2010 NSHRC 1

IN THE MATTER OF
THE NOVA SCOTIA HUMAN RIGHTS COMMISSION

BOARD OF INQUIRY

BETWEEN:

MICHAEL TRASK - Complainant

and

DEPARTMENT OF JUSTICE (CORRECTIONAL SERVICES) - Respondent

Parties

Mr. Michael Trask — **Complainant**

Represented by:
Mr. Paul Conway

Counsel

Mr. Michael J. Wood, Q.C.
Mr. Jason T. Cooke — **Solicitors for Nova Scotia Human Rights Commission**

Ms. Dale Darling
Ms. Alicia Arana
Mr. Sheldon Choo — **Department of Justice (Correctional Services)**

Board of Inquiry: Honourable Donald H. Oliver, Q.C.

Decision: February 1, 2010

1 Pursuant to the Regulations Respecting Boards of Inquiry made under the Human Rights Act, and a request received from the Nova Scotia Human Rights Commission dated the 24th day of July, 2008, I was nominated for appointment by the Nova Scotia Human Rights Commission to a Human Rights Board of Inquiry into the complaint of **Michael Trask**, dated June 21st, 2008, against **Department of Justice (Correctional Services),** being the complaint to which the request relates.

2 This matter arose out of a formal complaint filed by Michael Trask against the Department of Justice (Correctional Services) on the 7th day of June 2004. That formal complaint was followed by a detailed written response by the respondent. Michael Trask filed a rebuttal to the Department's response to complaint. As a result of this exchange, Michael Trask subsequently filed an Amended Complaint against the Department of Justice (Correctional Services) dated the 21st day of June 2008, four years later. The amended complaint is what is before us now.

3 The amended complaint is under Section 5 (l) (d) and (o) employment-disability under the Human Rights Act R.S.N.S. 1989 c. 214.

4 Mr. Trask alleges that he has dyslexia and other disabilities that affect his behaviour and writing skills and that the Department of Justice (Correctional Services) discriminated against him in or about the year 1997 in the matter of his employment as a result of his disability.

5 In his amended complaint, Mr. Trask alleges that the Department of Justice failed to accommodate "me in my efforts to secure employment with them for nearly 2 years and that the delay lead to me losing seniority and subsequently hours of work". He further alleges that he had been held back in his career at the Department because of some supervisor's prejudice against people with

learning disabilities and that he was exposed to degrading remarks from his co-workers.

6 Michael Trask is a 47-year old divorced male born the 24th of June 1961, in Digby, Nova Scotia. He suffers from a life-long learning disability. He is dyslexic. Dyslexia is a severe learning disorder that has inhibited his acquisition of literacy. There was agreement among counsel that Mr. Trask is dyslexic.

7 Dr. Emily Freeman, Ph.D., Educational Consultant, conducted an assessment of Mr. Trask for Landmark East School, educational assessment and program planning centre in Wolfville, Nova Scotia, on the 25th of March 1999. She said the following:

> "Frequently information about a person's early developmental and medical history can provide valuable insights regarding the etiology of his learning disabilities. Mike's history is problematic with respect to factors that might have caused or exacerbated a predisposition for learning difficulties. Although Mike was adopted as an infant, he had contact with his birth mother who indicated that she had toxaemia during her pregnancy with him. Problems were encountered during the prolonged labour that preceded his delivery. Mike required oxygen immediately following his birth and may have suffered from some oxygen deprivation during the delivery process. However, he is alleged to have attained most developmental milestones on schedule as he walked at 11 months and spoke in abbreviated sentences by the time he was a year and a half."

8 She later added:

> "Mike was an active boy in school, but rather clumsy. His activity level became a concern and his teachers labelled him hyperactive although he was never diagnosed as having "Attention Deficit Hyperactivity Disorder".

9 Mr. Trask received his elementary school education in Ontario and coped satisfactorily until the upper elementary grades. His family then moved to the Province of Nova Scotia and Mr. Trask went to junior high school in the Digby, Nova Scotia, area. He became increasingly frustrated by his lack of success and resented being placed in an alternative program.

10 Mr. Trask said in direct evidence that in Sudbury "I had special teachers", but he had no special teachers in Digby. Eventually he became so discouraged that he dropped out of school when he was 16, after grade 9. He said to the Inquiry that when he left school he had no math skills or English skills, so he went to work for a fish plant and for 4 or 5 years, he worked in a bar, and he worked at the local base in the kitchen. He said that a determination to succeed and a lack of job opportunities prompted him to enrol in an academic upgrading program. In October of 1994 he received a GED equivalent grade 12. He spent five days a week in school preparatory to writing the GED. He gave evidence that he wrote it six or seven times and failed on the first six attempts. He passed on the seventh. Because as he said "they accommodated me". He said there was no time limit for him to write the exam.

11 He then moved to Prince Edward Island to the Justice Institute of Canada in Summerside. He studied for 10 months to become a Correctional Officer. He was able to pass the written test because as he said "they accommodated me". Following the completion of the program in 1996, he began working on the 1020 hours required to gain experience. He first worked at a correctional facility in Prince Edward Island. He worked there from June until August 1997. He wanted to return to Nova Scotia to see his son. He was suffering from anxiety

and depression and sought medical assistance for it in Prince Edward Island. From October 1997 until September 1999, he was variously employed as a counsellor with community living and alternative organizations in Kentville in the Annapolis Valley.

12 When he returned to Nova Scotia from Prince Edward Island he had three different part-time jobs. He worked at the Kings Correction Centre in Waterville, Nova Scotia as a Correctional Officer for inmates. From October 1997 until 1998, he worked at the Kings Regional Rehabilitation Centre in Waterville, Kings County, Nova Scotia as a Program Assistant. From July 1998 to September 1999, he worked at the Kings County Lock-Up in Kentville as a Lock-Up Officer. He also worked at Community Living and Alternative Society in Kentville, Nova Scotia as a Counsellor. There, he assisted mentally and physically challenged clients in day-to-day living activities. He gave evidence that he told them that he had difficulty reading and writing but if they accommodated him and were supportive, he could carry out his job.

13 The evidence discloses that he had four different interviews for those various jobs. He failed a number of the applications and was frequently told that he should take some courses to improve his writing skills. He was told that he should learn how to use a computer so he could utilize modern technology. In most interviews, there was a written section and he would often be put in another room and afforded the time he needed to write the paragraph. In his evidence before the Inquiry, Mr. Trask was asked whether there were any special accommodations when he applied for various jobs with the respondent. Here's a typical answer:

> "Well, I just told them that I have dyslexia and I have problems with reading and writing."

> And they said, that's all right, no problem. What do you need, you know, what do you want. I said well...they said we got a...when I first got in it was handwritten, then after that it's...it was a computer. I didn't...You said you had to...

14 Later in his testimony he was asked:

> "Up to this point of time, say up until September of 1999, did you have a personal computer yourself at home?"

15 He said he obtained one through a grant in 1998. He said the purpose of the computer was to assist him applying for jobs and to help with resumes and things like that. He said that adult upgrading had taught him about computers. He was asked by counsel at the Inquiry:

Q: "And based upon your personal experience with the computer at home, how did that affect your ability to write, did it make it no difference, was it easier, was it harder, compared with doing it by hand?".

A: "It was easier by hand, you know ..."

Q: "It was, sorry?"

A: "It was easier by hand because I didn't have to type."

16 Did Mr. Trask mean by this that he preferred to write by hand rather than use a computer?

17 In June of 2007, Dr. John Sperry, Psychologist, said Mr. Trask (who was at home and had not worked for 2 years) "has begun to work on developing computer skills...".

18 The dozens and dozens of pages of evidence from six different witnesses on the application and use of the computer presented major differences. There are major conflicting versions in the evidence about the use of a computer as an "accommodation" device. Did he know how to use a computer? Did he have training on the computer? Did he have a laptop? Did Mr. Trask know how to use a laptop? Did he know how to use spell check? Did he need "Dragon" software for a voice activated computer? Was he offered a modern computer? Was it offered in a timely way when needed? Did he have a private place to use it? Was he accommodated in the use of a computer? Was he offered a computer that worked? Was he offered a computer in a room or area that was quiet and free from distraction?

19 The only consistent response to all these questions from the evidence before the Inquiry was their inconsistency.

20 Mr. Trask gave evidence he really wanted a full-time job with the Department of Justice and someone suggested to him that first he have a professional medical assessment done in relation to his disability. He agreed and he had one done by Dr. Emily Freeman, Ph.D., Educational Consultant at Landmark East School, Educational Assessment and Program Planning Centre on Main Street in Wolfville, Nova Scotia. The assessment was conducted on the 25th of March, 1999.

21 Dr. Freeman said that he worked hard to compensate for his learning disability and he successfully completed the Correctional Officer Training Program at Holland College, PEI, three years before her assessment. At the time of the assessment, Mr. Trask told her that his weak spelling and writing skills were affecting his ability to secure permanent employment in his chosen field because he has difficulty with the written part of employment competitions.

22 Dr. Freeman said the following:

> "Integrational problems, which are typical of people with Dyslexia, exacerbate Mike's difficulty with tasks that involve writing. Producing a piece of writing involves the integration of several complex processes at the neurological level and Mike has weaknesses in several of these processes. The first step in the writing process is to come up with an idea or topic which then must be expanded upon or supported by details. While Mike has no difficulty in generating ideas and he is able to formulate sentences to express them, he lacks the vocabulary to express his thoughts in abstract terminology that is appropriate for members of his age group. When he goes to record his thoughts on paper, Mike has trouble encoding longer and more sophisticated words in standard spelling. *The physical act of writing the words on paper is also problematic for him because his motor coordinator for this type of activity is poor. With access to current technology such as a laptop computer loaded with a word processing program with a spell check feature, Mike should be able to produce written reports of the type expected in his present job placement.* He could also benefit from some short term intensive instruction which focuses on the weaknesses in his written expressive language." Above italics are the author's.

23 Dr. Freeman made four recommendations. First she said Mr. Trask may wish to consider enrolling in the adult literacy program at Landmark East to work on his writing and expressive language skills. This was not done. Second, she said technology such as voice activated word processors would benefit Mr. Trask. Thirdly, and significantly, she said "Mike finds job interviews very stressful because he is conscious of his language processing problems". Four, "Mike needs to inform potential employers of his dyslexia, but he should not go into minute detail about it. The best approach is to simply say that he has this disability and that it affects his ability to communicate effectively in stressful

situations, but it does not affect his ability to do the job for which he is applying."

24 This was in 1999, before Mr. Trask had a full-time job with the respondent.

25 At the time of the Inquiry, Mr. Trask was not employed. He had been off work for more than four years on disability leave. He last worked on May the 27th, 2005. In addition to his Dyslexia, he suffered from anxiety and depression. The hearing started on the 30th of March and he gave evidence that he had been trying to get back into the workforce up to that time.

26 In 2004-2005, Mr. Trask became more anxious in the workplace and his frustrations often lead to violent outbursts. So he was placed on administrative leave.

27 Dr. John Sperry was called as an expert witness. He was engaged by the disability insurer, ManuLife Financial Group to determine whether it was possible for Mr. Trask to be gainfully employed once again. Dr. Sperry was qualified as an expert in anxiety disorder, "behavioral therapy" and depression.

28 His referral was made on the 5th of June, 2007, some two years after Mr. Trask first went on disability. Dr. Sperry gave strategic evidence about Mr. Trask's background and relationships. He said that Mr. Trask was in a relationship for some 13 years and married for three. And he reported that he separated from his wife in 1992 and had one child from the relationship, then age 12, and living in Sackville. And that Mr. Trask currently had a supportive girlfriend. His adoptive father was deceased for some 25 years.

29 Dr. Sperry saw Mr. Trask 45 times for 50 minute therapy sessions each. In a report to the disability insurer of October 5, 2007 he wrote the following,

"Attentional and memory processes remain impaired. These impairments are magnified by depression and anxiety. The implication of this is that Mr. Trask would not be able to work in any environment at this time." His last report to the life insurer of January 21, 2008 included the following:

1. Indication compliance is stabilized.
2. He has established a regular daily schedule which incorporates exercise; house and yard work; social and spiritual activities.
3. His taking responsibility for moving on psychologically and accepts that he will not be returning to work with his former employer.
4. He has begun to work on developing computer skills which may be helpful in returning to work.

30 Dr. Sperry concluded that despite the above progress, Mr. Trask continues to report feeling quite depressed.

31 During the Inquiry, when asked what happened on May 27, 2005, Mr. Trask discussed the nature of the disability that he was suffering that kept him from going to work, Mr. Trask answered "anxiety, depression". He did not say dyslexia.

32 The hearings began on the 30th day of March 2009, and more than 220 pages of exhibits were filed. The Board heard from the following witnesses:

- Michael Trask, Complainant;
- Dr. John Sperry, Psychologist;
- Russell “Rocky” Partridge, Superintendent of Central Nova Scotia Correctional Facility, and former Superintendent at Kings Correctional Centre and the Southwest Correctional Facility in Yarmouth;
- Paul Martell, Acting Superintendent at Amherst and Antigonish Correctional Facilities, and former Deputy Superintendent of Central Nova Scotia Correctional Facility;
- Judi Companion, former Human Resource Consultant for Correctional Services;
- Doug Whitman, Captain at Central Nova Scotia Correctional Facility;
- Margie LeClair, Occupational Health Consultant with Correctional Services;
- Greg McCamon, Deputy Superintendent at Central Nova Scotia Correctional Facility, and former Captain;
- Dr. Sreenivasa Murthy Bhaskara, Psychiatrist qualified as an expert on the treatment of depression and anxiety;
- Melinda McLeod, former Correctional Officer at Central Nova Scotia Correctional Facility;
- Sean Kelly, Director of Correctional Services and former Superintendent at Central Nova Scotia Correctional Facility;
- Dr. Scott Theriault, Psychiatrist

33 Proceedings were heard on the following dates in 2009: March 30, 31, April 1 and 2; June 26 and 30; and September 2, 3, and 10.

34 In terms of documentary evidence, there was an exhibit book prepared in three volumes. At the outset, the Board of Inquiry was advised that the document was not introduced by agreement per se, except for Dr. Freeman’s portion of it, but all counsel expected that most, if not all of the documents, would be referred to by witnesses and counsel in the normal course. That was the case. There were

no substantive objections from counsel to any witness or other party referring to any portion of the documentary evidence in the three volumes and accordingly, I will refer to those documents as evidence in the Inquiry.

35 A Board of Inquiry under Section 32 A (1) of the Human Rights Act is not a trial and it is not an arbitration. There are strict limitations on what a Board of Inquiry can do and cannot do. The Board of Inquiry shall conduct public hearings to inquire into the complaint. As is normally the case, there were a number of conflicting versions of events given by witnesses. There were also a number of matters raised during the Inquiry that were not germane to this decision, first, because there was no preponderance of evidence adduced, and secondly, because there was no jurisdiction in the Board to deal with them.

36 So from where does the Board receive its authority and what is the extent of that authority and jurisdiction? A hearing before a Board of Inquiry appointed under the *Human Rights Act* is not a civil proceeding subject to the Nova Scotia Civil Procedure Rules and the traditional rules of evidence. The jurisdiction of a Board of Inquiry is found at section 34(7) of the *Human Rights Act*, R.S.N.S. 1989, c. 214 (as amended):

> 34(7) A Board of Inquiry has jurisdiction and authority to determine any question of fact or law or both required to be decided in reaching a decision as to whether or not any person has contravened this Act or for the making of any order pursuant to such a decision.

37 The evidence which a board of inquiry may hear is described at section 7 of the Boards of Inquiry Regulations, NS Reg. 221/91:

> 7. In relation to a hearing before a Board of Inquiry, a Board of Inquiry may receive and accept such evidence and other information, whether on oath or affidavit or otherwise, as the Board of Inquiry sees fit, whether or not such evidence or other information is or would be admissible in a court of law; notwithstanding, however, a Board of Inquiry may not receive or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence.

38 The standard for assessing the evidence before the Board of Inquiry is on the civil balance of probabilities. If the Board of Inquiry is satisfied on balance that the complainant has proved the discrimination alleged and that there is no justification or defence available to the respondent, then the Board can fashion a remedy under 34 (8). If the Board is not satisfied that the complainant has met this burden, the Board can dismiss the complaint.

39 There were several issues of credibility that arose in this Inquiry. A lot of the evidence adduced from various witnesses was contradictory and witnesses for Correctional Services often had a very different view of the evidence than that expressed by the Complainant, Mr. Trask, and his witnesses. A lot of this evidence was about a computer. It is well known that the assessment of witnesses' credibility is essential in determining whether a complaint has been made out. It is also commonly accepted that it is the Board of Inquiry's function to determine witness credibility and to accept or reject portions of the evidence presented by a witness on the stand.

40 Counsel for the Nova Scotia Human Rights Commission referred to the British Columbia Court of Appeal case of **Faryna v. Chorny**, (1952) 2 D.L.R. 354 (B.C.C.A.) at 10 which reads:

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

41 A more recent statement of the test for assessing witness credibility can be found in **Leach v. Canadian Blood Services**, 2001 ABQB 54, at 70:

> Which adopted the test for assessing credibility set out by *Foster J. in Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd. and O'Connor* (1996), 190 A.R. 321 (Q.B.) at para. 27:
>
> 1. The witness's evidence should first be considered on a "stand alone" basis. In this regard, (the trier of fact should consider) factors such as firmness, memory,

accuracy, evasiveness, and whether the witness's story is inherently believable.

2. If the witness's evidence survives the first test above, the assessment moves on to a comparison of that witness's evidence with the evidence of others and documentary evidence.
3. Finally, the court must determine which version of events, if conflicting versions exist, is most consistent with "the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."

42 These are the tests I will follow in this decision. So, in this case, if I find as a fact that Mr. Trask is dyslexic and that this is a disability under the *Human Rights Act*, I must, in considering issues of memory, firmness, accuracy and evasiveness, bear in mind some of the essential characteristics of dyslexia.

43 So what are the issues raised by the complaint of Mr. Trask to be determined by this Inquiry? Counsel are agreed that there are four:

1. Respondent failed to accommodate Mr. Trask's learning disability during the employment application process before September 1999, causing him to lose seniority and hours of work;
2. The Respondent failed to accommodate his learning disability (dyslexia) in the course of his employment with the Respondent;
3. The Respondent failed to accommodate his adjustment disorder of anxiety and depression in the course of his employment;
4. Damages and/or other remedies

44 I will deal with them in turn. First, Mr. Trask alleges that the Respondent Nova Scotia Department of Justice (Correctional Services) failed to accommodate his learning disability during the employment application process before he was hired by the respondent in September of 1999. I could find no preponderance of evidence to support this complaint. And there was a lot of evidence to the contrary. For example, Mr. Trask was asked in direct evidence about his request for oral exams between 1997 and 1999 and why he did not contact the Human Rights Commission until 2002, 3 years later.

Q. Are you able to explain for the Chair why it was you waited until 2002 to contact the Human Rights Commission?

A. Well, I figured they'd give me my accommodation at the end, right.

45 But Mr. Trask then added:

Q. Okay. Now I know we're going to get into some of that in detail, but when was it that you first felt that they were not accommodating you in the workplace, was it 2002, or was it before that?

A. Well, we started...the old building was nothing but a mess, it was...people were coming there and working whenever they felt like it, they always needed people, it was...then when they got in the new building it started to straighten out, they got the shifts straightened out and everything.

And I never really said too much when I moved to Halifax because I wanted to wait until I got in the new building like...I mean, I told them that I had dyslexia, he knew that, but I didn't really force the issue because I didn't really want to make a big deal out of it.

46 Between 1997 and until Mr. Trask was hired in September of 1999, the evidence shows he participated in six or seven different competitions for positions with the respondent.

47 Some of these competitions were for specific full-time positions and others were for part-time “generic hiring pools”. Under the generic hiring pool process, successful candidates were placed on a roster and then given a part-time position as it arose, with considerations for geographic preferences. Mr. Trask told the Inquiry about four generic hiring pool interviews. One was in 1997, two in 1998 in the months of April and October, and the final one in 1999. He told the Inquiry that at the Kings Correctional Centre, there were about 70 correctional officers.

48 At this point, I must make clear that the position of the respondent is that there is no evidence that Mr. Trask suffered a disadvantage at being hired in 1999 rather than 1998.

49 Neither the Human Rights Commission nor Mr. Trask produced evidence before the Inquiry that Mr. Trask lost hours or seniority as a result of being hired in 1999. I accept the representations of the respondent that there was no preponderance of evidence that Mr. Trask was denied access to training or other opportunities during this period.

50 In his amended complaint to the Human Rights Commission, Mr. Trask stated that in the pre-employment period, he was discriminated against on the basis of his dyslexia. He says that the result of this was “fewer hours” with “less seniority” than more junior officers.

51 I could find no documentary evidence in support of the Complainant’s allegation. Indeed, counsel for Mr. Trask and the Commission agree that the purpose of participating in the interviews for full-time positions was to obtain practical experience in interviewing and not with the expectation of being successful candidate.

A. Not counting the full-timers. Remember, I don't think of them full-time interviews, I think of them as practice.

Q. Right.

A. I didn't expect to get a job.

Q. And I believe you testified that you practiced answers; is that right? As you...

A. Yes, I...I had a coup-...I had a friend of mine...matter of fact, Try Landers was one that really helped me a lot with questions. Rocky gave me some stuff and he asked me questions in his office; he said these might...these questions might be on the test.

Q. Okay. So by the time you had...you had...by the time you passed, you'd done the interview several times, correct?

A. Three times.

Q. Yeah, You'd been...

A. Four times, I should say.

Q. You'd been given a fair degree of familiarity with respect to what the material would be; is that...is that fair to say?

52 Counsel for the Commission also agreed that many material documents such as application forms for the various competitions were not found and therefore, were not put in evidence and are not available in proof of this part of the complaint.

53 In view of this it is not necessary to go into further details of the part-time generic hiring pool assessment of April 1998 and the full-time correctional officer competition in Yarmouth in 1998 or the part-time generic hiring pool of October 1998.

Ground Number 2

54 The second complaint is an allegation that the Respondent failed to accommodate Mr. Trask's learning disability in the course of his employment with the Respondent.

55 The Respondent says this Inquiry is about whether the Respondent discriminated against Mr. Trask primarily by not offering him a laptop computer. While this is a simplistic generalization, it does point to a central issue to be determined.

56 Mr. Trask was hired by the Department in September of 1999. The evidence does not disclose many complaints or problems for the rest of the year 1999, or for the 2000, or for the year 2001. The first real problems present themselves in August of 2002 when Mr. Trask received a performance appraisal dating from October 2001 to August 2002 at the Central Nova Scotia Correctional Facility. This report was prepared by Mr. Doug Whitman, one of the Captain's at the Facility. It was a Central Nova Scotia Correctional Facility Performance Appraisal of a Correctional Officer named Mike Trask, Classification Part-Time C.O. On the face of it, it was a very positive report. On page 94, Section D, "Facility Security", for example it reads as follows

> "C.O. Trask has handled a number of medical emergencies and followed appropriate procedure in a competent fashion. He has additionally encountered use of four situations in a similar fashion."

57 Item B "inmate supervision and control" reads:

> "C.O. Trask performs organized searches of both inmates and cell areas being consistent with standing orders and established policies and procedures."

58 However, near the conclusion of the report signed by Mr. D. Whitman, under the Section "Overall Appraisal Performance", we read the following:

> "C.O. Mike Trask provides consistent effort to the task at hand. He has developed good knowledge and skills as a Correctional Officer. When scheduled hours, C.O. Trask is punctual and goes to the position assigned with no difficulty, performing the job as required. C.O. Trask has proven to be an available and dependable employee by doing extra hours with short notice. C.O. Trask should only improve with more experience as a Correctional Officer."

59 This was positive. But, under "written communication the assessment", the report said the following:

> "C.O. Trask needs more work on written communication because of his disability which he has reported to this writer. He is aware of the importance of submitting pertinent information and should confer with his immediate supervisor to prepare competent report."

60 The word "competent" caught Mr. Trask's eye. He responded. He was anxious and extremely upset.

61 Mr. Trask was invited as employee to comment on the report. On the 13th of August 2002, Mr. Trask signed the report and said the following: "Everything is okay on this report. I would like someone with a knowledge of my disability to have a look at the writing part. Judy Companion."

62 Mr. Trask did not like the use of the words "competent report". Subsequently, the language was changed and the portion of the performance appraisal underwritten communications now reads as follows:

> "C.O. Trask needs more work on written communication because of his disability which he has reported to this writer. He is aware of the importance of submitting pertinent information and should confer with his immediate supervisor to ensure the report is clear and understandable." The word competent was removed and the language "the report is clear and understandable" was put in its place. This was an accommodation to Mr. Trask!

63 How did this accommodation come about?

64 After the performance appraisal, the evidence is uncontroverted that Mr. Trask was very upset with the comments about his written communication skills and particularly the use of the word "competent" in the report. Within a day of the performance review, there was a meeting with Mr. Trask, Mr. Kelly, Mr. Whitman and Peter Lloyd who was a union representative. A letter prepared by Mr. Lloyd presented as an exhibit at the Inquiry sets out four specific suggestions arising from the meeting. Mr. Lloyd wrote a letter: To Whom it May Concern summarizing the meeting. Paragraph 2 and 3 reads as follows:

> "Regarding C.O. Trask's allegations that Captain Whitman made negative comments towards him during the appraisal, Mr. Kelly dismissed them as being a mis-communication. Mr. Kelly stated that he felt Captain Whitman would not make discouraging remarks towards his staff.

65 Regarding C.O. Trask's claim that the Department has been offering little or no support to him in regards to his dyslexic disability, Mr. Kelly stated he recognized that C.O. Trask has a disability. He offered to give C.O. Trask assistance and ask what would be required. C.O. Trask suggested a computer to aid him in report writing. He also suggested specialized classroom training." As a result, Mr.

Lloyd said there was a four course plan of action in an attempt to resolve C.O. Trask's concerns. The plans of action were as follows:

1. Offer C/O Trask peer support.
2. Present to Mr. Kelly a plan to help educate C/O Trask further in dealing with his disability-possible computer aids or classroom training.
3. Have Sergeants support regarding written reports. (Email to be sent to all Sgts by Mr. Kelly regarding this). Also, explore the idea of oral reports.
4. Have ongoing meetings with Captain Whitman and C/O Trask in an attempt to ease relations between them.

66 After this, the meeting was adjourned with the understanding that this plan of action would be implemented as soon as possible. No further details at this time."

67 As of August 2002, everyone knew of Mr. Trask's disability. It had been disclosed. It was known he needed accommodation. Various suggestions for accommodation were advanced.

68 Friction between Captain Whitman and Mr. Trask was also noted. After the Peter Lloyd report of the 14th of August 2002, a specific plan of accommodation was agreed upon in relation to assistance in report writing. Mr. Sean Kelly, Director of Correctional Services and former Superintendent at Central Nova Scotia Correctional Facility, gave evidence that he did not initially undertake any investigation or follow up as a result of the Peter Lloyd letter of summary. That summary indicated that there was a clear understanding that this plan of action would be implemented "as soon as possible". Later Mr. Kelly was asked about dyslexia and what he was doing to follow up in relation to the Peter Lloyd report and he said:

Q. Okay. Now when Mr. Trask first raised this issue in ... with you at least, in August of 2002, did you undertake any investigation with respect to what dyslexia was and how it might play out in the workplace?

A. No.

Q. Did you ask anybody to do that?

A. Not initially, no.

Q. Okay. Did you ever ask anybody to do that?

A. Yes. At various times we talked about its ... with the occupational therapist, Margie LeClair.

69 Margie LeClair was an occupational health nurse who gave evidence at the Inquiry. She became involved with Mr. Trask and issues related to dyslexia in 2004. The Peter Lloyd report was in 2002.

70 Mr. Trask looked for other ways to get help with his disability. On the 20th of September 2002, a letter was sent to Mr. Michael Trask from Wayne E. Sole of Dyslexia Health for Children and Adults, in London, Ontario. Mr. Wes Sole told Mr. Trask that it will be necessary "for you to complete a personal Davis Dyslexia Correction program and also master all of the words on the trigger word list prior to your attending any formal training toward your own certification as a Davis Dyslexia Correction Facilitator. He explained that the program had three distinct parts and that the program is tailored where possible to the specific needs of the client. It came at a cost of $1,600. Mr. Trask sent the Sole letter to Mr. Kelly, but the course was never offered by the Respondent to Mr. Trask.

71 On the 24th of November 2003, Mr. Trask sent a letter to Superintendent S. Kelly about concerns about his written reports. He wrote the following: "I am therefore asking for funding to attend a program called "Dyslexia Solutions" which is an educational program designed to improve the functioning, including writing skills, of people with dyslexia ...."

72 Written reports are an essential part of the work at a correctional facility. The evidence before the Inquiry showed a great discrepancy about the amounts and the number of reports that an individual officer may have to produce from time to time. The evidence disclosed that there were many different types of reports required. There were "Level 1 – 2 – and 3" type reports. A "Level 1" might be a report on an inmate smoking in cell. There were "incident" reports dealing with subjects such as fights. There were "occurrence" reports.

73 One corrections official gave evidence that an officer might only have to prepare 6-10 reports a year! What type was not clear. Mr. Honsburger gave evidence that the average was 1 report every 3-day shift and the inference was that report writing was not a major part of the job. Mr. Trask gave evidence that he often had to do more than five reports in three days.

74 Being dyslexic, Mr. Trask had difficulty writing reports. Dyslexia is defined as "a general term for disorders that involve difficulty in learning to read or interpret words, letters, and other symbols, but that do not affect general intelligence." Mr. Trask had difficulty writing and reading as explained in the report referred to earlier from Dr. Freeman.

To Summarize:

75 Fred Honsburger, then Executive Director for the Respondent, wrote a letter in October 2005 and suggested that the report writing should on average be only a handful of reports a week. On the other hand, Mr. Trask said repeatedly that the amount of reports that may have to be written will vary according to the circumstances while on duty. He explained that if there are disruptions or fights or extensive drug use going on at the facility, then a worker may have to do a substantial number of reports and certainly more than the Honsburger average. Mr. Rocky Partridge gave evidence that after a bad weekend at the Central Nova

Scotia Correctional Facility, he could have to review something in the range of 30 to 40 reports. The evidence makes it clear that this would not be the total number reports that a given Correctional Officer would have to prepare, but instead those of the most serious nature known in the business as "level 211" reports.

76 Many of the witnesses who appeared before the Inquiry stressed the importance and the need for written reports. One corrections official said that report writing can be "critical" to the job because of the importance often of sharing information that could otherwise potentially lead to a significant event at the Centre.

77 So Mr. Trask needed some type of aid or assistance or accommodation with ordinary report writing that was an essential part of his job. Was this accommodation forthcoming?

78 I now wish to look at the issue of the computer. There is a wealth of evidence about desktop computers, laptop computers, computers with wizard software, computers at home, computers in Sergeant's office, and the evidence is not clear. What was offered and when was it offered?

79 On November 27, 2003, Mr. Trask wrote to Superintendent S. Kelly as follows: "Thank you for your interest shown during our meeting yesterday. You asked what could be done to accommodate for my disability. One of the main things that would improve my reports is an accessible computer and some uninterrupted time to compose them."

80 At a meeting on February 12, 2004, on the 10th floor of the Maritime Centre, with Sean Kelly, Randy Duplak, Rick Parsons, Mr. Ira Vaughan of the Union, found at Volume 3 of 3, page 388, in the course of those negotiations Mr. Trask said "I

need a computer to do my work. One that I can take away to a quiet area to do reports." Randy Duplak, Counsel for the Respondent, replied "We will decide what is needed, whether or not a computer is needed". In a report of Dr. Emily Freeman of ECS Educational Consulting Services, dated the 31st day of August 2005, she said on page 2 found at page 426 of Exhibit Book 3 of 3, the following: "The standard accommodation for an individual with dyslexia is to provide access to a computer with a good word processing program that has a spell check feature. Mr. McQuade indicated that the institution would be willing to provide a desktop computer in one of the small program rooms close to the control center. The computer would be set up with templates for writing reports and a flash card or portable jump drive device. Using this device would enable Mr. Trask to keep his work private as he could record his information on the device and remove it from the computer when he is finished. Placing the computer in one of the program rooms would provide Mr. Trask with an opportunity to go into a quiet place to produce his reports and would eliminate the necessity for him to leave the unit. If he was involved in writing a report when it came time to do his rounds, Mr. Trask might ask another officer to do that particular round for him, with the understanding that he would reciprocate the favour after he completed his report. The possibility of using a laptop computer was discussed. Dr. Freeman was of the opinion that Mr. Trask might find it easier to use the larger keyboard on a desktop computer. However, if Mr. Trask is employed in a position where he is required to rotate across units, a laptop computer could address the issue of portability. This computer could be stored in the control module and signed out by Mr. Trask as required."

81 There was also talk of voice activated word processors. Mr. Trask was asked about this on direct examination during the Inquiry.

Q. The Text says: "Technology such as voice-activated word processors would be a benefit to Mike." And it says, "Jim Roy work works at the rehabilitation

centre in Waterville is very knowledgeable about technological supports for people with various kinds of disabilities." Did you ever speak to Mr. Roy at the rehabilitation centre in Waterville?

A. Yes, I did. I was sent there by Margie LeClair. The only thing, though, it's like Jim Roy said, the only thing that would make it work is if I had a privacy to do it, and they wouldn't give me privacy to write my reports. They always had me in a control post or an office with three or four people in, it was always busy. And I said to Jim Roy, I said, it would be great if I could do this way but they wouldn't give me the privacy, so it was kind of...

Q. And was...this is, again, after you working in the Central Nova Scotia Centre?

A. That's right. Every computer that they set up wasn't in a private area.

Q. And the privacy was important because it needed to recognize your voice, is that right?

A. That's right. And he said it would no good if there was any background noises at all.

82 The evidence before the Inquiry indicates Mr. Trask was given the use of a particular desktop computer, but he complained that the particular computer was also used by offenders and therefore he did not accept it as a suitable option because of privacy and confidential concerns. On cross examination, Sean Kelly accepted that this was not an appropriate option for Mr. Trask or indeed any other correctional worker.

83 Later Mr. Trask was offered a computer in what is called the West Unit Control Office. Mr. Trask said it was a kind offer, but it did not work for him because it was difficult to write reports because of the high volume of traffic of activity and of noise. Mr. Kelly again agreed that this was not an appropriate option for Mr. Trask.

84 Later, Mr. Trask was offered the use of the computer in the Sergeant's office. But as was the case with the West Unit Control Office, Mr. Trask found that the Sergeant's office was quite busy with staff members and inmates going in and out on a regular basis. Melinda MacLeod indicated that the Sergeant's office was located in a hallway and many staff went through the area to access the washroom. Here's the way Mr. Trask expressed it:

Q. Okay, so what happened with respect to using that computer or a computer in that room?

A. Well, it's pretty hard for anybody to write a report in there.

Q. Why do you say that?

A. Well, there's all the buzzers and the radios and, you know, it's a control post, right? It's not a place where it's private. The computer in there, like I said, was being used for video games and e-mails and all staff were using it, it was getting viruses. I don't know if they were downloading anything on it or whatever but half the time it didn't even work. It never had the templates. It never had the levels on it it had to have. You know, it wasn't a computer for work. It was a computer for communication.

Q. So did you ever use that computer for preparing a report?

A. Yeah, I tried.

Q. And how many times did you try?

A. Probably half a dozen.

Q. How did it work out?

A. Well, sometimes it wouldn't work. There was some templates put on there and they disappeared. I don't know what happened to them. Sometimes it was virus....It just wouldn't work right half the time. It wasn't dependable, put it that way.

85 The Human Rights Commission argues that Mr. Trask was never provided with a laptop computer by the Respondent. The Respondent argues that a review of

the evidence shows that Mr. Trask was unhappy with the majority of the accommodations offered, specifically relating to computer access, and that he did not make a concerted effort to use the support provided to him. When a Dictaphone was offered, for example, Mr. Trask said in December of 2004

Q. All right. And how did this work out, the use of this Dictaphone?

A. Well, it didn't....well, I didn't really use it that much. I was busy, you know.

86 The Respondent argued that even Dr. Freeman who did not appear as a witness, but whose report was admitted by the consent of all parties, indicated that it would not be easy for Mr. Trask to adjust to a laptop because of the small keyboard, the mouse pad, the small screen, etc. And Ms. LeClair said the following:

Q. So Dr. Freeman told Mr. Trask specifically that a laptop would not be suitable.

A. She did.

87 Mr. Trask last worked on May 27, 2005. The Department of Justice (Correctional Services) wrote a letter to Mr. Michael Trask dated the 3rd day of October 2005, about accommodation. Point number 2 in that letter reads as follows:

> Computer Access
>
> You will be provided access to a computer, privacy and reasonable time to prepare reports (as above) on the desktop computer which will be housed in the program room – not the control module or the Captain's office.
>
> This computer will have a word processor with a spell check.

> The employer will investigate the possibility of providing you with a flash memory card which will allow only you to access your information on the computer.
>
> It is understood from your earlier comments that you could prepare a five sentence, 50 word report in approximately 30 minutes from the Dictaphone notes to a computer.
>
> You have agreed that once your report is finished that you will relieve your partner and assume some of their rounds so he-she gets a break. This shows consideration to your partner and promotes team work and camaraderie.
>
> All templates required for reports will be loaded on the computer and will be located where other employees will not have access.

88 So, more than four months after Mr. Trask stopped working at the Department of Justice (Correctional Services), this was the computer accommodation proposed.

89 The Respondent, while arguing that they were never at any time notified by Mr. Trask that he had a disability and needed accommodation, indicate that they provided a whole variety of different supports as a way of accommodating him. It is perhaps best explained by Mr. Sean Kelly in his testimony to the Inquiry on the 2nd of September as follows:

1. Permission to take the policy and procedural manual home, a staff person to dictate reports to.
2. Access to Mr. Kelly's assistant to dictate reports to
3. A Dictaphone, computer access.

4. Computer training, use of a flash memory card.
5. Additional time to complete reports.
6. Templates of forms, training in crisis intervention skills.
7. Opportunity to observe staff delivering programs to offenders.
8. His rotation was adjusted so he could be placed with a mentor.
9. A learning disability specialist was engaged to help develop a plan to accommodate him in the workplace.
10. Additional financial assistance for the employee assistance program and funding to be able to take courses to help develop his writing skills and to be able to teach literacy skills to other disabled persons.

90 Counsel for the Human Rights Commission agree that there were numerous things suggested to be done by way of accommodation. But the question was were they effective and did they work? Were they offered in a timely way? The results of the various accommodations set forth by the Respondent are perhaps best explained through the words of a party, not Mr. Trask, but someone who worked with him. For instance, throughout his time at the Department, Mr. Trask had Maureen Copley, a fellow correctional worker, who voluntarily assisted him with preparing reports when they were on the same shift. Mr. Trask asked that David Ross, a co-worker act as a mentor and as such be an intermediary between Mr. Trask and management with respect to issues of accommodation.

91 Melinda MacLeod, in her evidence, indicated that she was asked by Sean Kelly to assume the role of mentor after David Ross. Ms. MacLeod saw her role as providing peer support for Mr. Trask. She resigned as mentor to Mr. Trask in May of 2005. Her evidence to the Inquiry of the accommodation process is telling. She said she resigned as mentor because of ongoing issues and problems which she describes as follows:

A. The continuous talk in regards to needing a laptop, owning a laptop, needing the computer program, the things that we had discussed that....the accommodations that were supposed to be made that were in the other list of things that we were going to do, some of the things hadn't, the Dictaphone he did get, but the other things hadn't come to fruition, he hadn't received them. So just the continuous asking about it and me asking and Mr. Kelly having no real answers to give Mike. And it was just continuous and I just didn't have the answers. And I think it was frustrating for Mike as well because I couldn't provide him with any answers. I didn't have any.

Q. So you felt you weren't getting, you were raising these questions but you weren't getting....

A. It was more the answers that I was getting was that it was still being looked into, he was being provided the computer in the Sergeant's office and that was, at this point, all that he needed. But that wasn't what Mike wanted. The two were at very opposite ends of the spectrum, what Mike really needed and wanted and what Mr. Kelly seemed to be giving him at that time. I know there was a lot of other people involved, it wasn't just Mr. Kelly, I understand that. I didn't like being in the middle of that.

92 It is important to understand clearly the position of Mr. Kelly, the chief witness for the Respondent. I asked Mr. Kelly the following:

Q. Okay. The ... given all the evidence that you've heard and that you've given, was a laptop computer ever ordered for Mr. Trask?

A. No, it wasn't.

Q. So, okay, the next page, it contains the 1999 Landmark East Report. What was your general understanding of what the report was?

A. I think overall I believed at the time that with accommodation in the workplace, Mr. Trask could function very well.

93 The weight of the evidence strongly supports the complaints of Mr. Trask.

94 So when did the duty to accommodate first arise?

95 Or when did the respondent first learn that Mr. Michael Trask, an employee, was dyslexic and had an adjustment disorder and needed accommodation?

96 In a document tabled with the Inquiry, with the consent and approval of all parties, is a letter from the Nova Scotia Department of Justice Legal Services written and signed by Randall Duplak, Q.C., Senior Solicitor, dated the 7th of November 2003, to Mr. Martin Schulze-Allen, Human Rights Officer with the Human Rights Commission. On page 2 of that letter, Mr. Duplak, on behalf of his client, Department of Justice (Correctional Services) wrote:

> (b) Mr. Trask was interviewed in 1998 and scored an average of 34.3 out of 100% in an oral interview, as previously outlined above. Subsequent to the formal interview, Mr. Partridge met with Mr. Trask to discuss the results of the competition. At that time Mr. Trask revealed to Mr. Partridge that he had a learning disability and stated that he did not want to obtain a position through the affirmative action process, but rather wanted to be successful on his own merits.

97 Later Mr. Duplak, in the same letter, wrote the following:

> "In 1999, Mr. Trask applied for and competed in competition 99-0125, in which he declared himself to be an affirmative action candidate (dyslexia)."

98 Later in the letter Mr. Duplak wrote:

> "Once again, this process was a screening tool and Mr. Trask was accommodated with an oral interview given due consideration to his dyslexia."

99 Later Mr. Duplak wrote:

> "It is my client's position that Mr. Trask was provided ample opportunity to be interviewed and to take his disability into consideration. In the initial 1997-98 competitions, he did not declare or make staff aware of a disability. When this information came forward from Mr. Trask in 1998, he advised Superintendent Partridge that he had a disability but did not want to gain a position through the affirmative action process."

100 The respondent thus had the knowledge and information and acknowledged that they knew Mr. Trask had a disability which was dyslexia as early as 1998-99.

101 In relation to the competitions for correctional officer positions in Yarmouth, it is clear that Mr. Trask identified on both applications for full-time positions that he was a person with a disability (dyslexia). The Respondent, however, argued strenuously before the Inquiry and in Post-hearing submissions that a candidate's identification as an affirmative action candidate does not necessarily mean that the individual is requesting accommodation, but rather, that the individual is requesting that they be considered under the affirmative action program. Mr. Duplak's letter, however, indicates the opposite.

102 Mr. Doug Whitman, who completed Mr. Trask's performance review, says he did not have prior knowledge of Mr. Trask's disability.

Q. Do you remember whether he told you that he had a learning disability when you spoke with him about those reports?

A. No. Because as I told you, in 2002 when we did that assessment, that's the first time I knew he had a disability. I never knew there was anything out of the ordinary.

103 Assuming the disability referred to by Mr. Duplak as being known by the Department as early as 1998-99, was not in fact known until 2002, the question remains what was done to accommodate Mr. Trask's disability from 2002 until 2005? It is known that in August 2002, the Respondent employer identified in the performance appraisal, issues with Mr. Trask's written communication and Mr. Trask asked in both writing and in oral response for a meeting soon be given for assistance with his learning disability of dyslexia.

104 A great deal of medical evidence was presented at the Inquiry. Reports from Dr. Mathew Burnstein, Dr. Scott Theriault, Dr. John M. Sperry, Ph.D., Psychology, Dr. Emily Freeman, and Dr. Brian Garvey.

105 On the 16th of March 2004, Michael Trask gave written consent to Margie LeClair to discuss and review all aspects of "my assessment conducted by Emily Freeman, Psychologist-Educator". On March 31st, he gave permission to Margie LeClair to obtain written information from Dr. Martin Feldstein concerning his respiratory condition. On October 27, 2004, Margie LeClair wrote to Dr. Mathew Burnstein, to obtain information about Mr. Trask.

106 Mr. Trask was under the care of Dr. Brian Garvey for several years. He was diagnosed with Attention Deficit Disorder and moderately severe dyslexia. He suffers from significant distress related to work with abdominal symptoms, headaches, restless insomnia and generalized anxiety. Since December 28, 2004, Mr. Trask was off work with a diagnosis of anxious depression, stress,

burnout. Dr. Garvey, in a letter dated August 27, 2004, notes that Mr. Trask has been "suffering from a significant degree of distress as a result of stresses related to his work situation". Margie LeClair, in her notes tabled as Exhibits at the Inquiry, indicated that on May 26, 2005, at 14:00 hours, she noted that:

> "Mike's behaviour at work has become very verbally aggressive. His co-workers describe him as being very agitated and his breathing increases, he sweats profusely, his face is red and his eyes look "wild".
>
> He has numerous incidents of storming into the Superintendent's office and demanding his secretary draft a letter. He was loud and rude while dictating his letter. His colleagues and managers have found him almost impossible to reason with him regarding the need to stay in the unit to do his work or to be flexible regarding the need for him to change his planned work schedule. He has left the building three times over the last week, after he would have a verbally aggressive exchange with management and his supervisor did not know where he was.
>
> On May 19, 2005, John P.R. Hancey and myself met with all levels of management to discuss this situation. I advised to ask Mike if there was any medical reason to account for this behaviour so that I could determine if illness was a factor.
>
> Management was going to deal with the behaviour from a performance management perspective. Management was cautioned to use their good judgement in any situation they feel may be putting the employees, the offenders or Mike himself at risk. They need to make this call until I can get supporting medical information that indicates illness is the cause.

> Today I spoke to Mike and asked him why he was off and he stated it was depression. He indicated all his problems started when he came to Nova Scotia and he has needed medication over the last year. First he was on Effexor, then was changed to Paxil, 30 mg daily."

107 The nine-page report from Dr. P. Scott Theriault, M.D., F.R.C.P.C. Psychiatrist, dated the 20th of June 2005, and sent to Dr. Mathew D. Burnstein, of Occupational Health Medical Consultant with the Nova Scotia Public Service Commission, helps to summarize the problem when he wrote at page 3 in response to Mr. Trask's report that he felt dismissed by management and made to feel that his disabilities were "just in my mind" and that accommodating him was an extraordinary thing to do and he finds it frustrating to interact with management and accordingly became increasingly agitated, angry and anxious when required to do so. Mr. Trask concluded that the atmosphere within the institution was poisonous. Dr. Theriault said the following about the medical background:

> "Mr. Trask reports that as a result of these interactions, he has become increasingly depressed, anxious, frustrated, and irritable at work. He reports that he has been unable to disengage from work, taking things home with him and finding himself ruminating long into the night about his difficulties within the work situation. Mr. Trask says that he has attempted to deal with the situation through various mechanisms, including lawyers and Human Rights. He reports that matters came to a head last summer when he was accused of missing rounds, a charge he denies. He reports that he went off on stress leave. At that time, he indicates he was feeling depressed, often spending several days in bed, and generally withdrawing from his environment. He also reports feeling anxious, at times tremulous, with decreased sleep and decreased appetite. At this time, he was seeing his family physician, Dr.

Fleckenstein, and the print out that Mr. Trask gave me indicates that he was tried at least briefly on Celexa, an antidepressant, earlier that year (prescription dated January 26, 2004). While off on leave in the summer of 2004, he was referred to a Psychiatrist in his loc area, Dr. Brian Garvey, who he saw on a weekly or biweekly basis for several months, although he reports he has not seen Dr. Garvey now for over a year. At that time, Dr. Garvey made a diagnosis of attention deficit disorder and Mr. Trask was treated with both Dexedrine and Methylphenidate, standard treatments for ADD. Mr. Trask reports that he found these medications unhelpful and he eventually stopped them. He was tried for a period of time on Effexor, another antidepressant medication, but he reports no positive effect and had difficulties with nausea, a side effect of this medication. Most recently, Mr. Trask has been placed on Paxil, currently at a dosage of 30 mg OD. He reports that in general this has helped with his depression and anxiety, although its effects are limited largely to non work situations.

Mr. Trask reports that he returned to work in the autumn of 2004. At that tine, he took a course which allowed him an upgrade to Correctional Worker with a commiserate pay raise. However, he reports that the atmosphere at work was unchanged and he felt frustrated again at what he felt were inadequate attempts to accommodate for his disabilities and an ongoing lack of sensitivity and respect. He left the work situation again in December, returning in April. Again, he was back for a matter of six to eight weeks before going off once more on sick leave. During that six to eight weeks. Mr. Trask reports again increased feeling of anxiety, depression, rumination about his difficulties at work, decreased sleep, a sense of agitation, and he admits to increased irritability directed towards primarily management and to some degree acknowledging that this could impact on his relationship with inmates, although he indicates that he

attempts hard to control this. However, he reports that he is now so frustrated with the situation that he feels utterly unable to deal with management. In fact, with respect to his last interaction with management, he describes what clearly resembles a panic attack with a sense of needing to escape the building accompanied by a racing heart and heaviness in the chest. This may be what was noted in page 2 of the referral letter, where it speaks of Mr. Trask leaving his shift on two occasions in the middle of the day with outbursts of extreme anger at colleagues and senior management and appearing to have difficulties following simple directions from supervisors during the course of his shift. With respect to this latter matter, certainly if Mr. Trask was in a state of high anxiety, it would appear he were having difficulties following directions, as the focus of his attentions would be internal rather than external. Obviously, a state of high anxiety is not commensurate with the demands required of him in a setting in a correctional institution. Since his most recent leave, Mr. Trask reports that he now has "good days and bad days". He reports that at times he is prone to bouts of anxiety and depression and requires periodic Lorazepam. The anxiety appears to be easily provoked. For example, he reported that he had slept very poorly the night prior to this assessment and despite the use of Ativan earlier on the day of the interview, did appear slightly tremulous during the course of the interview."

108 Mr. Trask was placed on administrative leave.

109 By letter dated the 27th of May 2005, Mr. Fred Honsberger, Executive Director of the Department of Justice (Correctional Services), wrote to Mr. Trask inter alia

> "I am in receipt of information from Central Nova Scotia Correctional Facility which indicates that you have demonstrated inappropriate and unprofessional behaviour while at work in recent weeks.
>
> I have been informed that, while being counselled by acting Captain Scott on May 25, 2005, you were yelling, used profane language and demonstrated aggressive behaviour. In addition, within the last ten days you have left your unit without authorization and have demonstrated inappropriate conduct by bursting into the Superintendent's office on at least two occasions. You have also alienated fellow staff members by displaying inappropriate levels of anger."

110 Later, Fred Honsberger wrote in the letter:

> "Although I understand that you have concerns about the accommodation of your disability, your behaviour as above is an entirely separate matter. Your behaviour is distressing to fellow workers and creates an unsafe environment at your work site."

111 Mr. Trask was placed on paid leave. Mr. Trask was asked to meet with a doctor to determine whether there were health reasons behind his recent behaviour.

112 Over the next few months a number of experts analyzed what was in the best interest of Mr. Trask and the Department of Justice (Correctional Services) with respect to his employment.

113 It was Dr. Theriault's view that he was concerned at this point that Mr. Trask's perception of his work environment is such that it would be difficult to modify it successfully. He added that even if staff and management took the utmost care to treat Mr. Trask fairly (which obviously they should), the relationships may be

marred by past events. Dr. Mathew Burnstein said in June of 2005, that based on the information provided, it appeared that Mr. Trask is unfit for full or modified duties at this point. He said that if transferred to a new facility were an option this would be more appropriate. But he cautioned that even in that circumstance, significant energy would need to be expended ensuring that Mr. Trask's disability was appropriately accommodated and that individual with whom he worked had a clear understanding of the nature of his impairment and the need for accommodation.

114 At that time, Mr. Trask was under the medical care of Dr. Bhaskara, a Psychiatrist, and a mental health team at the Cobequid Community Health Centre in Nova Scotia. Dr. Bhaskara agreed with the diagnosis of Dr. Theriault. On October 5, 2005, Margie LeClair wrote to Dr. Bhaskara with a proposed return to work plan for Mr. Trask and he agreed with her rehabilitation plan. Susan Perry was the community medical health nurse who worked directly with Mr. Trask and she expressed concern consideration needs to be given to a change of place of employment. She said that a return to work in the same area would not be in the best interest of the patient.

115 Since June of 2007, Mr. Trask was treated by Dr. John Sperry, a clinical Psychologist, whose diagnosis was adjustment disorder with depressed and anxious moods, but noted that because the condition had gone on for more than six months, that it was formally now characterized as chronic. He also agreed that Mr. Trask should be transferred to another facility.

116 Counsel for the Human Rights Commission has argued that since Dr. Theriault's report of June 2005, the Respondent's duty to accommodate was triggered and that it did not appear that the Respondent had attempted to accommodate Mr. Trask's mental health disability. The Respondent retorts that "we are completely nonplussed by the Commission's position that in the fall of 2005, the employer

somehow failed to accommodate Mr. Trask's mental illness". "The evidence supports that the employer was not even made aware of Mr. Trask's mental health issues until after he had left the workplace for the last time May 25, 2005, until at the earliest June 15, 2005."

117 The evidence supports the Respondent's contention that in the summer and fall of 2005, the employer attempted to work with Mr. Trask, Occupational Therapist Margie LeClair, and Dr. Freeman, to arrange an accommodation plan that would be acceptable to both Mr. Trask and his treatment providers. These efforts were put on hold, however, following Mr. Trask's application and qualification for LTD benefits. The Respondents also make the good point that the medical evidence at the hearing confirmed that Mr. Trask remained unable to return to employment at the time of the Inquiry and there is no indication as to when Mr. Trask's condition would improve to the point that he would be permitted to return to gainful employment anywhere.

118 From this, can I find the Respondent failed to accommodate Mr. Trask when he was forced to be placed on leave and unable to participate in this employment?

The Law.

119 Mr. Trask's complaint is that he was discriminated against on the basis of physical and mental disability in the form of dyslexia and a learning disability, as well as an anxiety and depressive disorder.

120 The *Nova Scotia Human Rights Act* reads as follows:

5 (1) No person shall in respect of

(d) employment

Discriminate against an individual or class of individuals on account of

(o) physical disability or mental disability

"Physical disability or mental disability" is specifically defined in the *Act* as follows:

3 In this act

(l) "physical disability or mental disability" means an actual or perceived

(i) loss or abnormality of psychological, physiological or anatomical structure or function,

(ii) restriction or lack of ability to perform an activity,

(iii) physical disability, infirmity, malformation or disfigurement, including, but not limited to, epilepsy and any degree of paralysis, amputation, lack of physical co-ordinator, deafness, hardness of hearing or hearing impediment, blindness or visual impediment, speech impairment or impediment or reliance on a hearing-ear dog, a guide dog, a wheelchair or a remedial appliance or device,

(iv) learning disability or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language

(v) condition of being mentally impaired,

(vi) mental disorder, or

(vii) dependency on drugs or alcohol

121 Discrimination is defined at section 4 of the *Act* as follows:

For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic,

> or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages of an individual or class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.

122 I find as a fact, and the Board is satisfied from the evidence, that Mr. Trask suffered from a learning disability and/or a mental disorder and that he falls within the meaning of disability in the *Human Rights Act*.

123 Since it is decided that Mr. Trask had a disability, on whom does the burden lie to prove what?

124 It is accepted by all parties to the proceedings that the burden is on Mr. Trask to establish a prima facie case on a preponderance of the evidence and he has the burden of proving that he was not accommodated in his employment as a result of his disability.

125 So the onus is on Mr. Trask to demonstrate that he had a disability, was treated adversely by the Respondent employer, and that there was evidence from which it is reasonable to infer that the disability was a factor in the adverse treatment. See Sylvester v British Columbia Society of Male Survivors of Sexual Abuse (2002), 43 C.H.R.R.D/55, 2002 BCHRT 14 (B.C.H.R.T.) at 30.

126 There is an agreement that dyslexia is a disability under Section 510 of the *Act*.

127 But what about anxiety and depression?

c. Anxiety as a Physical or Mental Disability

128 Anxiety-related disorders have also been found to constitute a disability within the meaning of Human Rights legislation.

129 In ***Halliday v. Michelin North America (Canada) Ltd. (No. 2)*** (2006), 58 C.H.R.R.D/91 (N.S. Bd.Inq.), the board of inquiry accepted that an anxiety disorder could constitute a disability within the meaning of the legislation, and noted at 79:

> ...The BOI also agrees with Commission counsel and finds that a "disability" based on anxiety and stress-related symptoms do not constitute a trivial condition and clearly can constitute a disability within the meaning of the *Act*. In addition, mental illness does not have to be "severe" in order to constitute a disability under the *Act*. Certainly, mental disability is a serious disability although it is unfortunately often misunderstood.

130 In ***Mellon v. Canada (Human Resources Development) (No. 2)*** (2006), CHRR Doc. 06-242, 2006 CHRT 3, a complainant alleged that she was discriminated against in her employment on the basis of panic and anxiety attacks. The complainant had worked at a series of term contracts for the respondent, and had worked her way up to a higher classification. The complainant began to experience difficulties and work-related stress, and was on stress leave for three weeks in 1997. In June 2001, the complainant was experiencing increased stress and anxiety attacks, and let it be known that she was overwhelmed at work and needed some assistance. No assistance was forthcoming.

131 The complainant took a three week medical leave of absence, and then took her allotted vacation time. Before leaving on vacation, the complainant again wrote

to the employer and asked for assistance because of her health concerns. The employer determined that it could only extend her term contract until the end of October 2001 and told the complainant she could look for postings in other offices. The complainant asked to be kept on an unpaid leave of absence, but her request was denied and she was in fact terminated. When the complainant pointed out that the employer was not accommodating her, she received a letter indicating that accommodation consists of providing technical aids to enable a disabled employee to do his or her job. Shortly after, the complainant filed her Human Rights complaint.

132 The tribunal looked at what had to be proven to establish a prima facie case of discrimination, and noted that in the context of disability, there needs to be some evidence in order to establish that a disability exists (at 82). This requires more than the complainant's bare assertion that s/he suffers from a disability. There has to be evidence of disability, and it can be drawn from medical information and form the context of the acts giving rise to the complaint.

133 With respect to the specific issue of whether panic or anxiety attacks can constitute a disability, the tribunal referred to several cases in which tribunals have accepted that panic attacks constitute a disability under the legislation (at 87). Even minor mental disabilities which have no permanent manifestation can be considered disabilities under the legislation, but there still needs to be sufficient evidence to establish the existence of that disability (at 88).

134 In circumstances where an employer must have been aware that an employee is suffering from a delicate emotional state, the employer must inquire into the complainant's condition to see whether it may have an impact on any decision to terminate employment (at 98). At 99-100, the tribunal expanded on this:

> Even if the Complainant did not present the employer with a medical diagnosis of her disability, this does not disentitle her to the protection of the Act. An individual with a disability and, in particular, somebody with a mental disability may not know the exact nature and extent of that disability at the time they are experiencing the symptoms. In such circumstances, we cannot impose a duty to disclose a conclusive medical diagnosis.
>
> I do not minimize the importance for an employee to submit to the employer medical notes informing the employer of his or her medical situation. Employers rely on these notes to inform themselves of the employee's health condition insofar as this is relevant to the need for accommodation. I suspect, though, that most employees would be reluctant to inform the employer that they may have a mental disability. They may fear that an employer may use this information to their detriment and that it is in their best interest to work with their problems as best they can.

135 The tribunal went on to say that the employer should have explored why the Complainant was falling behind or why her work was piling up. Further, the decision not to extend the term contract was based partly out of a concern for the Complainant's "continued good health" (at 104). Disability was therefore obviously a factor which the Respondent was keeping in mind when it decided not to renew the Complainant's employment.

136 The Respondent contended throughout this Inquiry that the employer had not been provided with any medical documentation relating to Mr. Trask's mental illness. The evidence was clear that the outward symptoms of his illness were violent outbursts in the workplace. There was an abundance of evidence that his behaviour in the workplace had become verbally aggressive. He was loud and

rude and verbally aggressive. The evidence indicated that this condition had been growing more intense and worse over a period of many months.

137 It is the Respondent's position that the Department noted that Mr. Trask's behaviour was becoming problematic and dangerous in the workplace and that the employer accommodated Mr. Trask's suspected mental health issues by placing him on administrative leave pending the receipt of medical documentation.

138 The case of **Zaryski v. Loftsgard** makes the argument that an employer has a duty to inquire further when an employee is exhibiting signs of undiagnosed or undisclosed medical illness. In the case at hand, the Respondent alleges that it discharged it duty by placing Mr. Trask on administrative leave with full pay, pending the receipt of medical documentation rather than taking disciplinary action in relation to his inappropriate behaviour in the workplace. Mr. Trask's behaviour over many months dictated an obligation on the employer to inquire further. No such action was taken.

139 The Respondent strongly argues that because the employer arranged an IME for the Complainant to determine his medical health conditions, that that likewise discharged its obligations, not the least of reasons is because the resulting diagnosis was accepted by all of Mr. Trask's subsequent treating mental health professionals.

140 Is there is a mental element that could include anxiety or depression that often accompanies a diagnosis of dyslexia? And if so, was there an obligation on the employer to know or ought to have known that the inappropriate behaviour of the Complainant was an element or symptom of the frustration and anxious that flowed from a lack of accommodation for his disability?

141 And if the employer had been making available the accommodation required for Mr. Trask's dyslexia, should they not have seen that their failure to accommodate could have exacerbated his latent feelings of anxiety and heightened his depression? In this case it seems the two are clearly linked. However, there was no direct evidence on these questions. But it was known by Mr. Kelly.

> Q. Do you recall what was said?
>
> A. I recall that the primary issue was his perception of the workplace issues and that because of, and I think there was some terminology used that it was an acute adjustment disorder and, basically, that dealt with the issue of having difficulty with some of the issues that were happening in the workplace and that was really what was causing the ... what was triggering, I guess, the stress and some of the anxiety and depression or exacerbating it at least, his anxiety and depression.

142 It is appropriate now to look at the law of Duty to Accommodate.

143 Although there is no statutory duty to accommodate found in the *Human Rights Act*, the jurisprudence holds that there is a duty to accommodate disabled employees. Since the Supreme Court of Canada decision in **British Columbia (Public Service Employee Relations Comm.) v. B.C.G.E.U.** (1999), 35 C.H.R.R. D/257 (S.C.C.) ("**Meiorin**"), the test for accommodating disability has involved three steps: establishing that the impugned standard was rationally connected to and reasonably necessary to carrying out the job, and that the respondent is unable to accommodate the employee to the point of undue hardship. The analysis most often focuses on the accommodation, as the court in **Meiorin** stated that the standard is impossibility short of undue hardship.

144 The starting point for dealing with the duty to accommodate is the Supreme Court of Canada decision in **Central Okanagan School Dist. No. 23 v.**

Renaud (1992), 16. C.H.R.R. D/425 (S.C.C.). The court there (at 43-44) held that the search for accommodation is a multi-party inquiry, and the complainant has a duty to assist in securing appropriate accommodation. The complainant doesn't have to originate a solution, but does have to facilitate the implementation of a reasonable proposal by the employer and to accept reasonable accommodation. If the complainant turns down a proposal for reasonable accommodation, then his or her complaint will be dismissed.

145 This was echoed more recently by the board of inquiry in **Snow v. Cape Breton-Victoria Regional School Board** (2006), 58 C.H.R.R. D/177 (N.S. Bd.Inq.) at 73-74 where the tribunal said:

> It follows from this that the complainant does not have the right to refuse a reasonable accommodation <u>even if there is an alternate reasonable accommodation, which would not cause undue hardship to the employer, which the employee would prefer</u>: See Hutchinson, supra, at 778 and Tweten v. RTL Robinson Enterprises Ltd. (No. 2) (2005), CHRR Doc. 05-233 [reported 52 C.H.R.R. D/409] at 29.
>
> The complainant has the initial obligation to bring the facts relating to her disability to the attention of the employer so that the employer has the opportunity to offer accommodation. The employer has the responsibility to initiate the process of accommodation. The employee has the duty to work in good faith with the employer to attempt a workable accommodation, and the duty not to reject a proposed accommodation simply because it is not the one preferred by the employee. [Emphasis in original].

146 That was a case dealing with a teaching assistant who was relocated from a school in Sydney to Sydney Mines, and as she had a visual disability which

precluded her from driving, she was required to either find car pooling or take public transportation. The only bus to the new school arrived after the start of the school day, and the employee brought a complaint against the employer. The employer offered to allow the employee to start her day late so that she could take the public transportation. The employee rejected that as an option for accommodation. The tribunal found that changing the location of a disabled employee's job can amount to discriminatory action, but in the circumstances, the employer had provided reasonable accommodation which the employee should have accepted.

147 In **McLellan v. MacTara Ltd. (No. 2)** (2004), 51 C.H.R.R. D/103 (N.S. Bd.Inq.), the board considered the duty to accommodate employees who are physically disabled and precluded from working by virtue of their disability. The complainant was a fairly new employee and worked as a cleaner in the wood room. The complainant developed back pain which he attributed to his job, took a period of sick leave, and then requested that he be placed elsewhere in the company to work at a different job. The complainant's employment was terminated because he was unable to do his regular job, and there was nothing else available for him at the factory.

148 The board of inquiry found, however, that the respondent employer had not done all it could in the circumstances to accommodate the employee's physical disability (at 35-37):

> [35] In the specific context of this case, the question that must be addressed in considering this defence for discrimination is this: Whether the nature and extent of Mr. McLellan's physical disability reasonably precluded performance of work at MacTara? I can find that the actual or perceived disability reasonably precluded performance of work at MacTara if I find that it would cause undue hardship to MacTara to accommodate

Mr. McLellan's ability to work: *Shirley v. Eecol Electric (Sask.) Ltd.* (2001), 39 C.H.R.R. D/168 at 43 (Sask. Bd.Inq.).

[36] Determining what is "undue hardship" is the same as determining what is "reasonable" in terms of accommodation: see again, *Central Okanagan School District No. 23 v. Renaud, supra*. I base my conclusions about what is reasonable under S. 6(e) of the Nova Scotia *Act* on the authorities referred to me by the parties, and particularly *Conte v. Rogers Cablesystems Ltd.* (1999), 36 C.H.R.R. D/403 at 91 (C.H.R.T):

> In considering whether Rogers has met its duty to accommodate Ms. Conte, the relevant inquiry is: at the time of making its decision to terminate Ms. Conte, *did Rogers make proper inquiries to determine the nature of her disability, what was the prognosis, what accommodation was required, and was there other work that Ms. Conte could do?* It is clear that Rogers did not make any of these inquiries.

See also *Metsala v. Falconbridge Ltd*. (2001), 39 C.H.R.R. D/153 at 40 and 47 (Ont. Bd.Inq.).

[37] I am not suggesting that there is some procedural obligation to the duty to accommodate. The duty to accommodate, however, does involve the employer finding out what they can about the time and capacity dimensions of the physical restriction afflicting their employee. Having informed themselves as much as possible, the employer must consider whether there is something that the employee can do.

149 The duty to accommodate involves more than determining whether an employee can perform an existing job – it requires determining whether something can be done to the existing job to enable the employee to perform that job.

150 In some circumstances, an employer's duty to accommodate may require only that the complainant's job be kept available for a reasonable period of time. Factors such as the size of the operation, the cost to the employer of having to hire replacement workers or pay current staff overtime wages, the impact on seniority provisions under a collective agreement, and staff morale may all be considerations for determining whether an employer has accommodated a disabled employee to the point of undue hardship. If an employer wishes to rely on a defence of undue hardship, the onus is on that employer to demonstrate the hardship, and to support the claim with objective evidence. Mere impressionistic evidence or speculation about the likely effect of accommodating disabled employees will not suffice to discharge the employer's obligation.

151 The evidence reveals that Mr. Trask indicated his need for accommodation during the employment application process and indicated that he eventually received accommodation in the form of an oral rather than a written exam.

152 In *Hancoorn v. New Westminster Police Service and City of New Westminster,* 2006 B.C.H.R.T. 63, the complainant was not satisfied with her employer's efforts to accommodate her mental disability and as a result filed a Human Rights complaint while her employer was continuing in its efforts to find a suitable accommodation for her. At the time, as in the case of Mr. Trask, the complainant was off of LTD and had not been cleared by her psychologist to return to work. The employer had sent the complainant for an IME in an effort to seek a suitable position for the complainant to return to work. The tribunal stated the following at paragraph 30:

> While the respondents have been engaged in appropriate efforts to resolve Ms. Hancoorn's accommodation issues, Ms. Hancoorn's approach has had the effect of frustrating those efforts. She filed this complaint on September 22, 2005, the day after she attended the IME, and before the respondents even had the information in hand, which they required in order to attempt to accommodate her return to work. This is a good example of "short circuiting" the accommodation process.

153 The tribunal determined that the complaint was premature and encouraged the parties to sit down, with the Union and continue to discuss the process of finding reasonable accommodation.

154 The medical experts are in agreement that Mr. Trask should not return to work at the corrections facility. At the time of the Inquiry, Mr. Trask had not yet been cleared to return to work in any capacity. I accept the position of the Respondent that there is in fact no compelling evidence that the employer did not act in good faith in its efforts to return Mr. Trask to employment prior to his acceptance for long term disability benefits in the Fall of 2005.

Harassment

155 In Mr. Trask's complaint, he also alleges that he was exposed to degrading remarks and jokes from his co-workers and that the Respondent was aware of some of the incidents and failed to take appropriate action. Mr. Trask says he was discriminated against. Mr. Trask gave evidence that a couple of people made jokes about his disability. He said he spoke to one man. He got mad. But Mr. Trask did not report it. He said "it was not something that happen to me often". He said the man never did it again. So it was a learning or educational occurrence. That employee had gained some useful knowledge and information about a disability and the problem did not reoccur. From the evidence Mr. Trask

took the incident as that: a learning experience. So I make no finding no finding on discrimination.

156 But was the refusal on the part of the employer to accommodate Mr. Trask Harassment? Harassment based on disability can amount to discrimination. In **Sherman v. Mbotloxo Investments Ltd.** (2008), CHRR Doc. 08-380 (N.W.T.H.R.A.P.), a female employee of Boston Pizza complained about harassment in her employment. The harassment was both sexual and based on her disability. The complainant had chronic low back pain and used a stool to sit on in the kitchen in order to prepare food.

157 Co-workers routinely hid the stool in places such as the walk-in freezer, the ceiling, and the beer bottle storage area. The co-workers laughed and made fun of the situation when the complainant pointed it out. The complainant put up with such conduct and eventually wrote to the manager about the conduct of her co-workers. The manager agreed to make sure that the stool was not taken again.

158 The tribunal found that harassment is not limited to the concept of sexual harassment, and that it may extend to other grounds of discrimination (at 32). Harassment requires vexatious conduct or course of comment, and the panel agreed that vexatious means irritating, annoying or distressing. The conduct was not isolated but went on for a protracted period of time, and was clearly unwelcome. The manager's reaction was "unacceptable", and the tribunal found that the complainant had been discriminated against based on a disability (at 38).

159 The tribunal awarded exemplary and punitive damages.

160 A tribunal also found that a landlord discriminated against a tenant on the basis of disability in **Aquilina v. Pokoj** (1991), 14 C.R.H.R. D/230 (Ont. Bd.Inq.). A tenant with cerebral palsy rented a basement apartment, and the relationship between the two deteriorated over time. The landlord engaged in vexatious conduct towards the complainant, but more disturbingly referred to her in conversation and in writing as “retarded” and “miserable crap”.

161 The legislation at the time specifically prohibited harassment in accommodation, and harassment was defined as “engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.”

162 In **Memorial University of Newfoundland v. Matthews** (1994), 22 C.H.R.R. D/384 (Nfld. S.C.), the court upheld the decision of a board of inquiry which held that a medical student had been discriminated against based on a disability (stuttering) when some of his professors wrote negative comments about his disability.

163 The tribunal had noted that references to the complainant’s speech impediment which were made in an attempt to assist the complainant or were otherwise legitimate may not amount to harassment, but comments or opinions unrelated to the complainant’s performance as a medical student constituted harassment. Some of the comments made by professors caused the complainant a great deal of stress and may have affected his ability to perform at his best capacity. On appeal, the Supreme Court dismissed the appeal and granted the complainant’s cross-appeal seeking damages for the discrimination.

Recapitulation

164 Having looked extensively at the facts, having reviewed the burden of proof, the law with respect to accommodation and discrimination, it now remains to

determine whether any of the allegations or complaints of Mr. Trask had been made out. I have already dealt with the first allegation to the effect that the Respondent failed to accommodate Mr. Trask's learning disability throughout his employment application process before he was hired in September of 1999. As I suggested earlier, this was period of time when the evidence suggest the attempts at accommodation seemed to be working.

165 Ground number 2 of Mr. Trask's complaint was an allegation that the Respondent failed to accommodate his learning disability in the course of his employment with the Respondent. This deals with issues of laptops and computers which have been extensively canvassed. Did the Respondent fail to accommodate Mr. Trask's learning disability, an adjustment disorder, in the course of his employment from 1999 until May of 2005? Did Mr. Trask satisfy his initial obligation to bring the facts relating to his disability to his employer? Even though the burden of proof was on the Complainant to show that he had a disability, there has been agreement by all parties that Mr. Trask is dyslexic. There is no need to canvas the long list of authorities that set forth the burden of proof because it is well accepted in Human Rights jurisprudence that the prohibited ground need only be "a factor" in the discriminatory conduct in order to constitute discrimination.

166 Dyslexia is defined in the Oxford English Dictionary as "a general term for disorders that involve difficulty in learning to read or interpret words, letters, or other symbols, but that do not affect general intelligence". The Respondent and counsel for the Commission both agree that Mr. Trask's dyslexia constitutes a disability under the *Human Rights Act*.

167 Given that Mr. Trask is dyslexic, has he made out his case that he was discriminated against in the workplace by his employer as a result of his

disability? And therefore, was there an obligation on the employer to accommodate him?

168 Just because a citizen has a disability, it does not automatically mean they should be excluded from the mainstream.

169 We are all equal under the law notwithstanding our disabilities.

170 That means that Section 15 of the Charter of Rights and Freedoms should not be ignored. Even though the Charter has not been pleaded in the Trask case, there is in fact an interplay between Section 15 of the Charter involving Human Rights cases and the application of Human Rights legislation.

171 This was perhaps best explained by Mr. Justice Sopinka in **Eaton v. Brandnt (County) Board of Education** (1996), [1997] 1 S.C.R.P. 241 when he said (as summarized in the Green case:

1. At paragraph 66, he held that "not every distinction on a prohibited ground will constitute discrimination and that, in general, distinctions based on presumed rather than actual characteristics are the hallmarks of discrimination have particular significance when applied to physical and mental disability". He said "avoidance of discrimination on this ground will frequently *require distinctions to be made taking into account the actual personal characteristics of disabled person*" [emphasis mine] citing McIntyre J. in *Andrews v. Law Society (British Columbia)*, [1989] 1 S.C.R. 143 (S.C.C.), at page 169, that the "accommodation of differences ... is the true essence of equality". Sopinka J. added that one of the purposes of the Charter is "to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from the mainstream as has been the case with disabled persons".

2. At paragraph 69, he said in the case of disability, "the elimination of discrimination by the attribution of untrue characteristics cased on stereotypical attitudes relating to immutable conditions such as race or sex", was of the object of section 15 of the Charter. *He added, however, "[T]he other equally important objective seeks to take into account the true characteristics of this group which acts as headwinds to the enjoyment of society's benefits and to accommodate them. Exclusion from the mainstream of society results from the construction of a society based on "mainstream" attributes to which disabled persons will never gain access" [emphasis mine]*. He then added:

> *Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in the wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them.* The discrimination enquiry which sues "the attribution of stereotypical characteristics, reasoning as commonly understood *is simply inappropriate here*. It may be seen rather as a case of stereotyping which, by not allowing for the *condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of section 15(1) in relation to disability. [emphasis mine]*

3. At paragraph 68, Sopinka J. noted that in education in Ontario, the earlier policy was exclusion influenced in a large part by a stereotypical attitude

to disabled persons they could not function in a system designed for the general population. "*This situation was one where no account was taken of the true characteristics of the individual members of the disabled population nor was any attempt made to accommodate these characteristics" [emphasis mine].* However, he said this changed in Ontario where the policy shifted to one which assessed the true characteristics of the disabled persons with a view to accommodating them.

4. Sopinka J., at paragraph 69, said "[I]t follows that disability, as a prohibited ground, *differs from other enumerated grounds such as race or sex, because there is no individual variation with respect to these grounds. However, with respect to disability, this ground means vastly different things depending upon the individual and the context*. This produces, amongst other things, the "differences dilemma …". [*emphasis mine]*

172 Mr. Justice Sopinka was concerned in the Eaton case about the education system in Ontario and at one stage he was urged to state "this situation was one where no account was taken of the true characteristics of the individual members of the disabled population nor was any attempt made to accommodate these characteristics".

173 Therefore, since Mr. Trask fits into a group of Canadians who are dyslexic, it does not, ipso facto, mean they cannot and should not have the right to participate in the mainstream of Canadian society. Also, cited in the Green case was Eldridge where Mr. Justice La Forest at paragraph 56 pointed out:

> "It is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. Persons with disabilities have too often been excluded from the labour force, denied access to

> opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions."

174 Mr. Justice La Forest said being disabled was an historical disadvantage that was shaped and perpetuated by the notion that disability is an abnormality or flaw.

175 The Supreme Court of Canada looked at this matter again **Renaud v. Central Okanagan School District 23**, 1992 CarswellBC 257. This authority describes the role that the complainant, the respondent and all parties have in the search for accommodation up to the point of undue hardship.

176 Paragraphs 50 and 51 read as follows:

> The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation. The inclusion of the complainant in the search for accommodation was recognized by this court in *Simpson-Sears Ltd*. At p. 555 [S.C.C.], McIntyre J. stated:
>
> > Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment.
>
> To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in determining whether the duty of

accommodation has been fulfilled the conduct of the complainant must be considered.

This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfill the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in *Simpsons-Sears Ltd*. The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.

177 In the ***Syndicat des employés de l'Hôpital général de Montréal v. Sexton***, (2007) CSS 4 decision, the Supreme Court of Canada described at paragraphs 51 and 52 the evidentiary burden on a respondent proving undue hardship as "onerous":

> To justify it, an employer must show that the conduct was reasonably necessary to accomplish a legitimate workplace purpose. Part of proving reasonable necessity, as McLachlin J. explained in *Meiorin* at para. 54, is demonstrating that "it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer". This is where we examine whether the

> employer has reasonably accommodated an individual whose group identity has resulted in an arbitrary workplace disadvantage.
>
> *Meiorin* defines the applicable evidentiary burden on an employer for justifying discriminatory conduct, that is, for demonstrating that such conduct is brought "within an exception to the general prohibition of discrimination": para. 67. It is an onerous burden, and properly so. It reinforces the primacy of Human Rights principles in a workplace and tells employers that they can only justify such conduct towards a particular employee if the employee cannot reasonably be accommodated. If they can justify the conduct, there is no discrimination. It is part of the justification defence, not a stand-alone legal duty: if the conduct or standard is not discriminatory, on its face or in effect, no such burden of justification falls on the employer.

178 Mr. Trask was dyslexic. He had difficulty writing reports. He needed accommodation. The accommodation could take many forms. The Respondent contends that many forms of accommodation were suggested and given. That evidence is rejected by Mr. Trask and a number of other witnesses. In question is: What steps were taken to accommodate Mr. Trask between 2002 and 2005? I am persuaded by the direct, clear and independent evidence given by Melinda MacLeod who provided peer support for Mr. Trask. She was independent. She resigned as mentor to Mr. Trask in May of 2005. She complained about the continuous talk about doing things about accommodation.

> "so just the continuous asking about it and me asking and Mr. Kelly having no real answers to give Mike. And it was just continuous and I just didn't have the answers. And I think it was frustrating for Mike as well because I couldn't provide him with any answers. I didn't have any."

179 The evidence demonstrates that Mr. Trask's frustrations grew as corroborated by Ms. MacLeod in his constant attempts to obtain and receive accommodation that would work for him. The evidence demonstrates that Mr. Trask made many efforts to provide alternative forms of accommodation, but none of those offers were taken up by the Respondent.

180 The Respondent argues that there were many different forms of accommodation offered to Mr. Trask up to May of 2005, including:

1. Computer access
2. Dictaphone assistance
3. Administrative assistance
4. Time to prepare reports
5. Assistance from co-workers
6. Education regarding learning disability

181 The evidence is clear that none of those attempts were adequate to meet the Sopinka test outlined in the Eaton case, that Mr. Trask not be excluded from the mainstream. Therefore, I find that Mr. Trask has made out the case that the Respondent discriminated against him in the workplace on account of his disability.

182 The discussions and meetings continued up until Mr. Trask left, but with no resolutions. Here's what Sean Kelly said:

Q. And so around this time, April 2005, had you been having difficulty communicating with Mr. Trask?

A. Yes.

Q. What was the nature of that?

A. Our conversations were getting more and more difficult. I was having difficulty explaining some of the bureaucracies of government in terms of

trying to look at the laptop, you know. By this time, we had a number of different players involved in the discussion with the executive director was involved around this time because of letters that had gone to the Minister. So he was directly involved in the discussions. So there was certainly a lot of people involved at this time and they were trying to look at the issue of accommodation and whether or not a laptop, for instance, was warranted or whether it was reasonable to conclude that a desktop would meet his needs. So there were a number of discussions that were being had, I guess, relative to that point.

Ground Number 3

183 Mr. Trask alleges that the Respondent failed to accommodate him for his adjustment disorder manifesting itself in anxiety and depression. The evidence is clear that Mr. Trask had an adjustment disorder. He had had it since taking his training in Prince Edward Island. In 2004, his roommate and closest friend died. He lost strong moral support. The AD (Adjustment Disorder) component of his disability manifested itself on several occasions early on in Mr. Trask's employment with the Respondent. It manifested itself, for example, over words used in a performance appraisal report that were subsequently changed after he became very agitated and upset. Perhaps that one incident clearly brought both issues of dyslexia and Mr. Trask's emotional state into play. It perhaps suggests that it was a situation begging for accommodation. When discussing computer options that were made available to him, Mr. Trask put it this way:

Q. Fair enough. Were there any other computer options that were made available to you to prepare your reports?

A. Well, I go ... when I would ... when my anxiety depression would flare up with the way there were stalling and that, the way that staff was treating me, I would end up going home sick. And then after when I'd come back,

> that would be their way to get me back, they would offer me something, a piece of it, right? They offered a computer in the Sergeant's office. That was the next step. A computer in the Sergeant's office. There was a Captain, Sergeant and a Classification Officer in that one office. It was days it was busy. There was inmates going in and out. The Captain going in and out. The Classification Officer sitting in there all day. You know, it was a busy spot, right? They gave me that computer but wouldn't give me the access code."

184 That is not accommodation envisaged by the law. Accordingly, having reviewed all of the evidence, I find that Ground Number 3 has been made out in that the Respondent did not accommodate Mr. Trask with his adjustment disorder of anxiety and depression.

185 The Respondent made extensive arguments that the employer had not been provided with any medical documentation relating to Mr. Trask's mental illness. His behaviour in the workplace was such that it ought to have brought the matter to the attention of management to have made an earlier inquiry. Indeed that is the case in **Zaryski v. Loftsgard Supra** which makes it clear that an employer has the duty to inquire further when an employee is exhibiting signs of undiagnosed or undisclosed mental illness. The respondent argues that the evidence supports the employer in circumstance discharging its obligations by placing Mr. Trask on administrative leave with full pay pending the receipt of medical documentation. However, the problem had existed long before that decision was taken.

186 The evidence suggests that Mr. Trask, who was not working at the time of the Inquiry, has "a perception" of injustice in the Nova Scotia Department of Justice (Correctional Services) and his perception of that injustice was extremely strong. It is unlikely that he could successfully return to work in that environment.

187 So what is an appropriate remedy? Special damages. I found no adequate evidence suggesting an award of special damages would be appropriate. General damages. The Respondent acknowledges and agrees with the range of general damages set forth by Counsel for the Human Rights Commission in its prehearing brief.

188 If the Board of Inquiry is satisfied that the Respondent discriminated against Mr. Trask on the basis of disability and failed to accommodate him to the point of undue hardship, then it can fashion an appropriate remedy.

189 The powers available to a Board of Inquiry are found at section 34(8) of the *Human Rights Act*:

> 34(8) A board of inquiry may order any part who has contravened this Act to do any act or thing that constitutes full compliance with the Act and to rectify any injury caused to any person or class of persons or to make compensation therefor.

190 The most common remedies for violations of the Act include monetary compensation and non-monetary awards. The goal of compensation in cases of discrimination is to make the victim whole, taking into account principles such as reasonable foreseeability and remoteness. The purpose of remedies under the Human Rights legislation was discussed by the Alberta Court of Queen's Bench in **Farm Meats Canada Ltd. v. Berry** (2000), 39 C.H.R.R. D/317, 2000 ABQB 682 at para. 16:

> The main purpose of human rights legislation is compensatory. The preamble to the ... Act espouses the dignity and rights of all persons and make a commitment to the protection of diversity and equality rights. The goal is to attempt to place the aggrieved individual in the same position

> that they would have been in but for the contravention of the Act. Thus, any remedial powers under the Act must be sufficiently broad in order to attempt to restore individuals to their former position.

191 This is in keeping with the more than ordinary, but not quite constitutional nature of Human Rights legislation.

192 It should be kept in mind that remedies under the Human Rights Act contain both a private function and a public function. There are aspects of the remedies which are directed to the individual complainant and which are intended to make the person whole and to compensate that person for the effects of the discrimination. There are also aspects which are directed to the public interest, and those are most often in the form of non-monetary remedies.

(a) General Damages

193 Boards of inquiry have awarded general damages for the harm and injury to a complainant's dignity and self-respect, and to recognize the humiliation suffered as a result of discrimination or harassment.

194 Some of the considerations in assessing general damages in the Human Rights context are addressed at para 67 of **Marchand v. 3010497 Nova Scotia Ltd.** (2006), 56 C.H.R.R. D/178 (N.S. Bd.Inq.):

> In considering an appropriate range of general damages I am guided by a number of factors, which are, I believe relevant. I have considered the non-applicability of the principles applicable to unjust dismissal. The relevant factors include the following:
>
> a) The redress for the harm suffered by the discriminatory conduct, which in this case I consider to be economic, sociological (impacting an entire family) and emotional;

b) The need to ensure that a message is delivered to the Complainants [Respondents] and others that human rights must be respected; and

c) The need to ensure that the award does not appear to be so small as to constitute a minor cost of doing business, such as to encourage risk taking.

195 So, what is appropriate in Mr. Trask's case?

196 These principles are applicable not only in the context of employment, but in the context of accommodation, access to facilities and services, and all the other areas listed in section 59(1) of the *Human Rights Act*.

197 The Nova Scotia Human Rights cases dealing with the discrimination in employment usually arise in the context where the complainant's employment has been terminated by the employer, often while the complainant is on disability leave.

198 In **Cottreau v. R. Ellis Chevrolet Oldsmobile Ltd.,** (2007), 61 C.H.R.R. D/8 (N.S. Bd.Inq.) a physically disabled employee terminated from his employment while on disability leave was awarded $10,000 in general damages.

199 In **Hall v. Seetharamdoo** (2006), 57 C.H.R.R. D/322 (N.S. Bd.Inq.), a disabled employee was terminated from her employment while on disability leave received $3,500 in damages.

200 In **Marchand v. 3010497 Nova Scotia Ltd.** (2006), 56 C.H.R.R. D/178 (N.S. Bd.Inq.), a disabled employee was terminated from her employment while on disability leave and received $4,500 in general damages for the discrimination.

201 In **McLellan V. MacTara Ltd. (No. 2)** (2004), 51 C.H.R.R. D/103 (N.S. Bd.Inq.), a physically disabled complainant had his employment terminated on the basis of his physical disability as he was unable to do any other work at the factory. The board awarded $1,000 in general damages for damage to his dignity arising from the termination.

202 In **Bobbitt v. Royal Canadian Legion, Branch 19** (2003), 47 C.H.R.R. D/137 (N.S. Bd.Inq.), a disabled employee was terminated from his employment just prior to returning to work, and was awarded $2,500 in general damages.

203 In **Pinner v. K. Burrill's Supermarket Ltd.** (2002), 45 C.H.R.R. D/251 (N.S. Bd.Inq.) an employee who was terminated because of a mental disability received $2,000 in general damages for injury to his self-esteem.

204 I am of the opinion that an award of general damages should be awarded to Mr. Trask in the case at hand as a result of the discrimination he has suffered at the hand of the Respondent.

205 The Respondent has requested that the parties be provided with an opportunity to agree on an appropriate amount.

206 I hereby Order that the parties must reach an agreement and notify the Chair within 30 days of the date of this decision or the Inquiry will be reconvened at which time the Chair will make the Order of General Damages.

207 What steps can be taken to assist Mr. Trask in becoming gainfully employed? The overwhelming evidence is that he should not return to Corrections. The law is clear that potential remedies for employment discrimination includes reinstatement to the same or equivalent position. At present, Mr. Trask still has a position with Correctional Services and at present he is off on long-term

disability. The medical evidence adduced at the Inquiry clearly indicated however, that it would be extremely unlikely, if not impossible, for Mr. Trask to ever return to his former workplace.

208 In its post-hearing brief, Counsel for the Human Rights Commission made the following suggestions:

> "Mr. Trask has indicated that his preferred remedy would be to be placed in a position outside of his former workplace. In light of the requested remedy from the complainant, it may be in the benefit of all parties (....) to allow the respondent the opportunity to provide reasonable accommodation up to the point of undue hardship to Mr. Trask before imposing a more specific remedy.
>
> An example of such a remedy can be found in the 2007 decision of the Canadian Human Rights Tribunal in **Walden v. Canada (Canadian Human Resources and Social Development) (No. 1)** 2007 CHRT 56. The complainants were nurses who were classified as Medical Adjudicators under the Canada Pension Plan Disability Benefits Program. As Medical Adjudicators, they were paid less than Medical Advisors, who were medical doctors, although they performed substantially similar duties.
> After determining that the complainants were discriminated against by their employer, the Tribunal returned to the question of remedy. The Tribunal, apparently at the request of the parties, ordered the end of the discriminatory practice but left the specific measures to the parties to determine. At paragraph 144 the Tribunal stated:
>
> > Section 53(2)(a) of the CHRA provides the Tribunal with the authority to order the Respondents to cease the discriminatory practice and to take measures. In consultation with the

> Commission, to redress the practice or to prevent the same or a similar practice from occurring in the future. The parties requested that, in the event that I found the complaints to be substantiated, I make an order that the discriminatory practice case, but that I refrain from specifying the measures that should be taken to redress the practice. They asked to be given an opportunity to negotiate the appropriate measures to be taken with all of the stakeholders. I am in agreement with this request. Accordingly, I make the following Order, but retain jurisdiction over this aspect of my decision in the event that the parties are unable to reach an agreement:
>
> The Respondents are ordered to cease the discriminatory practice identified in paragraph 143 above.

The Tribunal also set a date of three months for a case conference to report on the status of negotiations. The Tribunal also ordered that at the case conference the Tribunal would set a deadline for the final resolution of matters with the opportunity if resolution had not been achieved for "a final determination after the parties have had the opportunity to present evidence, if necessary, and argument on remedy" (para. 145):

> A case conference will be scheduled for three months from the date of this decision at which time the parties will provide the Tribunal with a report on the negotiations. On that date also, a deadline will be set by the Tribunal for the final resolution of any outstanding matters arising from this aspect of the decision. If resolution is not achieved by the deadline, I will make a final determination after the parties have had an opportunity to present evidence, if necessary, and argument on remedy.

> In that case, the parties were ultimately unable to reach agreement on remedy and the Tribunal addressed remedies in subsequent decisions (see 2008 CHRT 21 and 2009 CHRT 16).

209 The Respondent's position, of course, is that all of this is premature because Mr. Trask has not even been cleared to return to work in any capacity nor is his medical status settled.

210 It is further the Respondent's position that at this point creating a return to work plan for Mr. Trask would be premature and would require an unreasonable expenditure of resources on something that may not become relevant. Furthermore, the LTD provider and the Public Service Commission have an extensive system in place to oversee the return to work of employees who have been disabled from their employment.

211 It is the Respondent's position, which I accept, that

> "should Mr. Trask be cleared to return to work, the employer should be given an opportunity to rely upon the expertise of the LTD and Public Service Commission professionals, in accommodating Mr. Trask and returning him to the workplace. Absent any evidence of any bad faith on the part of the respondent, the respondent submits that allowing the parties to continue the process that was previously initiated with respect to returning Mr. Trask to work, at the time when he is medically cleared to do so is more appropriate than the Chair remaining ceased of this matter for an indefinite period of time."

212 I agree with that proposal and consider it appropriate in circumstance and I so Order.

Conclusions to Decision

213 Mr. Trask is dyslexic. He suffers from an Adjustment Disorder. I have found as a fact that he was discriminated against by his employer in the workplace. How could this have happened? I am reminded again of the language of Mr. Justice Sopinka that the other equally important objective seeks to take into account the true characteristics of people who are disabled and which acts as head winds to the enjoyment of society's benefits and to accommodate them. Exclusion from the mainstream of society results from the construction of a society based on "mainstream" attributes to which disabled persons will never gain access.

214 When one considers the position of blind people, deaf people, and other disabled people in the workplace, our Canadian legislation is designed to find reasonable accommodations and to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them.

215 The discrimination inquiry which uses "the attribution of stereotypical characteristics, reasoning as commonly understood is simply inappropriate". If one ignores the nature of a disability, it often forces the individual, such as Mr. Trask, to sink or swim within the mainstream environment.

216 It is the recognition of the actual characteristics and reasonable accommodation of these characteristics which is central to what has been discussed in this decision.

217 The actual characteristics are that Mr. Trask was suffering from dyslexia and tried on different occasions to obtain relief and take training and advice in

relation to that. In addition, he had an Adjustment Disorder manifested by anxiety and depression which had to be understood and accommodated. It got worse and worse in the workplace. As Dr. Bhaskara said in his testimony

> "the anxiety symptoms when under stress and resistance to change make it unlikely that he will be able to return to any kind of work setting, his perception of injustice is rigid and almost an insurmountable barrier to therapy of any kind at this stage. The *fact that the patient perceives that there was an injustice is a characteristic that must be understood*."

218 As Dr. Bhaskara said from two years of treating him, "we felt that the perception of injustice was pretty strong".

219 What type of workplace environment would permit that type of perception of injustice to prevail? The Respondent strongly argues that there should be no award of a public interest remedy in this case. They state it would be inappropriate. The Respondent maintains a respectful workplace policy which requires mandatory training for all Public Service employees.

220 Is there authority for the Board to issue any such remedy?

221 Boards of Inquiry in Nova Scotia have awarded various non-compensatory remedies, largely designed to require respondents to remedy their discriminatory practices. Such remedies have included apologies (**Hill v. Misener** (1997), 28 C.H.R.R. D/355 (N.S. Bd.Inq.); **Wigg v. Harrison** (1999), CHRR Doc. 99-188 (N.S. Bd.Inq.); and **Association of Black Social Workers v. Arts Plus** (1994), 24 C.H.R.R. D/513 (N.S. Bd.Inq.)); anti-discrimination training and development of anti-discrimination policies (**Wigg v. Harrison**, supra; **Miller v. Sam's Pizza House** (1995), 23 C.H.R.R. D/433 (N.S. Bd.Inq.); and **Dillman v. I.M.P**. Group Ltd. (1994) 24 C.H.R.R. D/322 (N.S. Bd.Inq)); monitoring of

employment practices (**Wallace v. Hillcrest Manor Ltd**. (may 18, 1994, N.S. Bd.Inq. North, unreported)), and posting copies of the Act in a conspicuous place (**Borden v. MacDonald** (1993), 23 C.H.R.R. D/459 (N.S. Bd.Inq.)).

222 The issue I raised at the beginning of this section was how could this have occurred and what systems were in place? I put this question to Mr. Sean Joseph Michael Kelly, who is the Director of Correctional Services, Department of Justice, Correctional Services Division. It is a position he has held since July of 2005. He had been with the Department since May of 1983 when he was a correctional officer at the Halifax Correctional Centre. Near the conclusion of his evidence, I asked Mr. Kelly, the key witness for the Respondent:

Q. As the Director of the Unit, can you tell me what the corporate policy is today with respect to accommodation of people for .... with disabilities? Is there a formal written policy on accommodation for people with disabilities?

A. Now there are more opportunities. We have a section within the Public Service Commission. For instance, (inaudible). We have ... I think there's a special budget, for instance, that's offered to employees with disabilities. I know, certainly, of one occasion with an individual in Cape Breton who expressed a need for accommodation and he actually didn't even seek it out through the facility. He went directly to the Public Service Commission.

Q. So there is a formal published policy, you said.

A. There ... I don't know if it's ... there's certainly a policy in relation to, I know, accommodation in the workplace and through the Public Service Commission.

Q. Uh-huh.

A. There are more opportunities available today than there were in previous years.

Q. And so when you first encountered Mr. Trask, can you tell me ... compare today with then for what is available for persons with disabilities in terms of policies within your unit?

A. Well, right now there's more expertise available as of, for instance, to deal with individuals with disabilities, and there's also ... because we have an individual with the Public Service Commission who has that background (inaudible), (Charlie MacDonald?) perhaps.

But anyway, he's an individual, for instance, who offers support to the Public Civil Service in relation to individuals with disabilities. I don't recall that level of service being available at that time.

There's also special funding that's available to individuals with a disability. I know, for instance in Cape Breton the individual was offered a laptop computer, and he ... it ended up that he didn't receive it or use it because I believe he couldn't take the computer home. So he said, no, he didn't want it.

Q. What year would that be?

A. That was ...

Q. This is 2009. When would that have been?

A. That was within the last year.

223 Earlier Mr. Kelly had said:

Q. Okay. Now when Mr. Trask first raised this issue in ... with you at least, in August of 2002, did you undertake any investigation with respect to what dyslexia was and how it might play out in the workplace?

A. No.

224 So there is a greater awareness and greater understanding today than there was when Mr. Trask first joined Correctional Services. But he stressed that the support is offered by the Public Civil Service and not by the Department. The

issue and concerns upon which the complaint for this case is founded relate to the Department of Justice (Correctional Services) and not the Public Service Commission. The evidence at the Inquiry demonstrated an overwhelming dearth of pro-active measures in the Department to deal with persons with disabilities.

225 Mr. Trask has proven the case of discrimination and I am not satisfied that the Department has currently in place sufficient remedies to ensure that this could never happen again to another person. Accordingly, a public interest remedy would be appropriate in this circumstance. In his post-hearing brief, counsel for the Human Rights Commission said the following:

> "The respondent is a government department and there is a clear public interest in ensuring that public bodies are free from discrimination. Moreover, the discrimination in this case did not arise from any one individual, but rather seem to arise from a systemic failure to accommodate Mr. Trask."

226 I am in agreement with that conclusion.

227 I therefore Order that the Department of Justice (Correctional Services) undergo extensive anti-discrimination sensitivity training that shall be overseen by the Human Rights Commission commencing no later than the 1st day of March 2010.

RESPECTFULLY SUBMITTED

Board of Inquiry

Per Senator Donald H. Oliver, Q.C.