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*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

FATHI SOUAKER

Grievor

and

CANADIAN NUCLEAR SAFETY COMMISSION

Employer

Indexed as

Souaker v. Canadian Nuclear Safety Commission

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: [Marie-Josée Bédard](#), adjudicator

For the Grievor: [Valérie Charrette](#), Professional Institute of the Public Service of Canada

For the Employer: [Karl Chemsy](#), counsel

Heard at Montreal, Quebec,
May 13 and 14 and August 18 and 19, 2009.
(PSLRB Translation)

I. Individual grievance referred to adjudication

[1] The grievor, Fathi Souaker, was hired by the Canadian Nuclear Safety Commission (CNSC or “the employer”) on February 13, 2006, as an inspector in the Operations Inspection Division at the Eastern Regional Office in Laval, Quebec. He was covered by the collective agreement between the CNSC and the Professional Institute of the Public Service of Canada (“the collective agreement”). Mr. Souaker was subject to a 12-month probation period. On March 30, 2007, while he was still on probation, the employer terminated his employment on the grounds that he did not meet the requirements of the position. On April 11, 2007, Mr. Souaker filed a grievance in which he alleged that his rejection on probation was made in bad faith and in an arbitrary and discriminatory manner, contrary to article 6 of the collective agreement, which sets out all prohibited grounds of discrimination. Clause 6.01 of the collective agreement reads as follows:

There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practised with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, family status, marital status, mental or physical disability, conviction for which a pardon has been granted or membership or activity in the Institute.

[2] Mr. Souaker referred his grievance to adjudication on June 4, 2007 under paragraph 209(1)(a) of the *Public Service Labour Relations Act* (“the Act”), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, which deals with grievances concerning the interpretation or application of a provision of a collective agreement. Mr. Souaker claims that he was a victim of discrimination because of his ethnic origin and religious affiliation. Mr. Souaker is originally from Algeria and is of the Muslim faith.

[3] On July 5, 2007, the employer objected to the jurisdiction of an adjudicator to hear Mr. Souaker’s grievance on the grounds that a grievance about a rejection on probation cannot be referred to adjudication under section 209 of the *Act*. The employer argued that the grievance does not concern the interpretation or application of a provision of the collective agreement or a disciplinary action. At the start of the hearing, the employer reiterated its objection. After hearing the parties’ representations, I decided to take the matter under reserve and to hear the evidence on the merits.

[4] Mr. Souaker's allegations of discrimination are the central issue in this case. Mr. Souaker set out his allegations in the notice that he sent to the Canadian Human Rights Commission (CHRC), as required under section 210 of the *Act* when a party raises an issue involving the interpretation or application of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (*CHRA*). I think that it is useful to cite his allegations at this point to fully understand the context in which the parties presented their evidence:

[Translation]

My rejection on probation at the Canadian Nuclear Safety Commission was made in bad faith and in an arbitrary and discriminatory manner.

I would like to note the following facts in support of my allegations:

1. I started working as an inspector at the Canadian Nuclear Safety Commission, Laval office, on February 13, 2006. I never received negative comments on my work from February to October 2006, that is, for over eight months, from the three inspectors who accompanied me during inspection visits.

2. On October 2, 2006, Rick McCabe, Director, Operations Inspection Division, whose office is located in Ottawa, informed me for the first time that my work needed to improve. He told me that his evaluation was based on the comments of the three inspectors who supervised me (Louise Simard, Daniel Alu and Éric Fortier). Extremely surprised by that statement, I questioned the three inspectors concerned to find out if they were dissatisfied with my work.

3. The inspectors Louise Simard, with whom I conducted 80% of my inspection visits, and Mr. Alu assured me they did not agree with the comments that Éric Fortier, inspector and coordinator at the Laval office (highest level of authority at the regional level), had sent to Mr. McCabe. Moreover, they wrote to Mr. Rick McCabe to criticize the current evaluation system. In addition, I sent Mr. McCabe a table detailing the inspections that I had conducted and the positive comments of Ms. Simard and Mr. Alu.

4. When I questioned our coordinator, Mr. Éric Fortier, about the quality of my work, he did not provide any comments. However, he said that I was "a close-minded man with no personality" and that he had told that to Mr. McCabe. Later, he told me that he had made a mistake by giving a personal interpretation of my work, which he would rectify. It is

important to note that, as of my meeting with Rick McCabe on October 2, 2006, I had conducted only a few visits with Mr. Fortier.

5. Despite the corrections that the inspectors made about the quality of my work, it was agreed that I would conduct supervised visits during the month of October with Mr. Fortier and Mr. Poirier (another inspector) to enhance my training. I would like to specify that no evaluation criteria were provided to me at that time.

6. The visits conducted with Mr. Poirier went well. However, the week spent with Mr. Fortier was extremely trying for me. During our trip to Newfoundland, from October 15 to 19, 2006, Mr. Fortier did not hesitate to denigrate my religion and my origins on a number of occasions:

- He told me that “you Muslims are closed-minded people, you tell your wives ‘today we sleep here, we make children’ and your wives have no freedom and live at your mercy.”
- He asked me questions about my children's upbringing and asked me the following bizarre question: “What would you do if your children became Christians?” I responded that “I don't expect them to, but if they do it will be their choice.” Mr. Fortier then answered, “Why did you come to Canada? It would be better if you went back to Algeria.” He then launched into a series of questions about our standard of living in Algeria and whether there were stores, housing and social infrastructure. He asked if we lived like black Africans and cited Ethiopia as an example.
- He also made comments about the hijab (garment worn by Muslim women). He asked if my wife wore a hijab, and I answered that she did. He wasted no time in asking, “Why do you Muslims hide your women? That's so old fashioned. How do you live with that religion?”
- He spoke to me in a mocking tone when I didn't drink alcohol. He continued to refer to my religion, calling my choice ridiculous by saying the following: “It's ridiculous, but it's your choice.”
- In addition, Mr. Fortier refused to provide any comments about the visits conducted with him in Newfoundland.

7. Following the additional visits conducted with Mr. Fortier and Mr. Poirier, I received no further comments on my work.

8. On January 12, 2007, I was called to a meeting with Mr. McCabe and Mr. Fortier. Mr. McCabe then gave me a letter, dated January 8, which detailed a number of difficulties observed in my work, and informed me that my probation period would be extended. The letter was written in vague terms, contained a number of inaccuracies and was not based on any objective evaluation of my work. I was stunned on receiving that letter. Having received no comments since the October visits, I thought that everything was going well. I then tried to obtain further information about the conduct for which I had been criticized. Mr. McCabe then told me that he did not have his notes, and I did not receive any further clarification despite a number of attempts on my part.

9. Following the meeting of January 12, I was completely isolated at work. I regularly went to ask Mr. Fortier for work. He told me that he would give me work but didn't do anything. The inspectors with whom I usually worked, Ms. Simard and Mr. Alu, also refused to conduct inspections with me. I later learned through an access to information request that Mr. Fortier had explicitly asked Ms. Simard and Mr. Alu not to give me any more work.

10. In January, I asked my bargaining agent for help. We asked to meet with management to get to the bottom of the letter of January 8 and to clarify management's expectations. That meeting was refused, and on March 29, 2007, I was given a letter informing me that I was being rejected on probation.

11. My work situation began to deteriorate following the intervention of the coordinator, Mr. Fortier, who made negative comments toward me in October 2006, comments that were subsequently disavowed by my main supervisors. Mr. Fortier always lacked transparency with me. He always refused to comment on my work and to inform me of specific objectives that I had to meet. The only remarks that Mr. Fortier made to me had to do with me as a person, my origins and my religion. Finally, he isolated me during the critical period of my probation extension, thus preventing me from showing my ability to perform the duties of an inspector. The circumstances surrounding the evaluation of my work and my rejection lead me to conclude unequivocally that I was treated in a discriminatory manner because of my Algerian origin and my religion.

II. Summary of the evidence

[5] The evidence presented by both parties related to Mr. Souaker's main allegations and to the events that led to his rejection on probation. The parties presented very different visions of the events, and the evidence was often

contradictory. Since assessing the facts and the credibility of the witnesses is important in analyzing this file, I will somewhat exhaustively summarize each party's evidence. Although the parties did not discuss their respective burdens of proof at the start of the hearing, the employer presented its evidence first, and Mr. Souaker testified after hearing the employer's witnesses. I will follow the same order of presentation.

A. For the employer

[6] The employer called the following three witnesses: Rick McCabe, who was the director of the Operations Inspection Division when Mr. Souaker was hired and when he was rejected on probation; Éric Fortier, Inspector-coordinator, CNSC Eastern Regional Office, Laval; and Jean-Claude Poirier, Inspector-coordinator, Central Regional Office, Ottawa.

[7] The CNSC's mission is to regulate the development, production and use of nuclear energy and nuclear materials in Canada to protect the health and safety of people and the environment and to respect Canada's international commitments on the use of nuclear energy. The CNSC regulates the development and use of nuclear energy in all its applications, whether in nuclear power plants, research institutes, hospitals or industrial plants. Organizations and businesses that use nuclear energy or nuclear materials require a CNSC-issued licence to operate and are subject to control measures to ensure that they conduct their activities in accordance with the applicable regulations and conditions of their licences. That control is the responsibility of inspectors, who carry out inspections to verify whether the licensees are conducting their activities in a manner that conforms with the regulations and to the conditions of their licenses. The CNSC has nearly 3000 licensees of which 2200 are subject to inspections.

[8] The CNSC conducts its activities from four regional offices, including offices in Laval and Ottawa. Mr. Souaker was hired to work as an inspector at the Laval office. In his native Algeria, he graduated as an automation and instrumentation engineer and also received a specialized graduate diploma in nuclear engineering. Before immigrating to Canada and being hired by the CNSC, Mr. Souaker worked for 13 years as a research associate in radiation protection instrumentation at the Nuclear Research Centre of Birine in Algeria.

[9] At the CNSC, inspectors are normally hired at the NR-SI-05 or NR-SI-06 pay level. Mr. Souaker was hired at the NR-SI-06 level because of his expertise and experience.

[10] During the relevant period of Mr. Souaker's employment with the CNSC, Mr. McCabe was responsible for coordinating the hiring of staff, supervising and managing human resources, and ensuring quality control of the work. Mr. McCabe was the inspectors' line supervisor, but the operations of the regional offices were coordinated by the inspector-coordinators. Mr. Fortier was the inspector-coordinator for the Laval office. He indicated that his coordinator work occupied close to 40% of his time and that he was responsible for appropriately allocating human and material resources. He stated that he was the point of contact with the Ottawa office and that he saw himself as the eyes and ears of the director but clarified that he did not have a supervisory role over the inspectors or effective decision-making power.

[11] Aside from Mr. Souaker and Mr. Fortier, the two other inspectors who worked at the Laval office were Louise Simard and Daniel Alu.

[12] An inspector's responsibilities with respect to inspecting licensees is central to the criticisms that the employer made against Mr. Souaker. An inspector tasked with an inspection must plan the inspection, study the licensee's file, make travel arrangements when necessary and coordinate the logistics of the visit. During an inspection, the inspector tours the site, verifies the control documents and records and conducts an interview, generally with the licensee's radiation safety officer. Mr. McCabe stated that the interview is crucial because at that moment inspectors gather information and ask questions that can lead them to detect non-compliance or irregularities. Mr. McCabe indicated that inspectors must be attentive to the reactions of the people that they question, along with their behaviour and their answers, to assess the veracity of their statements and to detect any omissions or untruths. He emphasized that inspectors must be intuitive, shrewd and have the spirit of an "investigator" to be able to analyze and interpret the information that they gather and to detect any non-compliance from the licensee. Inspectors must also be careful to ensure their own safety since they can be exposed to a variety of hazards. Mr. McCabe also emphasized that inspectors need to have good driving skills because they have to travel to remote areas and travel in difficult conditions. To prepare and conduct their inspections, inspectors have a checklist that serves as a guide particularly during interviews and follow-ups with licensees.

[13] New inspectors follow a training program that includes a theoretical segment, practical training and pairing with experienced inspectors. On hiring, inspectors have junior inspector status, and they are not allowed to conduct inspections autonomously until they receive inspector certification in accordance with the *Nuclear Safety and Control Act*, S.C. 1997, c. 9. The CNSC's director general issues that certification, which usually takes just over a year. In the period following their hiring, inspectors accompany certified inspectors as observers. After a while, junior inspectors plan and conduct inspections themselves, under the supervision of a certified inspector, until they receive their certification. During his period of employment, Mr. Souaker conducted about 75 inspections.

[14] Mr. McCabe stated that, beginning in March 2006, he was informed that Mr. Souaker had difficulty performing certain routine tasks and adapting to certain practical aspects of an inspector's work. He said that he met with Mr. Souaker on April 4, 2006, to discuss his performance. The notes that Mr. McCabe prepared after that meeting were presented as evidence and read in part as follows:

Concerns about his performance were reported to me very early on. He was unable to fill a vehicle with gaz, check into a hotel without assistance, drive a car well and return to the office on his own after being taken to a garage about three blocks away.

These types of actions contrast with the initiative, improvisation and independence needed to be an inspector.

I explained to Fathi that he needed to take more initiative and I clearly stated he had my permission to do so. I explained that with his quiet and polite demeanor he should have little concerns about people being upset. I clearly explained that I wanted him to succeed as an inspector and that his education and experience should make the process of becoming an inspector easy. He said he found the work easy and just needed some help with the processes. I explained all new staff needed this and told him to advise me if he needed anything else to make his transition easier.

The conversation was pleasant and lasted about twenty minutes. I explained I would be concerned about sending him into a strange city where he has shown he could not cope with a location known to him. He indicated, several time, he understood me and would begin to take initiative.

[Sic throughout]

Mr. McCabe indicated that he showed his notes to Mr. Souaker and also that he notified him that his driving skills were of concern. On that point, he stated that Mr. Souaker had failed a defensive driving exam given by CAA-Quebec and that he had to retake it.

[15] Mr. McCabe stated that the inspectors who worked with Mr. Souaker considered him very intelligent, very strong technically and very pleasant but found that he did not seem to have the practical skills necessary to work well in the field and to successfully conduct his inspections.

[16] In July 2006, Mr. Fortier conducted a series of inspections with Mr. Souaker. He noticed some shortcomings in the way that Mr. Souaker led his inspections, notably in the way he interacted with the licensees' representatives. Mr. Fortier found that Mr. Souaker lacked field experience, did not always grasp the information provided by the licensees, tended to proceed very mechanically during interviews, was very dependent on his checklist, tended to ask the same questions several times, did not always listen or understand the questions that he was asked, was not intuitive, did not always detect potential problems, and lacked initiative. Mr. Fortier wrote an observation report that he sent to Mr. McCabe without discussing it with Mr. Souaker because, he said, he was not Mr. Souaker's line supervisor.

[17] On October 2, 2006, Mr. Fortier sent an email to Mr. McCabe in which he shared his evaluation of Mr. Souaker's performance and comments that he claimed to have gathered from the other two inspectors at the Laval office. That email reads as follows:

I include my evaluation of Fathi.

Daniel and Louise have nothing written about it but here are some of their verbal comments:

1- Fathi is good but he is a bit slow. After 6 months of inspections he should be able to know better what is important and what is not. He loses an awful lot of time on minors details and misses time for some more important stuff. He makes me think of as he can not let go anything. (Louise)

2- Fathi is still not ready to have his card. He should go out more and acquire more experience. I still don't think he is cut for the job. (Daniel)

Here is my personal evaluation on the 5 inspections I have done with Fathi and from the comments of other inspectors:

He is a very nice guy, very knowledgeable but just not in the right job. He should be sitting at a desk and review documents. He is not very good with people and he still have to convince me that he can handle the planning and the execution of a whole week of inspection outside Montreal.

[Sic throughout]

[18] Mr. McCabe indicated that he met with Mr. Souaker on October 2, 2006 and that the meeting served as a six-month performance evaluation, as required by the CNSC's human resource management policies. The goal was to take stock of Mr. Souaker's strengths and weaknesses and to specify the objectives that he had to meet. Mr. McCabe indicated that he informed Mr. Souaker of the shortcomings observed in his practical and communication skills. He said that he also discussed with Mr. Souaker the defensive driving exam, which Mr. Souaker failed, and that Mr. Souaker had contested the results of that exam, questioned the objectivity of the examiner and stated that he had not been treated fairly. Mr. McCabe recorded the content of the meeting, and his notes were presented as evidence. They read in part as follows:

I met with Mr. Souaker in April when it was first discovered he found it difficult to get around cities, did not demonstrate initiative in his new job and was found to be a very poor driver. We discussed this and Mr. Souaker assured me he understood and would get involved and demonstrated his commitment to the job.

I met with Mr. Souaker in Laval one on one on another occasion to see how he was progressing and to see if he needed anything to succeed.

I accumulated the comments from each person who had interacted with him either on inspections or in the office.

The message was consistent from the reviewers. He is intelligent and able to pick up technical aspects. Good inter-personal skills and likeable.

On the other side, he tends to be bogged down in minute details without having found any reason to dig that deeply. He is not able to handle practical things well and his driving ability demonstrates several problems quite well. Staff was concerned about his driving ability. As part of the training of inspectors some form of driver training and evaluation is required. Driving is a major hazard for OI inspectors.

Four inspectors including Mr. Souaker took the same drivers course conducted by CAA in Quebec. Three of the persons passed and Mr. Souaker did not. I immediately advised his

coordinator not to allow Mr. Souaker until this issue had been resolved. He came to my office expressing concern about the fairness of his evaluation by the instructor and that he had been singled out. He did not accept the evaluation or the fact that his driving requires improvement. This should have been an unbiased assessment from someone outside of the CNSC. We discussed this for some time and it became clear that he did not accept the evaluation and was not accepting that he may be a poor driver. He repeated the points that he had a PQ license and he considered himself a good driver despite everything indicating otherwise.

The above response from Mr. Souaker was the same as the interactions I had with him since joining the CNSC. He did not accept the information I provided to him he needed to improve his performance on the job. He constantly focused on individual comments from colleagues and did not see the overall picture. Mr. Souaker is unable to accept the constructive criticism provided to him and has not progress well in becoming and inspector.

He treated my comments on his lack of initiative, working in too much detail before it is demonstrated to be needed and his lack of practical skills in the field in the same manner as he did the driving trainers evaluation. He took no time to evaluate them and only continued to refute them and to imply everyone was telling him he was doing well and telling me something else. I explained it was not the inspector's job to evaluate him on the basis of one inspection but my job to summarize all the input.

I express concerns about him being able to look after his own safety if he were to be working on his own, about his receipt of constructive criticism and his lack of initiative and practical skills. I explained I would be concerned about his inspecting industrial plants as he did not seem to be aware of his environment and there could be significant hazards. He continually returned to the fact that he found the job easy and he was doing well. I told him several times we had different views on his performance. He seemed to be worn down by the discussions and reluctantly agreed.

As a result of our discussions, his coordinator put together a focused six week training session for Mr. Souaker and we agreed to evaluate his progress based upon the results of this further training. The program supplemented normal training by having a bilingual staff member accompany him to ensure there were no language barriers and he could get the feedback as soon as practicable. The results of the assessments were to be forwarded to his coordinator and then forwarded to me. I agreed to meet with Mr. Souaker around November 15, 2006.

Note : When my prsonal family matters interfered with having a meeting on Nov. 15, 2006 I verbally informed Mr. SOuaker of this change in timing.

[Sic throughout]

Mr. McCabe stated that he discussed all the points recorded in his notes with Mr. Souaker but that Mr. Souaker did not agree with his performance evaluation and that he tried to refute each point. Due to the shortcomings observed, Mr. McCabe decided to provide Mr. Souaker with what he described as an “. . . additional six weeks of training . . .” over the course of which Mr. Souaker was required to conduct inspections with experienced, bilingual inspectors who could support him and give him feedback.

[19] Following the meeting with Mr. Souaker on October 2, 2006, Mr. McCabe received, on October 10, 2006, the following email from Mr. Alu:

I would like to express my disapproval of the evaluation system that is presently in place at the CNSC. My evaluation of Fathi was done in a very non formal way with some off the cuff remarks. I did not realize that those exact words would be used in his final evaluation report. Had I been putting these comments down in writing, I would have chosen my words much more carefully, So with your permission, I would like to resubmit my evaluation.

Organisation: I feel Fathi is rushing to get his inspectors card. He is taking too much on his plate and is falling behind in his reports, follow-ups and all the other daily responsibilities. I have recently expressed my concern about this to Fathi and Eric.

Inspections: I have seen a gradual and steady improvement in his work. During the inspections, if I were to judge that something was done incorrectly, I would have Fathi aside and discuss the issue then and there. I might add that this did not occur very often. At the end of the day, in a very casual way, we would discuss the generalities of the inspection. The inspection reports were well written with only minor changes to be made,

Adapting to the job: When Fathi first started here, some basic activities such as booking a hotel or driving, where proving to be a challenge. I believe that there has been improvement in this category but feel there is still room for improvement.

Overall: I feel that Fathi will need time to develop. If there continues to be improvement, then I believe he will have the

tools to do the job correctly and efficiently. I would recommend another evaluation at a later date.

As for the new inspectors, I have no issues with taking them out as long as I am not evaluating them at the moment. However, once they begin performing the inspections and I am supervising, I would like to have some guidelines to follow. I would like to see a type of written evaluation form that we could complete after each inspection.

[20] Following the meeting of October 2, 2006, Mr. Souaker completed three series of inspections as part of the “additional training”: the first series, from October 16 to 19, 2006, took place in Newfoundland, with Mr. Fortier; the second series was in Alberta, from October 23 to 27, 2006, with Mr. Poirier; and the third series, again with Mr. Poirier, took place in the Gatineau area in Quebec from November 6 to 8, 2006. Mr. McCabe chose Mr. Poirier because he did not work directly with Mr. Souaker, because he would be able to offer a neutral perspective and because he had solid expertise coupled with extensive experience in training and evaluation.

[21] Mr. Fortier said that during the week he spent with Mr. Souaker he noted that Mr. Souaker still lacked experience, that he was too dependent on his checklist, that he sometimes used vocabulary that licensees did not understand, that he did not always seem to understand the information provided by the licensees, that he did not notice signs in the licensees’ behaviour or information that might indicate non-compliance, and that he sometimes had difficulty identifying what was relevant. Mr. Fortier indicated that he provided feedback to Mr. Souaker at the end of each day of inspections and that he wrote an observation report that he sent to Mr. McCabe.

[22] Mr. Fortier was asked about the allegations of discrimination that Mr. Souaker made against him and the comments that Mr. Souaker alleged that he made over the week of inspections. He stated that he became aware of Mr. Souaker’s allegations and the notice that he sent to the CHRC two weeks before he testified. He denied making discriminatory comments toward Mr. Souaker and stated that some of his comments had been twisted and presented completely out of context. Mr. Fortier stated that he had been upset to hear that Mr. Souaker put words in his mouth and that Mr. Souaker took some of the things that he had said completely out of context. He vigorously denied the discriminatory comments that Mr. Souaker claimed that he made and commented on some of Mr. Souaker’s allegations.

[23] First, he denied having said that Mr. Souaker had a closed mind and no personality. However, he acknowledged that he had a discussion with Mr. Souaker about his ethnic origin and religious faith. He presented the following version. The first day of the trip, he and Mr. Souaker stopped for lunch, and he noticed that Mr. Souaker did not order anything to eat. He asked him why he was not eating, and Mr. Souaker explained that he was observing Ramadan and that he could not eat while the sun was up. They then discussed Algeria and Islam. Mr. Fortier stated that he was curious because, he said, he was “ignorant” of that religion and that he asked Mr. Souaker questions out of interest. He said that he asked questions about Algeria, its social structures and its wealth and took Ethiopia as a point of comparison to understand how Algeria figured between Canada and Ethiopia. Mr. Fortier said that he understood from Mr. Souaker’s explanations that Algeria resembled Canada more than Ethiopia. Mr. Fortier also stated that he asked Mr. Souaker about the hijab and its purpose. He denied all the other discriminatory comments that Mr. Souaker claimed that he made against Muslim women and Islam.

[24] Mr. Fortier stated that the discussion had been very friendly, that the rest of the week had gone well and that he had felt no uneasiness between himself and Mr. Souaker.

[25] Mr. Fortier also testified about the comments that he allegedly made to Mr. Souaker because he did not drink alcohol. He denied making those comments and stated that a member of his immediate family had had problems with alcohol and that he would never ridicule someone for abstaining from drinking alcohol.

[26] Mr. Poirier testified about the two series of inspections on which he accompanied Mr. Souaker. His observations were similar to those of Mr. Fortier in many respects. He indicated that Mr. Souaker lacked practical skills, was much too attached to his checklist (which he followed systematically during interviews with licensees) and had difficulty communicating with licensees because he did not adjust his vocabulary to that of their representatives and that his accent, both in English and in French, was hard for some licensees to understand. He also indicated that Mr. Souaker proceeded too mechanically, tended to miss signs of non-compliance, and did not seem to listen to the information and answers provided by the licensees but rather focused on the next question that he had to ask. Mr. Poirier prepared an

observation report for Mr. McCabe on the two weeks he spent with Mr. Souaker. That report was presented as evidence.

[27] Mr. Poirier said that he shared his observations with Mr. Souaker and that he provided him with feedback at the end of each day of inspections. He indicated that, despite his guidance, Mr. Souaker repeated the same errors, which caused him to worry about Mr. Souaker's ability to adapt and learn from his mistakes and those of others. Mr. Poirier also indicated that Mr. Souaker was not receptive to criticism. In Mr. Poirier's opinion, it was clear that Mr. Souaker's learning curve was a lot higher than those of the other inspectors and that it would take him a few years to become a good inspector.

[28] Mr. Poirier stated that he had been upset by how the second week of inspections had ended. On the Wednesday of the second week, Mr. Souaker told him that he could lose his job if Mr. Poirier did not give him a positive performance evaluation. He stated that Mr. Souaker had tears in his eyes during that discussion. He then informed Mr. Souaker that he was a bargaining agent representative and that he could refer him to another bargaining agent representative if he wished to have the support of his bargaining agent. Mr. Poirier indicated that the same topic of discussion was raised the following day, that Mr. Souaker was crying and that Mr. Souaker asked for a positive evaluation. Mr. Poirier said that he told Mr. Souaker that he had a duty to communicate his observations objectively.

[29] Mr. McCabe said that he understood from the observations of Mr. Fortier and Mr. Poirier that, during those three weeks of inspections, Mr. Souaker had not progressed substantially, that the observed shortcomings remained and that Mr. Souaker had displayed an inability to accept criticism and to receive feedback.

[30] Mr. McCabe also received a note from Mr. Fortier dated October 9, 2006 in which he recounted a discussion he had with two inspectors who attended training with Mr. Souaker and who were critical of his behaviour during that training. For example, they indicated that he was not receptive to comments and advice from his colleagues, that he was very bossy and that he had made a disparaging remark about the work of a female inspector.

[31] Based on all the information in his possession, Mr. McCabe decided to extend Mr. Souaker's probation. He indicated that he was to meet with Mr. Souaker on

November 15, 2006 to review the situation and to discuss the observations of Mr. Fortier and Mr. Poirier. However, he had to postpone the meeting for family reasons. He finally met with Mr. Souaker on January 12, 2007, in the presence of Mr. Fortier.

[32] During that meeting, Mr. McCabe gave Mr. Souaker a letter that he had signed on January 8, 2007 and that described Mr. Souaker's alleged shortcomings as follows:

[Translation]

Subject: Performance Problems

Following our meetings of April 4, 2006 and October 2, 2006, I would like to confirm the discussions we had about your performance since your arrival at the CNSC on February 13, 2006.

During our discussions, I mentioned that you needed to improve your performance. We have noticed that you lack initiative and practical skills, that you waste time by unduly dwelling on details and that you find it difficult to accept constructive comments intended to help you improve your performance. Given that you do not seem to be very familiar with the work environment and the serious hazards that it can present, I expressed my concerns to you about the fact that your job involves inspecting industrial plants.

As I indicated, those qualities contrast with the qualities required to be a good inspector, notably, initiative, intuition, open-mindedness and independence. You communicated several times that you understood the problems and that you would show initiative from now on.

Despite the efforts made to help you and the follow-up, workplace training, mentoring, support and advice, you have not shown that you have the skills and the adaptability that are necessary to accomplish the tasks that are assigned to you. Consequently, we developed an additional six weeks of training (Oct. 2 - Nov. 8) to evaluate your progress and give you feedback to help you reach a satisfactory level of performance. The results of the evaluations completed for the additional training show that you have difficulty doing your work. Recent examples have shown that you still have a hard time adapting inspection techniques, that you conduct inspections too mechanically, that some of your questions have nothing to do with the authorized activity and that you sometimes repeat a question even though the licensee has already answered it. Your difficulties coordinating activities and accepting constructive comments persist, and your sense of direction is lacking.

[33] Mr. McCabe stated that during the meeting he offered to accompany Mr. Souaker during a round of inspections, along with Mr. Fortier, to give him a chance to demonstrate his skills. He stated that he also suggested to Mr. Souaker that he look for employment opportunities within the CNSC in an area more in line with his experience and his profile.

[34] In paragraph 9 of Annex 1 of the notice that he sent to the CHRC, Mr. Souaker alleges that he was completely isolated at work after the meeting of January 12, 2007, that Mr. Alu and Ms. Simard refused to conduct inspections with him, and that he later learned from documents obtained through an access to information request that Mr. Fortier had explicitly asked Mr. Alu and Ms. Simard not to give him work. Mr. Fortier testified about those allegations. He denied isolating Mr. Souaker and asking Mr. Alu and Ms. Simard not to give him work. Finally, he denied that Mr. Souaker came to see him every day to ask for work and that Mr. Alu and Ms. Simard had refused to conduct inspections with Mr. Souaker. The employer filed an email that Mr. Souaker obtained through an access to information request. The email, undated, is from Mr. Fortier to Mr. Alu and Ms. Simard and is copied to Mr. Souaker. It reads as follows:

[Translation]

As of now and until further notice, I ask that you not to give any more work to Fathi. I also ask that you take back everything that he now has.

That email was accompanied by a screenshot showing that it had never been sent. Mr. Fortier stated that he did not remember it. However, he indicated that he must have prepared it in the context of the discussions with Mr. McCabe concerning Mr. Souaker's training but that they must have later changed their minds.

[35] For his part, Mr. McCabe indicated that Mr. Souaker never told him that he had been isolated at work following the January 12, 2007 meeting.

[36] Mr. McCabe accompanied Mr. Souaker on five inspections during the week of February 12, 2007. One inspection was in English, and four were in French. Mr. McCabe said that he noticed the same shortcomings in Mr. Souaker as had the inspectors. He indicated that during the first inspection even the licensee's representative commented that Mr. Souaker seemed glued to his checklist. Mr. McCabe indicated that during another inspection it was noticed that a worker had been overexposed to

radioactive materials, that the licensee's representative did not have an appropriate process in place to avoid that type of situation and that Mr. Souaker did not grasp the seriousness of the situation. Cross-examined on his ability to follow what happened during the French inspections, Mr. McCabe stated that he had relied on the checklist.

[37] After the third day, Mr. McCabe cancelled the inspections scheduled for the fourth day due to bad weather and poor road conditions. He stated that, in any case, he had observed Mr. Souaker enough to draw his own conclusions. He also indicated that he had not made comments to Mr. Souaker at the end of each of his inspections so as not to discourage him.

[38] Mr. McCabe met with Mr. Souaker when they returned to the office, on February 15, 2007, to share his observations. He also saw him the following day. Mr. McCabe indicated that during their discussions Mr. Souaker kept going back to the driving exam that he had taken at CAA-Quebec and that he had failed on his first attempt. Mr. Souaker said that he still doubted the objectivity of the examiner, noting that the examiner had asked him where he had come from. Mr. McCabe said that he then asked Mr. Souaker if he felt that he had been the subject of discriminatory treatment by the examiner or anyone else and that Mr. Souaker initially replied timidly in the negative. Mr. McCabe said that he asked the question again and that Mr. Souaker denied having been the subject of discriminatory treatment.

[39] Mr. McCabe denied that Mr. Souaker informed him at any point that he had been the subject of discriminatory treatment. Cross-examined about a meeting that he reportedly had with Mr. Souaker's bargaining agent representatives on January 19, 2007, Mr. McCabe stated that they wanted to discuss Mr. Souaker's file and the possibility of him finding another position within the CNSC. Mr. McCabe indicated that no references to allegations of discriminatory treatment were made during that meeting. Notes taken during that meeting, which were presented as evidence, do not report allegations of discrimination made by Mr. Souaker.

[40] Mr. McCabe analyzed the overall situation and recommended to Ramzi Jammal, Director General, Directorate of Nuclear Substance Regulation, CNSC, that Mr. Souaker be rejected on probation because he did not meet the requirements of his position. He sent a memo to the manager of human resources in which he shared his performance review of Mr. Souaker and his recommendation.

[41] On March 29, 2007, Mr. Jammal signed Mr. Souaker's rejection letter, which reads in part as follows:

[Translation]

A review of your overall performance has indicated that you do not meet the requirements of your position. Although you were clearly informed of your shortcomings and we provided you with extra coaching and time to improve your performance to a satisfactory level, your shortcomings in mastering and adapting to the tasks remain.

Despite the efforts made to help you in the form of supervision, workplace training, mentoring, assistance and orientation, and six weeks of additional targeted training, you did not demonstrate the skills and adaptability required for the assigned tasks. Therefore, other measures were taken, such as extending your probation period and organizing a number of inspections with your manager and the coordinator of the regional office to help you improve your performance to a satisfactory level.

You were informed of the requirements of your position at a number of meetings and in connection with the support provided, as described above, to help you improve. You were also informed in a letter dated January 8, 2007, of your shortcomings and the consequences if you did not meet the requirements.

Your abilities to coordinate activities, adapt inspection techniques, develop the skills of an inspector, accept constructive feedback and implement corrective measures are below the standard expected for an employee in your position. Consequently, I have no choice but to reject you on probation, effective at the close of business on March 30, 2007.

B. For the grievor

[42] Mr. Souaker's description of an inspector's job was consistent with the description given by the employer's witnesses. He also said that Mr. Fortier was his immediate supervisor and that Mr. Fortier directly supervised him. Mr. Fortier supervised the staff and evaluated staff performance. According to Mr. Souaker, Mr. McCabe was much less involved in operations.

[43] Mr. Souaker testified about his integration into the Laval office. He stated that on his second day Mr. Fortier talked to him about the level at which he had been hired, i.e., NR-SI-06, and told him that since he had been hired at such a high level he should

have the skills to perform inspections autonomously. Mr. Fortier also apparently indicated that the office's inspectors had not been unanimous about his being hired at that level.

[44] Mr. Souaker stated that in the weeks after he was hired he was assigned material to read while the other inspectors hired at the same time started observing inspections as early as their second week of work. He stated that he had to wait six weeks before observing his first inspections, on a trip to Alberta. He said that, between March 13, 2006 and March 23, 2006, the date of his departure for Alberta, he read documents and that Mr. Fortier was his only contact. When he asked Mr. Fortier questions, Mr. Fortier responded that he, too, was new and that Mr. Souaker was going to be his guinea pig. Mr. Souaker said that, before his trip to Alberta, he had never seen a checklist, which is an inspector's main tool for inspections. He said that he learned about the checklist during his trip to Alberta and that the inspector accompanying him had been surprised that he was not yet familiar with that fundamental tool of the work.

[45] Mr. Souaker testified about his meeting with Mr. McCabe on April 4, 2006, but his version was completely different from that of Mr. McCabe. Mr. Souaker stated that the meeting had not been scheduled and that it was held after he took the initiative to stop in to say hello to his colleagues at the Ottawa office before meeting with the CNSC president, who had invited new employees to meet her. He said that his visit lasted five minutes at the most and that he saw Mr. Larabie, Mr. Poirier and Mr. McCabe. Mr. Souaker stated that Mr. McCabe did not criticize him during the meeting. On the contrary, he encouraged him in his new job.

[46] Mr. Souaker rebutted the contents of Mr. McCabe's notes. Mr. McCabe said that he wrote them after the meeting. Mr. Souaker denied that the meeting lasted 20 minutes and that Mr. McCabe made any remarks about his performance. He rebutted each complaint in the notes, stating among other things that he never had trouble booking a hotel room or filling up a gas tank. He also put into context the allegation in Mr. McCabe's notes that he had been unable to travel alone from a garage to an office and noted that he had taken a different exit from the highway than Mr. Fortier, which had made his trip longer.

[47] Mr. Souaker also testified about his meeting with Mr. McCabe on October 2, 2006. He said that the meeting had not been scheduled in advance and that

it was held spontaneously during his trip to Ottawa for a course. He noted that he stopped by the Ottawa office to say hello to his colleagues before going to his course, just as he did on April 4, 2006. He said that this time Mr. McCabe told him that he wanted to meet with him and that, during their meeting, Mr. McCabe addressed the following two issues: the CAA-Quebec driving test that he had had to retake and the alleged negative comments made by the Laval inspectors with respect to his performance.

[48] Mr. Souaker said that Mr. McCabe informed him that he had received a negative performance report from the three Laval inspectors about the following three specific areas: Mr. Souaker's initiative, his response in the field and his adaptability. Mr. Souaker said that he was very surprised and said so to Mr. McCabe because the inspectors never mentioned it or made any other major comments when he accompanied them on inspections. He said that he told Mr. McCabe that, on the contrary, the inspectors told him he was doing a good job. Mr. Souaker said that he asked Mr. McCabe if he could meet with his colleagues to understand their comments or to clarify things, to which Mr. McCabe apparently agreed, asking him to meet with them individually.

[49] Mr. Souaker said that during the meeting Mr. McCabe assumed a very intimidating tone. He noted that Mr. McCabe asked him if he saw himself as a scientist, saying that, if he did not like the job, he could "[translation] work on the numbers side in the reactor division." Mr. Souaker also said that he asked Mr. McCabe to give him some examples of the shortcomings that were alleged by Mr. Souaker's colleagues. He tried to explain the complaints against him, but Mr. McCabe did not give him any specific examples. Mr. McCabe did not let Mr. Souaker explain and said the following to him: "[translation] You don't listen, and since you don't listen, you are going to repeat back to me everything that I told you from the beginning of the meeting." Mr. Souaker stated that he then had to repeat back to Mr. McCabe everything that he had said since the beginning of the meeting.

[50] Mr. Souaker stated that he felt humiliated by Mr. McCabe's attitude toward him and felt that he was the victim of an injustice because he was doing a good job, he had good relationships with his colleagues and he had never received negative comments from them. He said that, on the contrary, during his inspections the inspectors gave him positive comments and noted a few areas for improvement, but never any major

comments. Mr. Souaker said that Ms. Simard accompanied him on most of his inspections.

[51] Mr. Souaker said that he met individually with his three colleagues when he returned to the Laval office. He first met with Mr. Fortier to ask why Mr. Fortier had sent a negative report about him to Mr. McCabe without talking to him first. He noted that Mr. Fortier responded as follows: “[translation] In any event, we didn’t want him to make your life miserable,” and added that he told Mr. McCabe that he thought Mr. Souaker had a closed mind and no personality.

[52] Mr. Souaker then met with Mr. Alu and stated that Mr. Alu confirmed that the negative comments made to Mr. McCabe had not come from him. Mr. Souaker said that Mr. Alu told him the opposite. Mr. Alu liked him and was very surprised to hear what Mr. McCabe had said.

[53] Mr. Souaker said that he then met with Ms. Simard, who allegedly told him that she had sent only one document with comments about his performance, i.e., an email dated August 25, 2006 that she sent to Mr. Fortier. Ms. Simard forwarded a copy of the email to Mr. Souaker, who submitted it in evidence at the hearing. It reads as follows:

[Translation]

In general, he does a good job with the inspections themselves, even if he is a bit slow, but he should get faster with time. The research laboratories were fine except that he had forgotten to verify the contamination. Labo S.M. took a long time, but the licensee was not very organized. He did rather well for the nuclear medicine, but he does not yet sufficiently understand how it works. A day-long internship in a department would be beneficial for him, especially to help him understand the different inventory and review systems that they use. On the practical side, he did okay with the help of the GPS and was able to find the locations. As far as preparing the meetings and tracing the inspection history of the licensees we visit, he will need practice, which I intend to do to prepare for Halifax. On the positive side, he is meticulous, polite and, with the checklist, he can do inspections correctly with a couple of oversights, but he learns quickly.

[54] Mr. Souaker prepared a chart of all the inspections that he had performed and said that he included Mr. Alu’s comments from their meeting following his meeting with Mr. McCabe on October 2, 2006. He also said that, with respect to each inspection,

Ms. Simard wrote her comments on the chart about Mr. Souaker's performance. Mr. Souaker said that after meeting with his three colleagues he forwarded the chart to Mr. McCabe with the following message:

As I proposed to you, I discussed with staff, Eric had family obligations: he heard me but did not emit comments before leaving the office.

Daniel confirmed that he was satisfied with my inspections and confirmed me that was well done. He didn't find any particular problem. I asked him about adaptability, initiatives and reaction in the field, he told me he didn't observe any problem of this kind and remember me when we were in Quebec, he was doing a consolidate inspection, he find me very helpful and positive when I was helping him by taking notes, inspecting laboratory instruments, doing the contamination tests and verifying all posters and stickers. He told me that he has used my notes to complete his report.

In the report on the inspections (attached) that you asked me, he propose me to write this comment: The supervisor was satisfied at the end of the inspection and confirm me that was well done, all comments were done during inspection.

Louise confirmed that I'm doing well my inspections taking initiatives, with good reaction in the field and no particular problem of adaptability. Some points need to be improved but it will come with time and give me the example of speed in inspections. The comments written on my inspection report are hers. I ask her to comment each inspection I done with her which she did.

[Sic throughout]

[55] Mr. Souaker said that Ms. Simard even suggested that he contest Mr. McCabe's evaluation.

[56] Mr. Souaker said that Mr. Alu and Ms. Simard told Mr. McCabe that they disagreed with Mr. Souaker's performance evaluation and with the manner in which their comments had been addressed. They subsequently refused to accompany the new inspectors.

[57] Mr. Souaker returned to the additional training that Mr. McCabe had required him to take and said that, in fact, there was no specific training plan. Rather, he was asked to do his regular work, meaning preparing and carrying out inspections, while

being accompanied by Mr. Poirier and Mr. Fortier. He had not been informed of any objectives.

[58] Mr. Souaker testified about the week spent in Newfoundland with Mr. Fortier and maintained that it did not go well. He first talked about the quality of his relationship with Mr. Fortier. He said that Mr. Fortier no longer spoke with him after October 2006. He attributed Mr. Fortier's attitude to the fact that Mr. Fortier's relationship with the other two inspectors at the Laval office had deteriorated because they had expressed their disagreement with Mr. Fortier's evaluation of Mr. Souaker's performance and with the comments that Mr. Fortier had attributed to them in that regard. Mr. Souaker indicated that since those incidents Mr. Fortier had talked to him only when strictly necessary, only for professional purposes and always during group meetings.

[59] Mr. Souaker confirmed that Mr. Fortier never gave him any feedback after the October 2006 inspections and told him that when he wrote his report he would give him a copy. Mr. Souaker confirmed that he never received Mr. Fortier's report and indicated that, during their meeting on February 15, 2007, Mr. Fortier himself admitted in front of Mr. McCabe that he had not given Mr. Soaker any feedback during the week of inspections. Mr. Soaker said that he obtained a copy of Mr. Fortier's report on January 22, 2007 after he made an official request with the assistance of his bargaining agent.

[60] Mr. Souaker also refuted Mr. Fortier's statement that the issue of his ethnic origin and religious affiliation came up after Mr. Fortier noticed that Mr. Souaker was not eating during the first lunch in Newfoundland. Mr. Souaker stated that Mr. Fortier knew well before their departure for Newfoundland that Mr. Souaker was observing Ramadan and, therefore, that he could not eat or drink from sunrise to sunset. Mr. Souaker noted that in 2006 Ramadan began on September 24 and continued until October 23. From September 24 to their departure for Newfoundland on October 15, 2006, he had been observing Ramadan, and he stated that everyone at the office was aware of it. He stated that he would sit with his colleagues during lunch even though he was not eating and that he had spoken of Ramadan with his colleagues on several occasions and often in the presence of Mr. Fortier.

[61] Mr. Souaker stated that the discussion that he had with Mr. Fortier about his ethnic origin and religious affiliation started in the car on their way back from an

inspection. He said that Mr. Fortier started the conversation by asking him why he had immigrated to Canada. Mr. Souaker said that he told him about the immigration process and his reasons and those of his family. He stated that Mr. Fortier then raised the problems in Muslim countries, in particular terrorism and the economic problems, to which he said that he retorted that it was not that bad in Algeria. The conversation continued, and at one point, Mr. Fortier apparently told him that, to him, Muslims had closed minds and told their wives what to do and that the women had no freedom. Mr. Souaker stated that he felt provoked by Mr. Fortier's words and that he did not want to respond in the same manner. Instead, he explained Islam's main beliefs and what Islam meant to him. The discussion continued and Mr. Fortier allegedly asked Mr. Souaker if he went to church. Mr. Souaker said that he explained to Mr. Fortier that Muslims go to mosque and not to church, stating that he went to mosque and that so did his wife and children. He then said that Mr. Fortier asked him what he would do if his children became Christians, to which he answered that it would affect him as a father, but if they made that decision as adults, it was their choice. Mr. Souaker said that Mr. Fortier then asked him why he came to Canada and did not go back to Algeria.

[62] The conversation about Algeria continued, and Mr. Fortier allegedly asked him if there were roads and stores like here or if Algerians lived outside like in Ethiopia. Mr. Souaker said that he responded that Algeria was not Canada but that people did not live outside and that they had the necessities. Mr. Souaker stated that he kept quiet, hoping that Mr. Fortier would change the subject because the direction of the conversation was having a strong effect on him.

[63] According to Mr. Souaker, Mr. Fortier continued the conversation, saying that he had seen beautiful Muslim women wearing headscarves and asking him if his wife wore a headscarf. Mr. Souaker said that he responded affirmatively and that he explained that the headscarf was part of the hijab. Mr. Fortier then allegedly said the following to him: "Why do you Muslims hide your women? That's so old fashioned. How do you live with that religion?" Mr. Souaker said that he responded that wearing the hijab was a divine order, that Muslims wear it out of conviction and that appearance does not make women free or oppressed. Mr. Souaker stated that the conversation ended there.

[64] Mr. Souaker also said that Mr. Fortier made a comment about him not drinking alcohol. He said that after each day of inspections they would stop for a meal, and

each time, Mr. Fortier would have an alcoholic beverage, whereas he would always have juice or a carbonated beverage. Mr. Souaker said that Mr. Fortier never missed an opportunity to say the following: “[translation] That’s what you’re drinking? It’s ridiculous, but it’s your choice.” Mr. Souaker stated that he told Mr. Fortier that he was Muslim and that he had chosen not to drink alcohol.

[65] Mr. Souaker then testified about the contents of the notification that he sent to the CHRC. Mr. Souaker stated that his bargaining agent representative had prepared Annex 1, which contained his allegations, using the information that he had given to her. He also confirmed that he approved the final version of the annex before it was forwarded to the CHRC.

[66] Mr. Souaker also testified about the two weeks of inspections that he spent with Mr. Poirier. He said that in general the inspections went well and that Mr. Poirier had made positive comments and some remarks on areas to improve. He also disagreed with Mr. Poirier’s performance evaluation and stated that Mr. Poirier had not told him about the shortcomings stated in his observation reports. Mr. Souaker talked about the comments that he said Mr. Poirier made to him. After one inspection, Mr. Poirier allegedly recommended that he adapt his level of language to that of the person with whom he was speaking, saying that licensees and their representatives do not all have the same level of education. Mr. Souaker said that he responded to Mr. Poirier by saying that he used standard French, that the inspection had gone well and that the licensee had answered all his questions without asking for clarification. After another inspection, Mr. Poirier allegedly remarked that the person with whom they had met had not understood Mr. Souaker’s questions because Mr. Souaker spoke European French and that he needed to adapt his accent and language to the licensee. Mr. Souaker said that he told Mr. Poirier that he admitted that the person had asked him to repeat and clarify some information, which had enabled him to dispel any misunderstanding.

[67] Mr. Souaker said that Mr. Poirier also made comments about the importance of body language, telling him about things that he taught in a course that Mr. Souaker had not yet taken, but without criticizing him and without drawing a parallel with his way of carrying out inspections. Mr. Poirier apparently also told him that not all licensees understood his English well, especially in western Canada.

[68] Mr. Souaker stated that he had never seen Mr. Poirier's observation reports before the hearing. He stated that he had contacted Mr. Poirier to ask him for copies of the observation reports and that Mr. Poirier had refused, stating that he was going to follow procedure and forward them to Mr. Fortier, to whom Mr. Souaker would need to speak to get a copy. Mr. Souaker said that he then asked Mr. Fortier for Mr. Poirier's reports, which Mr. Fortier refused to give him.

[69] Mr. Souaker testified about Mr. Poirier's statements that Mr. Souaker had allegedly asked him, with much emotion, for a good evaluation because he was afraid of losing his job. Mr. Souaker denied that it happened and said that during the feedback meetings with Mr. Poirier he never begged Mr. Poirier for a positive evaluation and did not raise the possibility of losing his job.

[70] With respect to Mr. Poirier's statements that he allegedly had informed Mr. Souaker that he was a bargaining agent representative and that he could refer him to the bargaining agent, Mr. Souaker again denied Mr. Poirier's words, stating that he did not even know at that time that Mr. Poirier was a bargaining agent representative and that, at that point, he did not feel the need to ask his bargaining agent for help. He stated that he first contacted his bargaining agent after his meeting with Mr. McCabe on January 12, 2007.

[71] During his testimony, Mr. Souaker rebutted the criticisms made against him. He submitted in evidence the results from the second language tests he underwent on hiring, which showed that he obtained higher results than the job requirements specified. He also gave numerous concrete examples from inspections to show that he was capable of taking initiative, was shrewd and could adapt in the field, and that he was not glued to his checklist. He also testified about the criticism that he received about his driving abilities. He submitted an excerpt of his driving record from the Société de l'assurance automobile du Québec (SAAQ) indicating that he had never committed a violation or incurred any demerit points. With respect to his CAA-Quebec driving examination, he stated that he was very surprised on failing the first time and that, when he retook it, he scored 88%. He said that he was also surprised that Mr. McCabe criticized the quality of his driving in January 2007 when he had retaken the examination and scored 88%. He also reported that he had driven in different places and environments for work and that he had never had an accident or damaged a vehicle.

[72] Mr. Souaker also testified about the criticism apparently made against him by the two inspectors with whom he had taken a training course in October 2006. He stated that he was never informed of the complaints and that his behaviour was appropriate during the course.

[73] Mr. Souaker testified about the January 12, 2007 meeting with Mr. McCabe and Mr. Fortier. He said that he did not know the purpose of the meeting in advance and that he was completely surprised when he learned about the letter dated January 8, 2007 from Mr. McCabe. Given that he had not received any feedback after the inspections that he carried out with Mr. Fortier and Mr. Poirier, he thought that everything was satisfactory. He reiterated that Mr. Fortier did not make any comments to him during the inspections that he performed with him in October 2006. However, Mr. Fortier said that he would give him a copy of the report, but he never did. Mr. Poirier's comments had nothing to do with the criticism of Mr. Souaker in the letter dated January 8, 2007.

[74] Mr. Souaker stated that, when Mr. McCabe proposed that he and Mr. Fortier accompany him on inspections, Mr. McCabe promised to be transparent, to give him feedback after each inspection and to give him the opportunity to comment on the report that he would write afterward.

[75] Mr. Souaker added that he asked Mr. McCabe to give him examples of the criticisms made in the January 8, 2007 letter. Mr. McCabe told him that he did not have his notes with him and that he would send them to him. He never sent them, even though Mr. Souaker asked him again by email. Mr. Souaker also stated that, with respect to the inspections on which Mr. McCabe accompanied him, Mr. McCabe did not give him a plan or objectives but simply asked him to prepare an inspection schedule and to proceed as usual.

[76] Mr. Souaker stated that, between January 12, 2007 and February 12, 2007, he was completely isolated at work. He was not assigned any inspections, and his colleagues completely ignored him. He said that every day he would see Mr. Fortier and ask him for inspections. Mr. Fortier would say that he would give him some but, in fact, he never did. Mr. Souaker stated that he did not participate in a single inspection during that time.

[77] Mr. Souaker stated that in January and February 2007 his situation was emotional torture and that he did not deserve such treatment. He said that he spoke with Mr. McCabe and asked him to intervene, but he did not.

[78] Mr. Souaker testified about the inspections performed with Mr. McCabe and Mr. Fortier. He said that the inspections, which were to take place over one full week, were limited to two days during which he did five inspections, four in French and one in English. Mr. McCabe cancelled the other inspections due to weather conditions.

[79] In testifying about Mr. McCabe's version of an incident in which a worker had been overexposed, Mr. Souaker maintained that he was the one who discovered that a worker had been overexposed to radioactive material and that he understood the severity of this situation and carried out the appropriate follow-up with the licensee. Mr. Souaker denied the comment that Mr. McCabe attributed to a licensee's representative that Mr. Souaker had been glued to his checklist.

[80] Mr. Souaker stated that he did not receive any comments or feedback from Mr. McCabe or Mr. Fortier after each inspection. Mr. Souaker said that he spoke with Mr. McCabe when he was alone with him on their return and reminded him he had promised to be transparent and to give him feedback after each inspection. Mr. Souaker claimed that Mr. McCabe then told him that he was not an inspector but that Mr. Fortier was going to prepare an evaluation report on which Mr. Souaker would have the opportunity to comment. Mr. Souaker stated that he never received the report.

[81] Mr. Souaker stated that the only feedback he received was on February 15, 2007, during a meeting with Mr. McCabe. During that meeting, Mr. McCabe allegedly made a number of remarks and criticized him for asking the same question three times. Mr. Souaker stated that he asked Mr. McCabe if he had noted the items mentioned in the letter dated January 8, 2007. Mr. McCabe told him that, even though he had not noticed any "technical deficiencies," he thought that he worked like a junior inspector. Mr. McCabe also suggested that he ask open-ended questions instead of closed-ended questions during interviews with licensees and that he take his time during inspections. Mr. McCabe added that Mr. Souaker had communication problems. Mr. Souaker stated that Mr. McCabe told him that he would talk him about his performance again the following week but that Mr. McCabe did not talk to him about it again before rejecting him.

[82] Mr. Souaker also stated that he saw Mr. McCabe again on February 16. He said that he told him that he had been isolated at the Laval office since January 12, 2007. He stated that he also informed him that he was being discriminated against. Mr. Souaker stated that Mr. McCabe responded by saying that “[translation] I’m not a judge” and then left the room and came back with Mr. Fortier. Mr. Souaker indicated that Mr. McCabe then asked Mr. Fortier if Mr. Souaker had been isolated, to which Mr. Fortier responded affirmatively, saying that Mr. Alu and Ms. Simard refused to go on inspections with him. Mr. Souaker asserted that Mr. McCabe then told Mr. Fortier that he wanted Mr. Souaker to start doing inspections again. Mr. Souaker said that Mr. McCabe did not return to the allegation of discrimination.

[83] Mr. Souaker stated that he started to worry after those meetings took place because Mr. McCabe did not talk to him again about his performance, contrary to what he had told him. Therefore, he talked to his bargaining agent and asked to meet with the director general, Ramzi Jammal, to give him his version of the facts. Mr. Souaker stated that the meeting had been scheduled and that it was cancelled at the last minute for reasons unknown to him. He also submitted the exchange of emails that show that the meeting had indeed been cancelled by the employer.

[84] Mr. Souaker testified about the period after he was rejected on probation. He stated that that period was very difficult and that it affected his health and his family life. He said that he was very stressed and that he suffered from insomnia but that he eventually found another job. He also testified about the steps that he took and the jobs that he held after the CNSC dismissed him.

[85] At the end of his testimony, Mr. Souaker stated that he attributed his dismissal to Mr. Fortier’s discriminatory behaviour toward him. He stated that from the time he was hired Mr. Fortier did not like him, that Mr. Fortier had not been transparent with him, and that during their trip to Newfoundland he had undermined him with questions about his religious affiliation and ethnic origin. He added that Mr. Fortier did not correctly quote comments by Mr. Alu and Ms. Simard in a performance evaluation sent to Mr. McCabe and that Mr. Fortier had then isolated him for a month.

[86] Mr. Souaker confirmed that only Mr. Fortier had made discriminatory comments to him. Mr. Souaker stated that Mr. McCabe had been intimidating and that his behaviour toward him was inappropriate but that he never heard him make

discriminatory comments. He also acknowledged that Mr. Alu, Ms. Simard and Mr. Poirier never made discriminatory comments against him.

[87] Mr. Souaker also confirmed that he did not consult with his bargaining agent about the alleged intimidation. In addition, he confirmed that, during the two weeks spent with Mr. Poirier, he did not tell Mr. Poirier about Mr. Fortier's comments and discriminatory behaviour from the prior few weeks. He also acknowledged that he did not talk to Mr. McCabe in January 2007 but stated that he contacted his bargaining agent in January 2007. His bargaining agent then tried to address the issue of Mr. Souaker's employment without bringing up the allegations of discrimination to avoid friction and attempt to address the situation.

III. Summary of the arguments

A. For the employer

[88] The employer maintained that Mr. Souaker's grievance is not adjudicable because rejection on probation is not one of the matters that can be referred to adjudication under section 209 of the *Act*. The employer further argued that section 211 of the *Act* does not apply to this case because the CNSC is a separate agency not subject to the *Public Service Employment Act*, enacted by sections 12 and 13 of the *Public Service Modernization Act*.

[89] The employer addressed each paragraph in subsection 209(1) of the *Act*. It began by ruling out the application of paragraph 209(1)(c) because Mr. Souaker is not an employee in the core public administration and paragraph 209(1)(d) because the CNSC is not a separate agency that the Governor in Council has designated by order for the purposes of that paragraph.

[90] Contrary to Mr. Souaker's allegations, the employer maintained that the grievance could not be referred to adjudication under paragraph 209(1)(a) of the *Act*, which deals with grievances involving the interpretation or application of a provision of the collective agreement. The employer maintained that the essence of a grievance must be determined to decide whether it is adjudicable and to identify on which paragraph of section 209 the rejection can be based. In this case, the employer argued that, although Mr. Souaker alleged that he was the subject of discrimination and grieved a violation of the non-discrimination clause of the collective agreement, the

essence of his grievance challenged his rejection on probation. From the employer's point of view, the legislator limited the circumstances in which a grievance challenging a termination of employment can be referred to adjudication through paragraph 209(1)(b), subparagraph 209(1)(c)(i) and paragraph 209(1)(d). Rejection on probation does not fall under the adjudicable categories of termination of employment unless it is a disguised disciplinary action.

[91] The employer added that the collective agreement does not provide for the possibility of filing a grievance against a termination and that the non-discrimination clause cannot be used as the basis for a grievance whose essential purpose is to challenge a termination. The employer maintained that referring a grievance that challenges a termination to adjudication, which otherwise would not be adjudicable, under the non-discrimination clause in the collective agreement would not be in keeping with the intention of the legislator, who chose to not grant the right to adjudication to employees rejected on probation; see *Porcupine Area Ambulance Service v. Canadian Union of Public Employees, Local 1484* (1974), 7 L.A.C. (2d) 182.

[92] The remaining provision to be considered is paragraph 209(1)(b) of the *Act*, which addresses grievances against disciplinary action. The employer submitted that the parameters developed in the jurisprudence about rejection on probation within the core public administration apply to a separate agency and that an adjudicator has jurisdiction to examine whether a rejection on probation is a subterfuge that in truth disguises a disciplinary action motivated by bad faith or discrimination. In that context, the employer recognized that it has the initial burden of proving that the rejection on probation was truly employment related. If so, the employer is not required to show that the reasons given justified the rejection. The employer submitted that the onus was then on the employee to provide evidence that his rejection on probation was in truth a disguised disciplinary action or a subterfuge concealing a termination made in bad faith or in a discriminatory manner. In that context, article 6 of the collective agreement became relevant to determining whether the rejection had been carried out in a discriminatory manner. Therefore, the employer submitted that the non-discrimination clause in the collective agreement could be invoked to determine whether the rejection constitutes subterfuge or a disciplinary or bad-faith termination. In that case, the reference to adjudication must be based on paragraph 209(1)(b) rather than paragraph 209(1)(a).

[93] The employer referred me to the following cases: *Canada (Attorney General) v. Leonarduzzi*, 2001 FCT 529, *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (C.A.), *Archambault v. Canada (Customs and Revenue Agency)*, 2005 FC 183, *Lundin v. Canada Customs and Revenue Agency*, 2004 PSSRB 167, *Chaudhry v. Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 72, *Arnould v. Treasury Board (Fisheries and Oceans Canada)*, 2004 PSSRB 80, *Melanson v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 33, and *Ondo-Mvondo v. Deputy Head (Department of Public Works and Government Services)*, 2009 PSLRB 52.

[94] The employer submitted that, in this case, the evidence clearly shows that Mr. Souaker's rejection was related to his employment, notably, to his performance, and that Mr. Souaker did not demonstrate that his rejection was motivated by discriminatory considerations, that it was made in bad faith or that it was disguised disciplinary action.

[95] The employer observed that Mr. Souaker and the employer's witnesses, mainly Mr. Fortier, presented contradictory evidence and that I would have to weigh their respective credibilities. On that point, the employer referred me to the criteria for assessing the credibility of witnesses that the British Columbia Court of Appeal used in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, and argued that in this case the employer's evidence should be preferred over Mr. Souaker's testimony.

[96] The employer submitted that the evidence clearly showed that the decision to dismiss Mr. Souaker was based on the shortcomings observed in his performance and in his practical skills in particular. The employer argued that all the inspectors who observed Mr. Souaker conducting inspections, i.e., Mr. Poirier, Mr. Fortier, Ms. Simard and Mr. Alu, noticed the shortcomings in Mr. Souaker's practical skills. Mr. McCabe also made the same observations when he accompanied Mr. Souaker on a round of inspections in February 2007. The employer argued that observations made by persons who are not concerned in any way by the allegations of discrimination toward Mr. Souaker and who had no reason to want to differentiate adversely with respect to Mr. Souaker are sufficient to show that his rejection was motivated by deficiencies in his performance and, in particular, in his practical skills.

[97] The employer further submitted that Mr. Souaker's contention that he satisfactorily performed his work as an inspector and that he did not receive support or feedback from the employer are not credible. The employer argued that

Mr. Souaker's behaviour, both within the CNSC and during his testimony, shows a person who believes that he is always right, who denies having any shortcomings, who tries to rebut all criticism directed at him and who disagrees with the observations of Mr. Fortier, Mr. Poirier, Mr. McCabe and to some extent with those of Mr. Alu.

[98] On Mr. Souaker's allegations of discrimination, the employer began by stressing that they were directed only at Mr. Fortier and that Mr. Souaker did not claim that Mr. Poirier, Mr. Alu, Mr. McCabe or Ms. Simard treated him in a discriminatory manner or made discriminatory comments against him. The employer argued that Mr. Souaker's allegations of discrimination were not credible and that they were made at the last minute when he realized that he would lose his job. For the employer, it seems implausible that a man like Mr. Souaker, who is educated and has significant life experience, would have been a victim of discrimination from the person he considered his immediate supervisor and would not have reported it in a timely manner. He never told Mr. Poirier. He did not tell Mr. McCabe until February 2007, according to Mr. Souaker himself. He did not tell his bargaining agent until January 2007, even though he had known since at least October 2006 that Mr. McCabe had doubts about his ability to meet the requirements of the inspector position and since January 12, 2007 that Mr. McCabe had decided to extend his probation.

[99] The employer submitted that it is just as implausible that Mr. Souaker's bargaining agent would have been informed of the allegations of discrimination and nevertheless would have chosen not to raise them with the employer when the employer had doubts about Mr. Souaker's ability to satisfactorily perform his work as an inspector and that Mr. Souaker was at risk of losing his job.

[100] The employer further submitted that Mr. Fortier's testimony must be preferred over Mr. Souaker's because it is more plausible and it is more consistent with the whole of the evidence. The employer stressed that Mr. Fortier did not deny having a conversation with Mr. Souaker about his ethnic origin and religious affiliation. Mr. Fortier may have been clumsy in certain respects and said that he was ignorant of Algerian culture and Islam, but he did not make discriminatory comments.

[101] The employer also argued that, even were I to accept Mr. Souaker's version concerning the comments and behaviour attributed to Mr. Fortier, it cannot be concluded from the evidence that there is a causal link between those comments and behaviour and the decision to reject Mr. Souaker on probation. The employer argued

on that point that the decision to recommend Mr. Souaker's rejection on probation was made by Mr. McCabe, not Mr. Fortier, and it was based on similar observations from a number of persons and not only on those of Mr. Fortier. The employer also argued that, according to Mr. Souaker himself, Mr. McCabe was not informed until February 15, 2007, of the allegations of discrimination formulated by Mr. Souaker and that at that time he had already made up his mind about Mr. Souaker's performance.

[102] Alternatively, the employer argued that, if Mr. Souaker's grievance is adjudicable, an adjudicator's jurisdiction against a rejection on probation must be limited to examining whether the employer's decision was made for reasons related to the employee's performance. He referred me to the principles set out in *Porcupine*.

B. For the grievor

[103] Mr. Souaker's perspective on his grievance differs from that presented by the employer. He submitted that his grievance is not based on paragraph 209(1)(b) of the *Act*, which addresses disciplinary measures, since he does not claim to have been subject to disciplinary action or to disguised disciplinary action.

[104] Rather, Mr. Souaker submitted that his grievance is based on paragraph 209(1)(a) of the *Act*, which addresses grievances involving the interpretation or application of a collective agreement. He claimed that his rejection on probation was motivated by discriminatory considerations about his ethnicity and religious affiliation, contrary to article 6 of the collective agreement and to the *CHRA*. Mr. Souaker referred me to the wording of the grievance, which clearly refers to an allegation of discrimination in violation of the collective agreement, as follows:

[Translation]

I contest my rejection on probation on March 29, 2007, because it was carried out in bad faith. It is arbitrary and discriminatory (article 6 of the collective agreement).

[105] Mr. Souaker disagreed with the employer's proposal that the pith and substance of the grievance lies in a challenge to his rejection on probation and not in a dispute arising from the application or the interpretation of the collective agreement. He submitted that, on the contrary, the essence of the dispute lies in the discriminatory treatment that he suffered, first expressed through Mr. Fortier's discriminatory comments, which was followed by adverse treatment and ended with

his dismissal. For Mr. Souaker, his dismissal was the culmination of the discriminatory treatment that he suffered, and the essence of his grievance lies in his allegations of discrimination.

[106] On that point, Mr. Souaker argued that article 6 of the collective agreement expressly prohibits all forms of discrimination and that that provision can legitimately form the basis of his grievance. Mr. Souaker submitted that article 6 clearly grants substantive rights to employees. Mr. Souaker also submits that paragraph 226(1)(g) of the *Act* gives jurisdiction to an adjudicator to interpret and apply the *CHRA* and to make orders in accordance with paragraph 53(2)(e) of the *CHRA*. In this case, the adverse treatment to which he was subjected and his dismissal were based on his religious affiliation and ethnic origin, which are grounds of prohibited or illicit discrimination within the meanings of sections 3 and 7 of the *CHRA*.

[107] Mr. Souaker argued that the jurisprudence does not require proof that discrimination is the only reason or the determinative reason behind the contested action but rather proof that the contested action was motivated, in whole or in part, by discrimination. In support of his proposal, Mr. Souaker referred me to *Bergeron c. Télébec Ltée*, 2005 CF 879.

[108] With respect to his burden of proof, Mr. Souaker submitted that he had to make a *prima facie* case that he was a victim of discrimination, and on that point, he referred me to *Rodovanovic v. Via Rail Canada Inc.*, [1994] C.H.R.D. No. 5 (QL), rendered by the Canadian Human Rights Tribunal. He also submitted that, once a *prima facie* case has been made, the employer must rebut the evidence. On that point, he referred me to *Compagnie minière Québec cartier c. Québec (Commission des droits de la personne)*, 1998 CanLII 12609 (QC C.A.), and to the following quotation in particular:

[Translation]

...

77. Before assessing the fundamental contention in Quebec Cartier that the judge clearly erred in finding that Blais had been dismissed in part due to his age, I would like to humbly say the following about the prima facie doctrine referred to by the judge: in all cases when, in some way, the claimant proves the allegations essential to the proceeding and the evidence is found credible by the tribunal, the respondent will be convicted unless it can counter the evidence brought by

the claimant. This is not a special principle of law, but a simple application of logic. I do not find that proving a fact by presumption in a case involving an alleged violation of a human right or freedom is or should be any different from proving a fact by presumption in any other civil case.

...

[109] Mr. Souaker maintained that he presented *prima facie* evidence showing that the employer discriminated against him, especially Mr. Fortier, who acted as his true immediate supervisor and who influenced Mr. McCabe in his decision to recommend rejecting Mr. Souaker on probation.

[110] Mr. Souaker acknowledged that I must decide between opposing positions and versions, mainly between his version and that of Mr. Fortier and that, to do so, I will need to apply the tests for assessing the credibility of witnesses established by the jurisprudence and choose the testimonies that are the most coherent with the whole of the evidence that has been adduced. He referred me to *Faryna*.

[111] Mr. Souaker also argued that the testimony of a witness who maintains that an event took place must be given preference over that of a person who denies it happened and referred me to *Lefeunteum v. Beaudoin* (1897), 28 S.C.R. 89, in support of his assertion.

[112] Mr. Souaker submitted that, in this case, analyzing all the evidence and applying tests for assessing the credibility of witnesses leads to the conclusion that his version must be retained because it is more credible and probable than that of the employer.

[113] Mr. Souaker initially submitted that he offered or provided clear evidence about the context and the nature of Mr. Fortier's racist comments and inappropriate behaviour toward him. Mr. Fortier never supported him, was not transparent with him, did not give him feedback and did not inform him of the other inspectors' evaluations. Second, Mr. Fortier made racist and denigrating comments during their week of inspections in Newfoundland, isolated him for a month during the extension of his probation period and misquoted comments made by the inspectors Ms. Simard and Mr. Alu about the evaluation of his performance. For his part, Mr. Fortier simply denied the racist comments that Mr. Souaker says he made and stated that he was quoted out of context and that his behaviour toward Mr. Souaker was satisfactory.

[114] Mr. Souaker returned to the employer's comments attacking his credibility based on the fact that he did not contact his bargaining agent in October or November 2006 even though he knew that his job was threatened. He indicated that that he was not worried in October 2006 since the information from Mr. McCabe on the comments of the three inspectors at the Laval office did not correspond to the comments that he had received, and he was convinced that he could set the record straight by meeting with the inspectors. Therefore, he did not feel the need to contact his bargaining agent at that time, and no conclusion can be drawn from the fact that he did not communicate with his bargaining agent representatives at that time.

[115] Mr. Souaker also submitted that the same comment applied to the employer's assertion that it was not plausible that the bargaining agent had been aware of Mr. Souaker's allegations of discrimination but chose not to inform the employer. It was a strategy, while the bargaining agent's priority was to save Mr. Souaker's job, and no conclusion can be drawn from it.

[116] Mr. Souaker also submitted that it was clear from the testimonies of Mr. Fortier, Mr. McCabe and Mr. Poirier that the employer did not do what it should have done to help him and to support him during his probation. Also, the behaviour of the employer's representatives casts doubt on the employer's position that the only reason for Mr. Souaker's rejection was his inability to satisfactorily perform the duties of an inspector. Mr. Souaker stressed the following points:

- From the beginning, Mr. Fortier told him that he had been hired at the NR-SI-06 inspector level and that, as a result, he should be able to prepare and carry out inspections autonomously. Mr. Fortier also told him that the level at which he was hired created discontent within the team.
- Unlike the inspectors hired at the same time as Mr. Souaker, who observed inspections as early as the second week after they were hired, he had to wait until March 26, i.e., six weeks after he was hired, to observe his first inspection in Alberta. In addition, he saw the checklist for the first time during his first inspection, even though it is an inspector's main work tool.
- It is implausible that Mr. McCabe was informed of his shortcomings as early as the beginning of April 2006, when the first inspection in which he participated was on March 26, 2006, the time being too short to evaluate his abilities.

- When Mr. McCabe evaluated his performance in October 2006, he retained only the negative elements of the performance evaluations done by Ms. Simard and Mr. Alu, whereas those evaluations, although they brought up some areas to be improved, contained a number of positive elements that were not considered.
- His relationship with Mr. Fortier deteriorated in October 2006 from the time he questioned Mr. McCabe's evaluation of his performance, based on the observations of the inspectors at the Laval office sent by Mr. Fortier, and after Mr. Alu and Ms. Simard expressed their disagreement about how the evaluation had been completed.
- The additional training that he was supposed to receive in fall 2006 in fact consisted of asking him to do his usual work. He did not receive any coaching or training.
- He had a lot of trouble obtaining concrete feedback with examples of the shortcomings for which he was criticized, and it was impossible for him to conceptualize the criticisms without details or examples. Mr. McCabe refused to provide concrete examples of his criticisms and neglected to follow up as he had promised. Mr. Fortier did not provide him with any feedback during the inspections they performed together and refused to give him Mr. Poirier's written observations. Mr. Fortier never told him about the negative report from the inspectors with whom he had attended a training course.
- The employer did not respect its own performance management policy, which provides that a formal performance evaluation must be completed in the event of performance issues, which did not happen in this case.
- The employer criticized the quality of his English, even though his second-language tests results showed that his level of English was higher than the language requirements of the inspector position.
- The employer questioned his driving abilities, even though his driving record from the SAAQ does not show any violations or demerit points.
- Mr. McCabe stated that he had not yet made his decision in January 2007, even though the exchange of emails between Mr. McCabe and Mr. Fortier in

November 2006 clearly shows that the employer already intended to reject him on probation.

- The employer did not see fit to ask Mr. Poirier to help him again, even though Mr. Poirier was the training specialist.
- He was isolated during the extension of his probation period. The employer did not give him any work, even though it was a crucial time, in spite of his persistent requests and Mr. Fortier's promises to give him work.
- Mr. McCabe stated that he extended Mr. Souaker's probation and accompanied him on inspections to give him a last chance to show his abilities, but in fact, Mr. McCabe cancelled a good number of inspections, accompanied Mr. Souaker on inspections in French even though he did not understand French and did not provide feedback.
- Even though all the employer's witnesses accused Mr. Souaker of staying glued to his checklist during inspections, Mr. McCabe stated that he relied on that same checklist to follow the course of the inspection in French when he accompanied Mr. Souaker and evaluated his performance.

[117] Mr. Souaker also stressed the numerous examples that he provided during his testimony that show his abilities and that contradict the image of him that was created by the employer's witnesses.

[118] Therefore, Mr. Souaker submitted that a full analysis of the evidence shows that his rejection on probation was not truly based on his performance and that Mr. Fortier's discriminatory behaviour toward him influenced the decision to reject him on probation.

[119] Mr. Souaker submitted that the employer is responsible for its managers' actions and that it cannot claim to have been diligent when informed of the situation. On that point, he referred me to *Rodovanovic*. He further argued that the employer did not take the allegations of discrimination seriously and that it did not follow up as it should have. Mr. McCabe was informed of the allegations of discrimination during the meeting on February 15, 2007, but he did not follow up on them. For his part, Mr. Fortier stated that he heard about Mr. Souaker's allegations of discrimination two weeks before his testimony. That shows that the employer did not really investigate,

even though in its response at the final level of the internal grievance procedure it indicated that its investigation led it to conclude that the allegations of discrimination were not justified.

IV. Reasons

[120] I must begin by ruling on the objection to my jurisdiction raised by the employer and determine whether Mr. Souaker's grievance can be referred to adjudication under paragraph 209(1)(a) of the *Act*. The parties view the subject matter of the grievance from different perspectives. Mr. Souaker submitted that his grievance was referred to adjudication under paragraph 209(1)(a), which deals with the application or interpretation of the provisions of the collective agreement, whereas the employer argued that Mr. Souaker's grievance cannot be referred to adjudication under that paragraph. The employer argued that that could only be the case if there is evidence that Mr. Souaker's rejection on probation was a subterfuge concealing a disciplinary termination of employment. In that respect, the employer argued that the principles developed by the jurisprudence on cases of rejection on probation must apply.

[121] For the reasons that follow, I do not share the employer's point of view, and I find that Mr. Souaker's grievance was validly referred to adjudication under paragraph 209(1)(a) of the *Act*.

[122] The employer advanced a number of arguments against Mr. Souaker's position. It first claimed that the substance of Mr. Souaker's grievance lies in the challenging of his rejection on probation and not in discrimination allegations. With respect, I find that the challenge to Mr. Souaker's rejection cannot be dissociated from his allegation of discrimination. He argued that he was the subject of discriminatory treatment based on his ethnic origin and religious affiliation, which ultimately led to his rejection on probation. Therefore, Mr. Souaker's allegations of discrimination seem to me to be the central issue and to constitute the substance of the grievance, even if the challenged measure is the rejection on probation.

[123] The employer also argued that section 209 of the *Act* limits the circumstances under which a grievance challenging a termination can be referred to adjudication and that rejection on probation is not included in the types of termination listed in any of

the paragraphs of section 209, unless the evidence shows that the rejection was in truth subterfuge concealing a bad-faith and disciplinary termination.

[124] I agree that an employee's right to refer a grievance to adjudication must originate in the *Act* and not the collective agreement. In section 209 of the *Act*, the legislator expressly and narrowly set out the matters that can be referred to adjudication and, in principle, a grievance against a rejection on probation is not adjudicable. However, in my opinion such a conclusion is not sufficient to resolve the issue of my jurisdiction. In addition to grievances filed against measures expressly noted in paragraphs 209(1)(b), (c) and (d), the legislator also provided in paragraph 209(1)(a) that grievances involving the application or interpretation of a collective agreement are adjudicable. Mr. Souaker submitted that his termination violates article 6 of the collective agreement. Clause 6.01 reads as follows:

There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practised with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, family status, marital status, mental or physical disability, conviction for which a pardon has been granted or membership or activity in the Institute.

[Emphasis added]

That provision is clear: it provides that every employee has the right to equal treatment and to not be subject to discrimination. It imposes a corresponding duty on the employer to treat its employees equally and without discrimination. I do not see on what basis I could conclude that that clause does not grant substantive rights to employees and that it could not be used as the basis for a grievance.

[125] When an employee alleges in a grievance that a decision that affects his or her conditions of employment or that involves the very survival of his or her employment relationship was motivated by discriminatory considerations and that the collective agreement specifically provides for the absence of all discrimination in the workplace, it is, in my view, a grievance that involves the application of the collective agreement within the meaning of paragraph 209(1)(a) of the *Act*. Therefore, an adjudicator has jurisdiction to decide on the allegation of discrimination.

[126] Contrary to the employer's claims, I find that allowing the referral to adjudication, under paragraph 209(1)(a) of the *Act*, of the rejection on probation of an employee who alleges that his or her termination was motivated by discriminatory considerations in violation of the collective agreement does not violate the intention of the legislator. The legislator certainly did not intend for a violation of the collective agreement to escape review by an adjudicator.

[127] It is also useful to note that paragraphs 226(1)(g) and (h) of the *Act* expressly grant jurisdiction to an adjudicator to “. . . interpret and apply the *Canadian Human Rights Act* . . .” and to “give relief in accordance with paragraph 53(2)(e) or subsection 53(3) of the *Canadian Human Rights Act*.”

[128] Therefore, I dismiss the objection to my jurisdiction raised by the employer and find that I have jurisdiction to decide Mr. Souaker's grievance, which was validly referred to adjudication under paragraph 209(1)(a) of the *Act*. However, a few words on the extent of my jurisdiction follow.

[129] Although article 6 of the collective agreement provides me with jurisdiction over Mr. Souaker's grievance, that jurisdiction is limited to determining whether the rejection on probation was made in a discriminatory manner, and it does not allow me to consider the merits of the rejection. The legislator chose to make new employees subject to a probationary period and chose not to grant them the right to grievance adjudication when they are rejected on probation. Therefore, an adjudicator must be careful not to evaluate the merits of a decision to reject an employee on probation on the grounds that he or she has jurisdiction to review whether the rejection was motivated by discriminatory considerations.

[130] Given that I have found that Mr. Souaker validly referred his grievance to adjudication under paragraph 209(1)(a) of the *Act*, I do not have to rule on whether Mr. Souaker could have referred his grievance to adjudication under paragraph 209(1)(b) or apply the criteria developed in the jurisprudence in cases in which an employee rejected on probation alleges that his or her rejection on probation conceals a disciplinary termination of employment.

[131] I will now examine the allegations of discrimination raised by Mr. Souaker. It is well established in the jurisprudence that a person who alleges that he or she has been the victim of discrimination must present *prima facie* evidence of his or her

allegations. When that person meets his or her burden, it is then up to the respondent to provide an explanation to show that it did not act in a discriminatory manner or that its conduct was otherwise justified. The Federal Court of Appeal commented as follows in *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204, about the concept of *prima facie* evidence:

...

[18] The decisions in Etobicoke, supra, and O'Malley, supra, provide the basic guidance for what is required of a complainant to establish a prima facie case of discrimination under the Canadian Human Rights Act. As McIntyre J. put it in Etobicoke, at page 208, "Once a complainant has established before a board of inquiry a prima facie case of discrimination,..., he is entitled to relief in the absence of justification by the employer". McIntyre J. reiterated the test for establishing a prima facie case of discrimination in O'Malley, supra, at page 558:

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

...

[132] Tribunals have also recognized that a measure, in this case Mr. Souaker's rejection on probation, can be motivated by a number of reasons and that, if it is established that one of the reasons is discriminatory, the measure is considered unlawful: *Holden v. Canadian National Railway Co.* (1990), 112 N.R. 395 (C.A.).

[133] Finally, it is recognized that the burden of proof applicable in matters of discrimination is that of the balance of probabilities.

[134] In this case, to meet his burden of proof, Mr. Souaker had to present *prima facie* evidence that, on a balance of probabilities, he was the subject of discriminatory treatment and that such discriminatory treatment was one of the reasons for his rejection on probation. For the reasons that follow, I find that Mr. Souaker did not establish a *prima facie* case.

[135] I refer as follows to Mr. Souaker's summary of his perception of the situation in the notice that he sent to the CHRC:

[Translation]

...

11. My work situation began to deteriorate following the intervention of the coordinator, Mr. Fortier, who made negative comments toward me in October 2006, comments that were subsequently disavowed by my main supervisors. Mr. Fortier always lacked transparency with me. He always refused to comment on my work and to inform me of specific objectives that I had to meet. The only remarks that Mr. Fortier made to me had to do with me as a person, my origins and my religion. Finally, he isolated me during the critical period of my probation extension, thus preventing me from showing my ability to perform the duties of an inspector. The circumstances surrounding the evaluation of my work and my rejection lead me to conclude unequivocally that I was treated in a discriminatory manner because of my Algerian origin and my religion.

...

[136] The parties' contentions are diametrically opposed. Mr. Souaker claimed that Mr. Fortier made discriminatory comments toward him, put him at a disadvantage based on discriminatory considerations and influenced the final decision to reject him on probation. The employer, for its part, denied that Mr. Fortier made discriminatory comments or engaged in discriminatory conduct against Mr. Souaker and also argued that the comments and conduct attributed to Mr. Fortier had no influence on the decision to reject Mr. Souaker on probation.

[137] The evidence has been largely contradictory. Therefore, I must assess the credibility of the witnesses and determine the version of the facts that seems the most probable to me in view of all the evidence in this case. The parties referred me to the criteria set out in *Faryna* to help me assess the credibility of the witnesses, and I find that the following passage is particularly relevant:

...

... But the validity of evidence does not depend in the final analysis on the circumstance that it remains uncontradicted, or the circumstance that the Judge may have remarked favorably or unfavorably on the evidence or the demeanour of a witness; these things are elements in testing the evidence

but they are subject to whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time; and cf. Brethour v. Law Society of B.C., [1951] 2 D.L.R. 138 at pp. 141-2.

If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen or heard, as well as other factors, combine to produce what is called credibility . . . A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether 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 the 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. . . . 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.

The trial Judge ought to go further and say that the evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.

...

[138] The analysis of the evidence in this case leads me to conclude that the version of the facts presented by the employer's witnesses is more plausible and more probable than that of Mr. Souaker and that certain factors weaken Mr. Souaker's credibility.

[139] First, I retain the testimony of Mr. Fortier rather than that of Mr. Souaker, for the following reasons.

[140] I will begin by addressing Mr. Souaker's statement that, when he met with Mr. Fortier after his meeting with Mr. McCabe on October 2, 2006, Mr. Fortier allegedly told him that he had informed Mr. McCabe that he thought that Mr. Souaker had a closed mind and no personality. I find that Mr. Souaker's assertion is not consistent with some of the evidence.

[141] First, Mr. Fortier sent an email to Mr. McCabe on October 2, 2006, i.e., just before Mr. McCabe met with Mr. Souaker. In the email, Mr. Fortier expressed his opinion of Mr. Souaker and indicated that Mr. Souaker was a nice guy who was very knowledgeable but who was not in the right job. I find that the contents of the email are inconsistent with the comments that Mr. Souaker claims that Mr. McCabe made about his personality. Second, I find it surprising that, in the email that he sent to Mr. McCabe after meeting with Mr. Fortier and the other two inspectors, Mr. Souaker did not mention the negative comments that he claims Mr. Fortier made during his meeting with him. On the contrary, Mr. Souaker wrote that Mr. Fortier never made any comments and that he left because he had family obligations. Finally, the negative comments that Mr. Fortier allegedly sent to Mr. McCabe about Mr. Souaker contrast with the following excerpt from Mr. McCabe's notes written after his meeting with Mr. Souaker on October 2, 2006, in which he describes the inspectors' view of Mr. Souaker:

I accumulated the comments from each person who had interacted with him either on inspections or in the office.

The message was consistent from the reviewers. He is intelligent and able to pick up technical aspects. Good inter-personal skills and likeable.

The excerpt does not mention the negative comments that Mr. Fortier allegedly made to Mr. McCabe about Mr. Souaker's personality. On the contrary, it refers to a positive consensus among Mr. Souaker's colleagues. Mr. McCabe's notes are detailed, and I find

it more probable to think that, had it really happened, Mr. McCabe would have made note of a comment like the one Mr. Souaker attributes to Mr. Fortier.

[142] I will now address Mr. Souaker's assertions that his relationship with Mr. Fortier began to deteriorate as of October 2006, i.e., after Mr. Souaker contested his performance evaluation, and that Mr. Fortier's relationships with Ms. Simard and Mr. Alu deteriorated after they expressed their disagreement with Mr. Fortier's assessment of Mr. Souaker's performance and with the comments that Mr. Fortier attributed to them on that matter. Mr. Souaker indicated that, after those events, Mr. Fortier no longer spoke to him except for strictly professional purposes and always in a group setting. I find it difficult to believe that Mr. Fortier would have initiated a discussion about a topic as personal as religion during their week of inspections in Newfoundland, from October 16 to 19, 2006, if their relationship had deteriorated to that extent. Furthermore, Mr. Souaker's statement contrasts with Mr. Fortier's comments in the written observations that he sent to Mr. McCabe after the week of inspections and in which, after noting the shortcomings that he had observed, Mr. Fortier highlighted the positive sides of Mr. Souaker's qualities and attitude. He wrote the following comment:

...

[Translation]

However, Fathi has a good understanding of the laws and regulations. He is knowledgeable in instrumentation and theoretical nuclear physics. In addition, he has an extraordinary willingness to work. It is never too late or too early for Fathi. He is willing to travel like no other inspector at the Laval office.

...

Those comments do not reflect any animosity from Mr. Fortier toward Mr. Souaker. On the contrary, they show a willingness not to insist only on the negative aspects of Mr. Souaker's performance. I add that I did not sense any animosity from Mr. Fortier toward Mr. Souaker during his testimony.

[143] Mr. Souaker's third assertion leaves me wondering. Mr. Souaker stated that Mr. Fortier made inappropriate comments about the fact that he did not drink alcohol. In his testimony, Mr. Fortier denied having made such comments and explained that, since a member of his own family had had problems with alcohol, he would never

ridicule someone's choice not to drink. I find it very hard to imagine that Mr. Fortier would have "made up" such a personal explanation just to justify not having made such comments.

[144] Mr. Souaker also stated that Mr. Fortier had misquoted Mr. Alu and Ms. Simard when he sent their reviews of his performance to Mr. McCabe and that they had not made negative comments toward him. However, the email that Mr. Alu sent to Mr. McCabe on October 10, 2006, and that of Ms. Simard sent to Mr. Fortier on August 25, 2006, report their positive comments, but also areas for improvement.

[145] Another point raises doubts in my mind about the plausibility of Mr. Souaker's version. Along with the discrepancies between his testimony and that of Mr. Fortier, Mr. Souaker's testimony also contains significant differences in comparison to the testimonies of Mr. Poirier and Mr. McCabe.

[146] First, the following are some contradictions that I noted between the testimonies of Mr. Souaker and Mr. Poirier:

- Mr. Souaker stated that Mr. Poirier never told him about the shortcomings that he noted in his observation reports and that the only comments he made were about his accent in English and in French and his language level, which licensees had trouble understanding. On the contrary, Mr. Poirier maintained that he had discussed all the elements in his observation reports with Mr. Souaker.
- Mr. Poirier asserted that Mr. Souaker asked him for a positive evaluation because he was afraid of losing his job. Mr. Souaker completely denied that assertion and added that in October 2006 he was not afraid of losing his job and did not feel the need to consult with his bargaining agent because he felt that he would be able to set the record straight by meeting with the inspectors who had made negative comments about his performance.
- Mr. Poirier stated that he informed Mr. Souaker in November 2006 that he was a bargaining agent representative and offered to refer him to another representative if he felt that the bargaining agent could help him. Mr. Souaker denied that the conversation took place and maintained that he had not learned before 2007 that Mr. Poirier was a bargaining agent representative.

- Mr. Poirier stated that he had noticed a number of shortcomings in Mr. Souaker's performance and that in October 2006 Mr. Souaker was already feeling that his job was at risk. Those points are inconsistent with Mr. Souaker's proposal that his performance was satisfactory and that he was not worried about his situation in October 2006.

[147] In light of all the facts in this case, I find that Mr. Poirier's testimony is more plausible than that of Mr. Souaker. Mr. Poirier is completely neutral, is not targeted by Mr. Souaker's allegations of discrimination and has no reason to want to differentiate adversely toward Mr. Souaker. On the contrary, his role as bargaining agent representative would motivate him to support Mr. Souaker and to refer him to the bargaining agent for help. Mr. Poirier testified objectively, without animosity toward Mr. Souaker, and he showed genuine uneasiness when he spoke of the very emotional discussions with Mr. Souaker. I find that Mr. Poirier had no reason to make up the discussions that he reportedly had with Mr. Souaker and that he had no interest in doing so. I also find that Mr. Poirier had no reason not to give an objective evaluation of Mr. Souaker or not to give him complete feedback; he had agreed to accompany him specifically to assess him and to give him feedback, and Mr. McCabe chose him because he was neutral and had solid expertise in training.

[148] Mr. Poirier's observations also lead me to believe Mr. Fortier's observations. Mr. Souaker refuted Mr. Fortier's observations as much as those of Mr. Poirier. The evidence shows that, essentially, the observations of Mr. Poirier and Mr. Fortier were similar and essentially consistent and, as I indicated, nothing allows me to doubt Mr. Poirier's objectivity.

[149] Second, there are numerous contradictions between Mr. Souaker's testimony and Mr. McCabe's testimony, including the following:

- Mr. McCabe stated that he met with Mr. Souaker on April 4, 2006, to discuss some of the shortcomings in his performance, whereas Mr. Souaker denies that Mr. McCabe criticized him during that meeting.
- Mr. McCabe asserted that, during his meeting with Mr. Souaker on October 2, 2006, he told him about all the information reported in the notes that he wrote after this meeting. For his part, Mr. Souaker maintained that Mr. McCabe talked to him about the driving test that he had had to retake and about the comments that he had

received from the three inspectors, which were confined only to the following three areas: his initiative, his response in the field and his adaptability.

- Mr. Souaker stated that he informed Mr. McCabe first by telephone and then during their meeting on February 15 or 16, 2007 that Mr. Fortier had isolated him after the January 12, 2007 meeting. Mr. McCabe denied that Mr. Souaker told him that he had been isolated.
- Mr. McCabe maintained that, when he accompanied Mr. Souaker on an inspection, a licensee remarked that Mr. Souaker seemed glued to his checklist. Mr. Souaker denied that that was the case.
- Mr. McCabe stated that during another inspection Mr. Souaker had not understood the seriousness of a worker's overexposure to radioactive material. Mr. Souaker denied it and stated that he was the one who had discovered the overdose and had understood the severity of the situation.
- Mr. Souaker claimed that he informed Mr. McCabe during their meeting on February 15, 2007 that he felt that he had been the victim of discrimination. Mr. McCabe argued that, on the contrary, he specifically asked Mr. Souaker after the discussion about the driving test he had failed whether he felt that he had been discriminated against by the reviewer or by anyone else and that Mr. Souaker answered in the negative.

[150] Certain elements lead me to find that Mr. McCabe's testimony is more plausible than that of Mr. Souaker. First, a word about the meeting of April 4, 2006. Mr. McCabe testified about that meeting and its contents. He referred to it in the notes that he wrote after the meeting, the notes that he prepared after the meeting of October 2, 2006 and the letter dated January 8, 2007 that he sent to Mr. Souaker. I do not see what interest Mr. McCabe would have had in lying about the contents of that meeting, and I believe that, were it the case, Mr. Souaker would have pointed out the inaccuracy in the letter of January 8, 2007, which referred to the meeting. In January 2007, Mr. Souaker knew that his job was at stake, and he did everything that he could to save it. I am satisfied that if an element likely to keep him from maintaining his job were inaccurate he would have pointed it out.

[151] Second, in his testimony Mr. Souaker rebutted the criticisms that Mr. McCabe stated that he made during the meeting of April 4, 2006 about Mr. Souaker's driving skills and his difficulty checking into a hotel, but Mr. Alu also reported those shortcomings in an email that he sent to Mr. Souaker on October 10, 2006, in which he wrote the following:

When Fathi first started here, some basic activities such as booking a hotel or driving, were proving to be a challenge. I believe that there has been improvement in this category but feel there is still room for improvement.

[152] Third, Mr. Souaker asserted that Mr. McCabe adopted an intimidating tone with him during the meeting of October 2, 2006 and that he felt intimidated and humiliated by Mr. McCabe's attitude toward him. I find that assertion difficult to reconcile with Mr. Souaker's statement that in October 2006 he was not worried, did not in any way feel that his job was at risk and did not feel the need to talk about Mr. McCabe or Mr. Fortier's attitudes with his colleagues or even his bargaining agent.

[153] Other elements support Mr. McCabe's version. First, Mr. McCabe is not targeted by Mr. Souaker's allegations of discrimination. Nothing in the evidence hints at animosity from Mr. McCabe toward Mr. Souaker or an attitude consistent with the desire to get rid of Mr. Souaker. On the contrary, the evidence shows that Mr. McCabe wanted to help Mr. Souaker. He asked Mr. Fortier and Mr. Poirier to accompany him on a series of inspections, he agreed to extend Mr. Souaker's probation period even though he was not required to do so and he agreed to accompany Mr. Souaker on inspections to give Mr. Souaker the opportunity to show his abilities.

[154] Mr. McCabe's testimony, which I find to be more plausible than that of Mr. Souaker, also leads me to believe Mr. Fortier's testimony when he claims not to have isolated Mr. Souaker from January 12, 2007 to the time of the inspections performed with Mr. McCabe during the week of February 12, 2007. Mr. McCabe denied that Mr. Souaker informed him that he had been isolated, whereas Mr. Souaker stated that he informed Mr. McCabe by telephone after the meeting of January 12, 2007 and during the meeting of February 15, 2007.

[155] Other elements also lead me to question the version of events presented by Mr. Souaker.

[156] M. Souaker denied and contradicted all the elements unfavourable to him. He rebutted all the complaints that were made against him and tried to portray himself as a person whose performance was adequate and whose rejection on probation could only have been motivated for reasons unrelated to his performance. Yet, the observations of Mr. Fortier, Mr. Poirier, Mr. McCabe and, to a certain extent, those of Mr. Alu, are all consistent and highlight the shortcomings in Mr. Souaker's ability to perform some of an inspector's duties.

[157] I also find it difficult to believe that Mr. Fortier made discriminatory comments toward Mr. Souaker in October 2006, yet Mr. Souaker did not report the situation to Mr. McCabe until February 2007. First, and in spite of statements to the contrary, Mr. Souaker had every reason to understand that his performance raised serious concerns as early as October 2006. Mr. McCabe was clear and presumably intimidating during the meeting of October 2, 2006, and Ms. Simard even suggested that Mr. Souaker contest his evaluation. In addition, in spite of his interventions with his colleagues and after telling Mr. McCabe about them, Mr. Souaker was not able to rectify the misconception that Mr. McCabe had about him. In fact, Mr. McCabe required him to perform three weeks of inspections accompanied by Mr. Fortier and Mr. Poirier. Therefore, Mr. Souaker must have known that the evaluations of his work by Mr. Fortier and Mr. Poirier would be important.

[158] In light of that, I find it difficult to believe that Mr. Souaker did not see fit to report the inappropriate comments that Mr. Fortier allegedly made about his lack of personality or the discriminatory and degrading remarks he allegedly made during the week of inspections in Newfoundland. Such an omission seems completely inconsistent with the combative attitude that Mr. Souaker displayed in his efforts to convince Mr. McCabe, and to convince me during the hearing, that the evaluation made of him by the employer's witnesses did not reflect his performance or his abilities. I find it even more implausible that Mr. Souaker would not see fit to speak to Mr. McCabe in January 2007 about the discriminatory treatment that Mr. Fortier inflicted on him when he knew that his probation period was being extended and that it was highly uncertain that he would retain his employment.

[159] There is one other element that causes me wonder. In his testimony, Mr. Souaker made several points that suggested that Mr. Fortier had treated him adversely from the beginning of his employment. He stated that, as of his second day,

Mr. Fortier made comments to him about the level at which he had been hired, that he had not started in the normal way given that he had to wait six weeks before being able to observe his first inspection and that he had not been properly prepared because he did not even know about the checklist. Those points were not mentioned in the notice that Mr. Souaker sent to the CHRC, which contains a detailed account of Mr. Souaker's allegations and the facts behind his allegations.

[160] Therefore, based on the whole of the evidence that has been filed, I find that the balance of probabilities does not support the version of the facts presented by Mr. Souaker to the effect that Mr. Fortier made discriminatory remarks toward him and that Mr. Fortier treated him adversely because of his ethnic origin and religious affiliation.

[161] Furthermore, even had I concluded that Mr. Fortier made some discriminatory comments toward Mr. Souaker and placed him at a disadvantage by isolating him during the extension of his probation period, I find that the evidence does not establish any kind of connection between Mr. Fortier's conduct and the rejection of Mr. Souaker on probation.

[162] Despite the perception that Mr. Souaker might have of him, it is Mr. McCabe who was his immediate supervisor and recommended his rejection on probation. Also, it is Mr. McCabe who evaluated Mr. Souaker in October 2006, signed the letter extending his probation period and spoke with Mr. Souaker to plan the series of inspections that Mr. McCabe would conduct with him.

[163] The evidence clearly shows that it was Mr. McCabe's opinion that Mr. Souaker did not have all the qualities needed to properly perform his job as an inspector. Mr. McCabe's opinion was not based solely on Mr. Fortier's observations and comments but also on those of Mr. Poirier, Mr. Alu and Ms. Simard and on his own observations. Nothing in the evidence allows me to conclude that Mr. McCabe's attitude or his recommendation to terminate Mr. Souaker's employment was motivated by discriminatory considerations in any way. Mr. McCabe never made discriminatory remarks toward Mr. Souaker, and the evidence does not show any discriminatory attitude on his part. Moreover, I did not detect the slightest hint of animosity or prejudice on the part of Mr. McCabe toward Mr. Souaker.

[164] Finally, it has been established on a balance of probabilities that Mr. McCabe was never informed of Mr. Souaker's allegations of discrimination before recommending his rejection on probation. On the contrary, Mr. McCabe stated that he had specifically asked Mr. Souaker whether he felt that he had been the victim of discrimination, to which Mr. Souaker replied that he had not. Even were I to accept the version of the facts presented by Mr. Souaker, Mr. McCabe was not made aware of Mr. Souaker's allegations of discrimination until February 15, 2007 at the earliest. By February 15, 2007, Mr. McCabe had already made a number of decisions on Mr. Souaker's performance, which he considered inadequate. He had discussed it with Mr. Souaker in April 2006 and October 2006, required that he take a training program, decided to extend his probation period and joined him on some inspections. There is no reason to think that his recommendation to reject him on probation was motivated or influenced by the allegations of discrimination of which he was reportedly informed on February 15, 2007.

[165] I recognize that the employer is not blameless in terms of the follow-up and feedback that it gave to Mr. Souaker, and therefore, I think that some of the points that Mr. Souaker raised are accurate. However, I am unable to link any such lack of follow-up or rigour to discriminatory considerations.

[166] Therefore, I find that Mr. Souaker has not made a *prima facie* case that he was the victim of discrimination and that his rejection on probation was discriminatory or that it constituted a pretext that camouflaged discriminatory considerations.

[167] Despite my finding that the analytical framework traditionally applied in grievances relating to rejection on probation does not apply in this case, I wish to note that, had I applied such a framework, I would have allowed the employer's objection on my jurisdiction. I would have found that the employer established that it had rejected Mr. Souaker on probation for reasons related to his performance and that Mr. Souaker did not establish that his rejection had been made in bad faith or that it was a subterfuge.

[168] For all of the above reasons, I make the following order:

(The Order appears on the next page)

V. Order

[169] The grievance is dismissed.

November 5, 2009.

PSLRB Translation

**Marie-Josée Bédard,
adjudicator**