vessel for conveying CATSA regulations to the Screening Officer. It is solely responsible for managing the recruitment of staff and co-operating with CATSA to ensure Screening Officers are certified.

In *Re Eldrige, supra*, one of the questions before the Supreme Court of Canada was whether the *Charter* applied to a decision not to provide sign language interpretation for the deaf under Section 1 of the Medicare Protection Act S.B.C. 1992 c. 76. Put differently, whether the definition of "benefits" in Section 1 of the Medicare Protection Act of British Columbia impugned S. 15(1) of the *Charter* by failing to include medical interpreter services for the deaf.

The Medicare Protection Act delegates powers to the medical services commission. Funding for medical services by doctors and other health care practitioners is provided by the provinces Medical Services Plan. Neither it, nor Hospital Services, which is funded under the *Hospital Insurance Act,* pays for sign language interpretation for the deaf.

The first question that the Supreme Court said that it must decide was whether and in what manner the *Charter* applies to the decision not to provide sign language interpreters for the deaf as part of the public funded scheme for the provisions of medical care. Mr. Justice Laforest stated that apart from legislation being subject to the provisions of the *Charter,* actions of a statutory authority may equally be subject to *Charter* scrutiny. This view was expressed in the following way at paragraph 21, page 644:

> There is no doubt, however, that the *Charter* also applies to actions taken under statutory authority.
>
> The rationale for this rule flows inexorably from the logical structure of s. 32. As Professor Hogg explains, in his *Constitutional Law of Canada* (3rd ed. 1992 (loose leaf), vol. 1, at pp. 34-8 and 34-9:

> Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether
>
> legislative, administrative or judicial) which depends for its validity on statutory authority.

At paragraph 22 page 645, Mr. Justice Laforest concluded that the question the court must determine was whether the alleged breach of S. 15(1) arises from the impugned legislation itself or from actions of entities exercising decision making authority pursuant to that legislation . In a like manner, I am being asked to consider whether the alleged breach of the *Charter,* by Garda, was a result of its decision making authority under the CATSA Act.

After concluding that the legislation itself was not in breach of the *Charter*, Laforest J. said that one must then look to the delegated authority under the legislation to determine if there is a *Charter* breach, paragraph 29, page 651:

> It is clear, therefore, that the failure to provide expressly for sign language interpretation in the *Medical and Health Care Services Act* does not violate s. 15(1) of the *Charter*. The Act does not list those services that are to be considered benefits; instead, it delegates the power to make that determination to a subordinate authority. It is the decision of authority that is constitutionally suspect, not the statute itself.

Laforest J. next considered whether the *Charter* actually applied to the Medical Services Commission and the Hospitals since they were the entities that denied the translation services for the deaf and therefore, the source of the alleged s. 15(1) *Charter* violation, paragraph 36, Page 655:

> There are myriad public or quasi-public institutions that may be independent from government in some respect, but in other respects may exercise delegated governmental powers or be otherwise responsible for the

> implementation of government policy. When it is alleged that an action of one of these bodies, and not the legislation that regulates them, violates the *Charter*, it must be established that the entity, in performing that particular action, is part of "government" within the meaning of s. 32 of the *Charter*.

After considering a number of cases which dealt with the meaning of "government" when applied to entities, other than government that exercise delegated governmental powers, including *McKinney, supra, Hartson v. University of British Columbia*, [1990] 3. S.C.R. 451, *Stoffman v. Vancouver General Hospital*, [1999] 3 S.C.R. 483 and *Douglas/Kawantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, the court concluded at paragraph 42, pages 659-660:

> It seems clear, then, that a private entity may be subject to the *Charter* in respect of certain inherently governmental actions. The factors that might serve to ground a finding that an activity engaged in by a private entity is "governmental" in nature do not readily admit of any *a priori* elucidation *McKinney* makes it clear, however, that the *Charter* applies to private entities in so far as they act in furtherance of a specific governmental program or policy. In these circumstances, while it is a private actor that actually implements the program, it is government that retains responsibility for it. The rationale for this principle is readily apparent. Just as governments are not permitted to escape *Charter* scrutiny by entering into commercial contracts or other "private" arrangements, they should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities. In *McKinney,* I pointed to *Slaight, supra*, as an example of a situation where action taken in furtherance of a governmental policy was held to fall within the ambit of the *Charter*. I noted at p. 265, that the arbitrator in that case was "part of the governmental administrative machinery for effecting the specific purpose of the statute". "It would be strange", I wrote, "if the legislature and the government could evade their *Charter* responsibility by appointing a person to carry out the purpose of the statute": *see idem*. Although the arbitrator in *Slaight* was entirely a creature of statute and performed functions that were exclusively governmental, the same rationale applies to any entity charged with performing a governmental activity, even if that entity operates in other respects as a private actor.

The Court stated, therefore, that in order for the *Charter* to apply to a private entity, it must be found to be implementing a specific governmental policy or program. And that is

precisely the Union's argument here, that in implementing governmental policy, pursuant to the CATSA Act, Garda is subject to the *Charter*.

Mr. Justice Laforest determined that it is not enough to just say you are not government for the purposes of s. 32 of the *Charter*.

In this regard he stated the following at paragraph 44, page 661:

> This demands an investigation not into the nature of the entity whose activity is impugned but rather into the nature of the activity itself. In such cases, in other words, one must scrutinize the quality of the act at issue, rather than the quality of the actor. If the act is truly "governmental" in nature — for example, the implementation of a specific statutory scheme or a government program — the entity performing it will be subject to review under the *Charter* only in respect of that act, and not the other, private activities.

Mr. Justice Laforest concluded at paragraph 51, page 665:

> ... in the present case there is a "direct .. precisely defined connection" between a specific government policy and the hospital's impugned conduct. The alleged discrimination — the failure to provide sign language interpretation — is intimately connected to the medical service delivery system instituted by the legislation. The provision of these services is not simply a matter of internal hospital management it is an expression of government policy. Thus, while hospitals may be autonomous in their day-to-day operations, they act as agents for the government in providing the specific medical services set out in the Act. The Legislature, upon defining its objective as guaranteeing access to a range of medical services, cannot evade its obligations under s. 15(1) of the *Charter* to provide those services without discrimination by appointing hospitals to carry out that objective. In so far as they do so, hospitals must conform with the *Charter*.

In applying Laforest J.'s reasoning to the facts in the present case, I am of the view that Garda's actions in enforcing the DSSO are subject to *Charter* scrutiny. Garda, in my view, plays a significant role in implementing the safety aspects of the CATSA Act. While CATSA may retain responsibility for the program, it is Garda that implements it on behalf

of CATSA. Quite simply, Garda is CATSA's agent or to put it another way, the vehicle through which the MOT and CATSA enforce the standards and the safety of the air travelling public.

Garda argued that it plays no role in determining the standards and is only the administrative vehicle through which they are applied. Nevertheless, it is my view that in implementing and in fact enforcing the standards by ensuring that the employees are medically examined every two years and by identifying and initiating the accommodation process when a Screening Officer fails a standard, Garda is working in concert with CATSA to enforce the government standards. It is Garda who implements the statutory scheme by requiring the Screening Officers be subject to a medical examination and initiating the accommodation process as a result of a failure to pass the exam.

It was, after all, Garda who terminated the Grievor's employment, not CATSA, because he would be no longer certified as a Screening Officer due to his failure to meet one of the standards under the DSSO and his subsequent refusal to participate in the accommodation process.

In the result, I am of the view that the *Charter* applies to Garda's actions, not by the nature of it being a security screening company at Federal Airports, but solely with respect to the function of the implementation of the MOT's and CATSA's DSSO.

Section 15(1) of the *Charter*

I turn now to the Union's argument concerning the alleged violation of the Grievor's *Charter* rights under s. 15(1).

The Union argued that by denying the Grievor the right to work on the X-Ray machinery his s. 15 (1) Charter rights were violated by Garda. In support of its position the Union relied on a number of decisions of the Supreme Court of Canada.

The first case relied by the Union was *Andrews, supra.* In that case, Mr. Andrews had met the requirements for admission to the bar of British Columbia. However, his admission was denied by the British Columbia Law Society because he was not a Canadian Citizen.

The question to be decided was whether the requirement to be a Canadian Citizen for entry to the bar impugned his rights under s. 15(1) of the *Charter.*

In finding that Mr. Andrews' *Charter* rights were impugned Madam Justice Wilson stated at page 151:

> I agree with my colleague that a rule which bars an entire class of persons from certain forms of employment solely on the ground that they are not Canadian citizens violates the equality rights of that class.

What distinguishes the Andrews case from that before me is that neither the Grievor nor any other Screening Officer was barred from employment because of his or her colour blindness.

The Grievor's removal from the duties on the X-Ray machine did not deny him the right to gainful employment. Nor does his removal from duties on the X-Ray machine, in my view, in light of the compelling reasons for doing so, on which I will comment later, discriminate against him so as to violate his rights under s. 15(1) of the *Charter.*

As such, I do not find that the *Andrews* case is helpful to the Union's argument.

In *Nancy Law supra*, another case relied on by the Union, Ms. Law was denied survivor's benefits under the Canadian Pension Plan. Her application was refused because she was under 35 years of age, she was not disabled nor did she have dependent children.

In his analysis of the law, as it related to s. 15(1), Mr. Justice Iacobucci relied on, to some degree, on the analysis of Mr. Justice McIntyre in *Andrews,* which I found to be most

instructive. At paragraph 23, page 516, Mr. Justice Iacobucci set out Mr. Justice McIntyre's approach to s. 15(1) issues:

> McIntyre J. in *Andrews* adopted an approach to s. 15(1) which focusses upon three central elements: (1) whether a law imposes differential treatment between the claimant and others; (2) whether an enumerated or analogous ground of discrimination is the basis for the differential treatment; and (3) whether the law in question has a "discriminatory" purpose or effect.

At paragraph 24, page 517 Mr. Justice Iacobucci undertook the following analysis of these three elements:

> McIntyre J. began his discussion of the requirement of differential treatment by noting. At p. 164, that equality is a comparative concept. "The condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises". It is impossible to evaluate a s. 15(1) claim without identifying specific personal characteristics or circumstances of the individual or group bringing the claim, and comparing the treatment of that person or group to the treatment accorded to a relevant comparator. This comparison determines whether a s.15(1) claimant may be said to experience differential treatment, which is the first step in determining whether there is discriminatory inequality for the purpose of s. 15(1).
>
> At the same time, McIntyre J. emphasized that true equality does not necessarily result from identical treatment. Formal distinctions in treatment will be necessary in some contexts in order to accommodate the differences between individuals and thus to produce equal treatment in a substantive sense...
>
> ...The main consideration McIntyre J. stated at p. 165, must be the impact of the law upon the individual or group to whom it applies, as well as upon those whom it excludes from its application. He explained that the determination of the impact of legislation, by its nature, must be undertaken in a contextual manner, taking into account the content of the law, its purpose, and the characteristics and circumstances of the claimant, among other things.

Mr. Justice Iacobucci continued his analysis of Justice McIntyre's reasoning at paragraph 26, page 518:

> Moving on to discuss the requirement that a s. 15(1) claimant show that differential treatment is discriminatory in order to establish a *Charter* violation, McIntyre J. defined "discrimination" in the following terms at pp. 174-75:
>
> ...discrimination may be described as a distinction whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society...
>
> ...The protection of equality rights is concerned with distinctions which are truly discriminatory. A discriminatory burden or denial of a benefit, McIntyre J. stated, is to be understood in a substantive sense and in the context of the historical development of Canadian anti-discrimination law, notably the human rights codes: "The words 'without discrimination' ... are a form of qualifier built into s. 15 itself and limit those distinctions which are forbidden by the section to those which involve prejudice or disadvantage".
>
> Further discussion of McIntyre J."s statements regarding the purpose of s. 15(1) in remedying prejudice and disadvantage occurs below, where I discuss the purpose of s. 15(1) in more detail. At this point, it is sufficient to note that the Court in *Andrews* held that the fact that a distinction is drawn on the basis of a ground expressly enumerated in s. 15(1) or one analogous thereto, although generally sufficient to establish discrimination does not automatically give rise to this conclusion. In some circumstances a distinction based upon an enumerated or analogous ground will not be discriminatory. As mentioned, McIntyre J. in *Andrews* gave an indication as to one such type of permissible distinction, namely a distinction which takes into account the actual differences in characteristics or circumstances between individuals in a manner which respects and values their dignity and difference.

A key element, in my view, in Mr. Justice Andrews' analysis in considering whether the law in question has a discriminatory purpose or effect is a determination of the impact of the law on the complainant. In the case before me, that impact is the actions of Garda acting under statutory authority.

Mr. Justice Iacobucci summarized the post *Andrews* jurisprudence as provided by himself and Mr. Justice Cory in *Egan,* at paragraph 32, page 521:

> In *Egan, supra,* at paras. 130-31. Cory J., for himself and Iacobucci J., summarized the approach set out in *Andrews, supra*, as a two-step analysis with two components to the second step, in the following terms:
>
> > In *Andrews, supra,* and *Turpin, supra,* a two step analysis was formulated to determine whether a s. 15(1) right of equality had been violated. The first step is to determine whether, due to a distinction created by the questioned law, a claimant's rights to equality before the law, equality under the law, equal protection of the law or equal benefit of the law has been denied. During this first step, the inquiry should focus upon whether the challenged law has drawn a distinction between the claimant and others, based on personal characteristics.
> >
> > Not every distinction created by legislation gives rise to discrimination. Therefore, the second step must be to determine whether the distinction created by the law results in discrimination. In order to make this determination, it is necessary to consider first, whether the equality right was denied on the basis of a personal characteristic which is either enumerated in s. 15(1) or which is analogous to those enumerated, and second, whether that distinction has the effect on the claimant of imposing a burden, obligation or disadvantage not imposed upon others or in withholding or limiting access to benefits or advantages which are available to others.

Applying Mr. Justice Iacobucci's two-step analysis to the facts before me there is no doubt that Garda, because of the Grievor's vision impairment, drew a distinction between him and others based on that personal characteristic.

However, that distinction did not give rise to discrimination, because it did not impose a burden, obligation or disadvantage on the Grievor not imposed on others, nor did it result in the withholding of or limiting access to a benefit or an advantage available to other Screening Officers. As Mr. Justice McIntyre stated, "True equality does not necessarily result from identical treatment." The distinction between the Grievor and others was not,

in other words, a distinction that was truly discriminatory. He was denied nothing that would be applicable to other Screening Officers other than that he would no longer be required to work the X-Ray machine.

I find no disadvantage to the Grievor which arises from his prohibition to work the X-Ray machine. His claim that his shifts would be affected and he would no longer be able to work in the TL function is not supported by the evidence. Rather, the effect of the accommodation offered may have resulted in him being made a permanent TL. His evidence was clear that he was not permitted to work on the X-Ray machine while performing TL duties, because a TL could not watch the workers on the floor if he was performing X-Ray functions.

In my view, given the Grievor's obstinacy in the accommodation process, his claim of discrimination under s. 15(1), is at best premature. He may well have had a case after the results of the accommodation were revealed. For example, if as a result of the accommodation process he was found to be no longer employable. However, based on the evidence, that conclusion is highly unlikely.

At the point in time when the Grievor refused to sign the accommodation request his hours of work, shifts and rate of pay were unaffected. He remained in his job as a Screening Officer performing the following functions.

Boarding pass security scanning;

Entry/access position;

Bag Search;

Walk Through Metal Detector;

Using a hand wand device;

Partial or full physical search

FBS

Performing trace tests to detect explosive particles.

I am not persuaded by the Union's argument that the performance of any of the above noted duties of a Screening officer are of lesser importance than performance of X-Ray functions. In my view, they are all of equal importance in protecting the safety of the flying public. Nor do I find the Union's argument that Garda's actions suggested that people with less than "normal colour vision" were less than competent when it comes to stopping bombs getting on a plane. The only person, in my view, who considered the Grievor to be less than competent was himself which, in light of the circumstances of the case was a result more of a "bruised ego" because of his issues with Mr. Burcul. To the contrary, Garda made every effort to ensure that the Grievor remained in his position as a Screening Officer, with the prospect of increased TL functions which would have made him a more valuable asset to the overall screening operation.

As such, the accommodation process which was thwarted by the Grievor's actions could just have easily impacted the Grievor's status in a positive way, rather than the negative one which he assumed would result.

For all of these reasons, I do not find that there has been any discrimination on the part of Garda towards the Grievor in any manner and as such, I do not find that his s.15 *Charter* rights have been violated.

Section 1 of the *Charter*

Should my conclusion regarding the Union's argument concerning the Grievor's *Charter* rights under s. 15(1) not be fully determinative of the issue, I will now consider the application of s. 1 of the *Charter* to the circumstances of the case.

The test for deciding whether a limitation of a *Charter* right exists was best described by

Mr. Justice Laforest in *Eldridge,* at paragraph 84, page 604, in which he referred to the analytical framework for such a determination as set out in *Re Oakes, supra*, and which was adopted by Mr. Justice Iacobucci in *Re Egan vs. Canada*, [1995] 2 S.C.R. 513:

> In order to justify a limitation of a *Charter* right, the government must establish that the limit is "prescribed by law" and is "reasonable" in a "free and democratic society". In *R v. Oakes*, [1986] I S.C.R. 103, this Court set out the analytical framework for determining whether a law constitutes a reasonable limit on a *Charter* right. A succinct restatement of that framework can be found in the reasons of Iacobucci in Egan, at para. 182:
>
> > First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable.

The Pressing and Substantial Objective:

The objective of the DSSO is clearly one of safety for the travelling public. It goes without saying that it is common knowledge that airports and airplanes have been for many years subject to a high risk of terrorism. Therefore, the screening of passengers and their luggage is of major importance to the safety of the passengers in airports and airplanes. The threat to the public's safety in this day and age is not remote.

I cannot help but take judicial note of the threats to our safety and security that are occurring frequently. In recent months, two Canadian forces members, in broad daylight, Warrant Officer Patrice Vincent and Corporal Nathan Cirilloin were killed by two attackers,

expressing radical beliefs, in broad daylight in the streets of our cities. A terrorist attack was made on our parliament.

Practically every day we lift our newspapers to be assailed by news of a further atrocity carried out in some part of the world or closer to home, as in the case of the two recently convicted terrorists who plotted to blow up a bridge onto a VIA passenger train passing, which had they been successful in all likelihood would have resulted in a number of fatalities.

Frequently we read of the Islamic State of Iraq and levant ("ISIL") issuing fresh calls for supporters to attack Canadians over our government's support for the military coalition. We cannot ignore the fact that today we live in a frightening world where terrorists stalk the land. No longer can we say "it will not happen here". It already has and will again unless we remain vigilant. We cannot and must not let down our guard. In my considered view, the object of safety and security at airports and on airplanes is therefore, pressing and substantial.

The means chosen must be proportional to the objective:

At the outset of the hearing, there was an issue concerning whether all of the X-Ray machine monitors were viewed in colour or black and white. Therefore, I requested a view of the security area at the Thunder Bay Airport. After having had the advantage of the view, I am satisfied that items passing through the X-Ray machines are viewed on colour monitors. Further, that the monitors exhibited, in particular, various hues of reds, blues and greens. Dr. Ulakovic in a letter to Union's original Counsel, Mr. Hamud, stated "males with colour vision defects will be poor at discriminating subtle differences in hues of the red, orange, yellow and green region of the visual spectrum. They will make errors in many hues in this region because colours will appear to be somewhat shifted towards the red end of the spectrum."

As such, I am satisfied that a real possibility exists that someone who has less than normal colour vision may not detect a lethal threat to airport or airplane safety.

I am further, of the view that no amount of testing of the Grievor's ability, as the Union suggested, would result in an absolute certainty that in each and every occasion his colour vision impairment would not impact his ability to detect a threat. It is not a question of whether he was able to demonstrate that he could perform the X-Ray functions in the past, or for that matter at the present, it is a question of whether at some time in the future he may not detect a threat. Such a risk, in my view, is not acceptable for Garda to assume given that removing the Grievor from the responsibility for working the X-Ray functions would result in, if any, a minimal impairment of his rights. For Garda to do otherwise, under the circumstances, I would go so far as to say would be tantamount to negligence.

It is therefore, my view that the Grievor's visual impairment would, in light of the medical evidence, jeopardize the safety of the public travelling through the Thunder Bay airport the standard which prohibits Screening Officer who do not have perfect colour vision from performing X-Ray functions is rationally connected to the objective of safety.

Further, the Grievor, in my view, cannot credibly argue that his removal from the X-Ray function violated his *Charter* rights when he was never removed from his job as a Screening Officer and continued to perform five sixths of his functions pending the results of the accommodation process. It is not his right to work the X-Ray machine that is protected by the *Charter* because of his disability. Rather, it is his right to continue working as a Screening Officer with little or no adverse affect.

In my opinion, Garda in its efforts to accommodate the Grievor, was clearly attempting to find a reasonable solution by balancing public safety with the Grievor's right to accommodation. I am not persuaded by the Union's argument that the Grievor's job would have been severely diminished or that taking away the X-Ray functions would leave a mere

shadow of the job.

If Garda had revoked the Grievor's certification and failed to initiate an accommodation process, the Grievor may well have had his *Charter* Rights impugned. But such was not the case. Rather, the Grievor, as I have earlier stated, should have taken the sound advice of his Union representative, signed the accommodation request form, under protest, and continued the fight if he was not satisfied with the outcome. Finally, the evidence does not support the Union's contention that the Grievor would no longer be able to perform his TL functions.

In the result, I therefore find that the Grievor's rights were minimally impaired when weighed against the objective of the actions of CATSA and Garda to protect the travelling public. As stated above, the result of the accommodation process may were well have been to the Grievor's advantage. However, that is something that we will never know, given his refusal to participate.

The obligation, in my opinion, imposed on Garda to ensure a minimal impairment of the Grievor's rights, once it became aware of the Grievor's vision deficiency, is best summed up by Mr. Justice Laforest, in the following passage from *Eldridge, supra,* at paragraph 94, page 690:

> In summary, I am of the view that the failure to fund sign language interpretation is not a "minimal impairment" of the s. 15(1) rights of deaf persons to equal benefit of the law without discrimination on the basis of their physical disability. The evidence clearly demonstrates that, as a class, deaf persons receive medical services that are inferior to those received by the hearing population. Given the central place of good health in the quality of life of all persons in our society, the provision of substandard medical services to the deaf necessarily diminishes the overall quality of their lives. The government has simply not demonstrated that this unpropitious state of affairs must be tolerated in order to achieve the objective of limiting health care expenditures. Stated differently, the government has not made a "reasonable accommodation" of the appellants' disability. In the language of this Courts' human rights jurisprudence, it has not accommodated the

appellants' needs to the point of "undue hardship". (emphasis added)

Unlike what occurred in *Eldridge*, Garda gave the Grievor more than sufficient opportunities to be accommodated. In this regard, the evidence was clear that all Screening Officers identified as having a colour vision deficiency were accommodated and remained productively employed with Garda, as Screening Officers.

The *Human Rights Act* Argument

Prior to the introduction of the duty to accommodate into Canadian Law, the discovery of a disability would often mean the end to an employee's career, if not his future employability. Human Rights legislation, however, imposes on employers and unions a duty to take every reasonable step, short of undue hardship, to accommodate an employee whose disability falls under S. 25 of the Canadian Human Rights Code. Put another way, employers can no longer discriminate against a person with a disability by discharging him from his employment. Rather, the thrust of the law and the jurisprudence is to create legal responsibilities on employers and unions to find ways to ensure that the disabled employee is not treated differently and adversely, for no justifiable reason. The duty that has emerged from the very first cases on this issue, is the duty to accommodate.

In *Meiorin*, the British Columbia government established physical fitness standards for its forest firefighters. One of these tests was an aerobic standard. Ms. Meiorin, a female firefighter failed on four attempts to meet the aerobic standard and was dismissed. She grieved.

The principle to be gleaned from *Meiorin* is that in cases where an employee is discriminated against by denying him or her employment as a result of the application of a standard, an employer must demonstrate that that employee could not be accommodated to the point of undue hardship. This is best illustrated by the following passage at paragraph 72, page 40:

> Under the third element of the unified approach, the employer must establish that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer. In the case on appeal, the contentious issue is whether the Government has demonstrated that this particular aerobic standard is reasonably necessary in order to identify those persons who are able to perform the tasks of a forest firefighter safely and efficiently. As noted the burden is on the government to demonstrate that, in the course of accomplishing this purpose, it cannot accommodate individual or group differences without experiencing undue hardship. (emphasis added)

It is that link between the adoption of the standard and an accommodation of persons who fail the standard that is the crux of the issue in *Meiorin*. There is a clear distinction from the case I am being asked to decide. The application of the standard resulted in Ms. Meiorin being medically unfit to perform the forest fire fighter job. In this case, the evidence shows that the application of the DSSO did not result in the Grievor being medically unfit to perform the totality of the Screening Officer job but rather only one function of the job namely, the operation of the X-Ray machine.

The Court's decision in *Meiorin,* clearly hinged on the Employer's failure to accommodate Ms. Meiorin to the point of undue hardship, paragraph 79, page 42:

> Referring to the Government's argument on this point, the arbitrator noted that, "other than anecdotal or 'impressionistic' evidence concerning the magnitude of risk involved in accommodating the adverse-effect discrimination suffered by the grievor, the employer has presented no cogent evidence ... to support its position that it cannot accommodate Ms. Meiorin because of safety risks". The arbitrator held that the evidence fell short of establishing that Ms. Meiorin posed a serious safety risk to herself, her colleagues, or the general public. Accordingly, he held that the Government had failed to accommodate her to the point of undue hardship. This Court has not been presented with any reason to interfere with his conclusion on this point, and I decline to do so. The Government did not discharge its burden of showing that the purpose for which it introduced the aerobic standard would be compromised to the point of undue hardship if a different standard were used.

Arbitrators have consistently relied on the reasoning in *Re Meiorin*, *supra*, as a guide when called on to adjudicate disputes concerning discrimination and accommodation in the work place. The Union, in the instant case did not suggest that the application of the standard was discriminatory because the Grievor was denied employment as a result. Rather, it argued that removing the Grievor from the performance of X-Ray functions was discriminatory. That such action on the part of Garda was somehow an affront of his dignity.

The Union in this case, however, is not seeking accommodation for the Grievor, rather, it insists that he be permitted to perform all of the functions of the Screening Officer, despite his disability. Such an accommodation if one would call it that, is not contemplated by the legislation nor, in my view, by the plethora of case law since the Supreme Court's decision in *Meiorin*.

The Union also relied on *Re Terry Grismer, supra*. In that case, Mr. Grismer driver's license had been cancelled because he suffered from homonymous hemianopia ("HH") which eliminated most of his left side peripheral vision in both eyes.

The following passage, which I find particularly noteworthy, illustrates the view that there is a duty either to show that no accommodation is possible or that an accommodation to the point of undue hardship has been at the very least explored.

> Page 887 paragraph 82:
>
> Against this background, I come to the question of whether the Superintendent met the burden of showing that the standard he applied to people with H.H. — an absolute denial of a driver's licence — was reasonably necessary to achieve the goal or moderate highway safety. In order to prove that its standard is "reasonably necessary", the defendant always bears the burden of demonstrating that the standard incorporates every possible accommodation to the point of undue hardship, whether that hardship takes the form of impossibility, serious risk or excessive cost. In

> this case there are at lease two ways in which the Superintendent could show that a standard that permits no accommodation is reasonably necessary. First, he could show that no one with the particular disability could ever meet the desired objective of reasonable highway safety. For example, using current technology, someone who is totally blind cannot safely operate a motor vehicle on the highway. Since accommodation of such a person is impossible, it need not be further considered. Alternatively, if the Superintendent could not show that accommodation is totally inconsistent with his goal, he could show that accommodation is unreasonable because testing for exceptional individuals who can drive safely despite their disability is impossible short of undue hardship.

However, *Grismer* is quite distinguishable from the circumstances of this case in that CATSA did not adopt a standard that permits "no accommodation". Rather, it adopted a standard with a built in process to accommodate employees who could not meet the standard.

In *Re Canadian Pacific Ltd., supra,* the Grievor was held out of service and advised that his medical condition which arose from his diabetes, which required him to inject insulin one or more times a day, might disqualify him from being employed as a track man on the railway. The issue once again was whether the Grievor might be accommodated rather than lose his job.

The Union in the *Canadian Pacific* case argued that the general policy not to employ diabetics on maintenance on the railway was unreasonable, unjust and discriminatory. As such , the Grievor should have been reinstated and accommodated for his disability.

The arbitrator found that the Grievor's discharge was not for just cause, but in reinstating him to employment, imposed certain conditions, page 11:

> Just cause for Mr. Henderson's termination is not established on the evidence before the arbitrator. In the circumstances of the instant case, however, I am not persuaded that the grievor should be reinstated without certain conditions designed to protect the legitimate interests of the

> employer. It is not disputed that much of the union's case establishing the employability of Mr. Henderson rests on the largely subjective premise of his faithfulness to a healthy life-style and careful control of his insulin intake, diet and exercise...
>
> ...In the arbitrator"s view, given the grievor's condition as a stable insulin-dependent diabetic, it would not appear unreasonable to require as a condition of his reinstatement that he undertake a programme of ongoing periodic monitoring of his blood sugar levels, with the further requirement that he be subject to periodic medical examinations, the results of which are to be disclosed to the company's doctor. Such a precaution will ensure that in the unlikely event that Mr. Henderson's condition as a stable and controlled diabetic should change, that development will become readily known to his own physician as well as to the company.

Had the Grievor, in the instant case, been discharged by Garda because he was colour blind and I was being asked to rule on the justification of his discharge, I may very well ruled that he be reinstated on the condition he be accommodated to permit him to work all of the Screening Officer functions, save that of the X-Ray machine. Such is not the case, however. The Grievor was not discharged because of his colour vision deficit. He was discharged because he refused to co-operate in the accommodation process.

The cited case that, in my view, resembles to a certain degree, the fact situation in the instant case is that of *Marine Atlantic Inc.*, *supra*. In that case, it was discovered, by accident, that the Grievor could not distinguish between the colours red and green. A subsequent medical examination revealed that he was, in fact, colour blind. As a result the Grievor was terminated.

Apart from being disturbed by what he viewed as "the entirely, ad hoc nature of the employer's decision to terminate the Grievor," Arbitrator Outhouse found that the Grievor could easily have been accommodated by relieving him of the duty of checking the door panel which required the ability to distinguish between the colours of red and green. He stated the following at page 16:

> A great deal of emphasis was placed by the employer on the Door Status

> Panel aboard the Caribou. Undoubtedly, the grievor could not check that panel given his colour vision disability. However checking the Door Status Panel is but one of many duties of the junior electrical engineer and it appears from the evidence of Messrs. Murphy and Cameron that it would have been relatively easy for the employer to have accommodated this particular problem.

Of note in Marine Atlantic was the acknowledgement by the Union that the Grievor could not distinguish between the green and red lights. However, it maintained that no safety hazard would arise from his employment if he was reinstated to perform all of his duties, as a junior electrical engineer, with the possible exception of those related to the Door Status Panel This, the Union argued, was the accommodation that the employer could easily have afforded the Grievor in order for him to be reinstated.

Having said that, however, I must emphasize that Arbitrator Outhouse's reasoning and conclusions were based on circumstances where the Grievor had been discharged because he was colour blind.

Finally, in *Canadian Pacific Railway Company and Teamsters, supra,* the facts were also similar in nature to those before me. In that case, a conductor was permanently restricted to yard work, because he was colour blind.

Like the Grievor in the case before me, the conductor had an excellent safety record and had passed every evaluation given, notwithstanding his colour blindness. Page 9:

> There is no dispute that the grievor has worked in all occupational capacities including utility, yard helper, yard foreman, trainperson, conductor, yard service helper/yard service employee/hump operator, and locomotive engineer. He has worked in every yard, on every customer siding, on all main tracks, in both freight and passenger services, as required in the Greater Toronto Area. The grievor has passed every evaluation, has never had an accident or incident of any nature, nor has he received any discipline in any form. His safety record is excellent, his attendance exceptional and he has never failed to fulfill the requirements of productivity or safety during his tours of duty.

The Union in that case sought to have the Grievor field tested to determine whether he could nonetheless perform his duties as a conductor. A similar argument was made by the Union in the present case.

What, however, distinguishes the *Canadian Pacific Railway* case, from the circumstances of what is before me, is that the restrictions imposed on the Grievor, by the Company, precluded him from working as a conductor or as a locomotive engineer, which the arbitrator found had impacted, and would continue to impact significantly the Grievor's earning potential?

As a result, the arbitrator expressed concern about the Company's approach to accommodating the Grievor, particularly, its refusal to offer additional field testing. As

such, he found that the Company had not met its ongoing duty to accommodate the Grievor and directed further field testing.

Concerns over the Grievor's earning potential do not present themselves before me. Rather, there is the real possibility that the Grievor's fortunes may have increased by his participation in the accommodation process, in particular a possible increase in his TL hours.

Nor, am I of the view that any amount of field testing in this case, would ensure that no mishap would occur in future. As stated above, it is not the Grievor's test results in the past, or for that matter the present, that matter but the real possibility that, because of his colour vision deficiency he may miss some threat in the future.

In *Renaud, supra,* the Supreme Court made it clear that finding accommodation in the workplace is a multi-party responsibility. Not only the employer and the union, but the individual employee must actively participate in finding appropriate accommodation.

Further, since *Renaud*, there has been an abundance of case law that makes it absolutely clear that if an employee either does not co-operate or turns down reasonable accommodation, then the employer's duty is at an end and discharge is the inevitable result.

See for example *City of Cornwall v. Canadian Union of Public Employees, Local 3251 (Greggain - O'Brien Grievance)*, [2008] O.L.A.A. No. 76 (Kaplan); *Babcock and Wilcox v. United Steel Workers of America (Hardorf Grievance)*, [2007] O.L.A.A. No. 152 (Kaplan); *McKummon v. Shaw Cable Systems GP*, [2011] C.L.A.D. No. 93 (Grounds).

In *Re Star Choice Television, supra,* adjudicator Cantin dealt with a case of alleged wrongful dismissal. The complainant, Mr. Tatula, worked in the call centre for Star Choice Television. The Complainant had been off work due to cervical strain and pains to his neck. The Employer made numerous attempts to have the Grievor return to work by offering him accommodation, he refused at every turn to participate in the process and was subsequently discharged.

At page 9 adjudicator Cantin commented as follows at paragraphs 43 and 44:

> All in all, I cannot and do not give credence to the Complainant's alleged reasons for refusing to meet with the Employer and to return to work after being offered accommodation.
>
> I have examined the case law submitted by Counsel for the Employer and I fully agree that the latter met its duty to investigate and offer accommodation measures, as outlined in *Scarlett v. Hamilton Health Sciences Corp.*. It tried, as suggested in *Renaud v. Central Okanagan School District No. 23,* to "originate a solution".There was a duty on the part of the Complainant to assist and cooperate but he did not. As decided in *Dunlop v. Alter Moneta Corp.*, he had to "do his part as well". He could have made suggestions, but he did not. He simply ignored the Employer. The Complainant chose on his own not to return to work despite the accommodation that can be qualified as reasonable...

Similarly, I cannot accept, in light of the circumstances, the reasons given by the Grievor

for refusing to participate in the accommodation process. His assertion that he would be agreeing to a lie is just not persuasive. Rather, it is more credible that he had decided that no one, particularly Burcul, was going to tell him what functions he could or could not perform. An intelligent and well-educated young man such as the Grievor should know or ought to know that he could have signed the form and participated in the process, all the while reserving his right to challenge the outcome. Ms. Franks obtained and was witness to that assurance from Mr. Burcul. The Grievor's refusal to participate in the accommodation process had more, in my view, to do with challenging authority than furthering a human rights claim.

The Grievor's failure to participate in the accommodation process and more particular his refusal to sign the document which would have triggered the process was fatal to his case. The Grievor's lack of co-operation, in the face of Garda's willingness to accommodate him, in my opinion, justified his discharge.

The final issue that needs to be determined is whether Garda was justified in not permitting the Grievor to work from May 10, 2013 until June 13, 2013 the date of his discharge letter.

The evidence was clear that he had some 30 days remaining on his two month certification when Mr. Morin told him he could no longer report for work, unless he signed the accommodation request form. Mr. Morin readily admitted that he told the Grievor he could not work because he did not co-operate. When it was put to him in cross-examination that he could have permitted the Grievor to work, Mr. Morin agreed.

I find no good reason, other than Mr. Morin's frustration by the Grievor's attitude, to deny the Grievor's right to work for the remainder of his two month certification period, albeit not the X-Ray function.

Therefore, in the interests of fairness, I order that the Grievor be paid, at his regular rate of pay from May 10, 2013 until the date of his discharge letter, June 13, 2013 or until his

two month certification as a Screening Officer had expired, whichever came first.

I leave it to the parties to work out the details of the payment. In the event that they are not able to reach agreement, I shall remain seized.

Subject to the above noted comments concerning the remaining approximately 30 days of the Grievor's final two month certification, the grievances are dismissed.

DATED AT OTTAWA THIS 7TH DAY OF MARCH 2015

SYDNEY BAXTER