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PRESENT: The Honourable Madam Justice Mactavish

Docket: T-1615-09

BETWEEN:

AIR CANADA PILOTS ASSOCIATION

Applicant

and

ROBERT NEIL KELLY, GEORGE VILVEN,
CANADIAN HUMAN RIGHTS COMMISSION,
and AIR CANADA

Respondents

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AIR CANADA

Applicant

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CANADIAN HUMAN RIGHTS COMMISSION,
and AIR CANADA PILOTS ASSOCIATION

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REASONS FOR JUDGMENT AND JUDGMENT

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I. Introduction

[1] Paragraph 15(1)(c) of the *Canadian Human Rights Act*, R.S., 1985, c. H-6, [*CHRA*] allows an employer to terminate the employment of an individual if that person has reached the "normal age of retirement" for those working in similar positions.

[2] This Court has previously found that paragraph 15(1)(c) of the Act violates subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982 c.11, as it denies the equal protection and equal benefit of the law to workers over the normal age of retirement for similar positions. In so doing, paragraph 15(1)(c) has the effect of perpetuating the group disadvantage and prejudice faced by older workers by promoting the stereotypical view that older workers are less capable, or less deserving of recognition or value as human beings or as members of Canadian society: see *Vilven v. Air Canada*, [2010] 2 F.C.R. 189, [2009] F.C.J. No. 475, at paras. 9 and 337-339 ("*Vilven* #1").

[3] These reasons pertain to two applications for judicial review of a subsequent decision of the Canadian Human Rights Tribunal which found that paragraph 15(1)(c) is not a reasonable limit justifiable in a free and democratic society as contemplated by section 1 of the *Charter*. One application is brought by Air Canada and the other by the Air Canada Pilots Association (or "ACPA"), the bargaining agent for Air Canada pilots. The applications were consolidated by order of this Court.

[4] For the reasons that follow, I find that the Tribunal's decision on the *Charter* issue was correct. As a result, ACPA's application, which only raises the *Charter* issue, will be dismissed.

[5] Also at issue in Air Canada's application for judicial review is whether the Tribunal's finding that Air Canada had failed to demonstrate that age was a *bona fide* occupational requirement for its pilots was reasonable. I have concluded that the Tribunal erred in its analysis of the *bona fide* occupational requirement issue as it related to the period after November of 2006. Consequently, Air Canada's application for judicial review will be granted in part.

[6] What is *not* in issue in these proceedings is any question relating to pilot safety. The fitness of individual pilots to fly is determined not by Air Canada, but by Transport Canada as part of its pilot licensing regime. If, after an individualized assessment, Transport Canada determines that an individual is no longer fit to fly, then that individual's pilot's license will not be renewed.

II. <u>Background</u>

[7] In order to provide a context for these reasons, I will provide a brief summary of the facts, which is largely taken from my decision in *Vilven* #1.

A. *Mandatory Retirement at Air Canada*

[8] Mandatory retirement for pilots at Air Canada was initially a company policy. Since 1957, the Air Canada pension plan has identified 60 as the compulsory retirement age for pilots. As of the early 1980's, provisions mandating retirement at age 60 have been included in the collective agreement in force between Air Canada and its pilots' union. ACPA began representing Air Canada pilots in 1995.

[9] Shortly before the commencement of the initial Tribunal hearing of Messrs. Vilven and Kelly's human rights complaints, ACPA held a referendum on the mandatory retirement issue. Seventy-five percent of ACPA members voted in favour of retaining mandatory retirement for Air Canada pilots.

B. ***George Vilven's Career***

[10] George Vilven was hired by Air Canada in May of 1986. Over the ensuing years, he was able to use his seniority to bid on a succession of higher status and higher paying positions on increasingly larger aircraft. In his last position with Air Canada, Mr. Vilven was flying as a First Officer on Airbus 340 aircraft.

[11] Mr. Vilven turned 60 on August 30, 2003. In accordance with the mandatory retirement age provisions of the Air Canada/ACPA collective agreement and the Air Canada pilot pension plan, he was required to retire on the first day of the month following his 60th birthday.

[12] There is no suggestion that there were any performance problems or medical fitness issues with respect to Mr. Vilven. Indeed, it is common ground that the only reason for the termination of his employment was the application of the mandatory retirement provisions of the Air Canada/ACPA collective agreement and the Air Canada pilot pension plan, which is incorporated by reference into the collective agreement.

[13] Based upon his years of service with Air Canada and his pre-Air Canada military service (which are included as years of service for the purpose of Air Canada's pension plan), Mr. Vilven is entitled to receive substantial pension benefits until his death.

[14] After leaving Air Canada, Mr. Vilven was able to continue his career in aviation. He flew with Flair Airlines from April of 2005 until May of 2006, when he quit flying in order to prepare for his Tribunal hearing. At the time of the original Tribunal hearing, Mr. Vilven continued to hold a valid Canadian Air Transport Pilot's License.

C. *Robert Neil Kelly's Career*

[15] Robert Neil Kelly was hired by Air Canada in September of 1972. At the time of his retirement from Air Canada, he was flying as the Captain and Pilot-in-command of Airbus 340's.

[16] The term "Pilot-in-command" should not be confused with that of "Captain". Pilot positions at Air Canada include Captains, First Officers and Relief Pilots. The *International Standards on Personnel Licensing* promulgated by the International Civil Aviation Organization (or "ICAO"), the United Nations organization charged with fostering civil aviation safety, requires that one pilot on each flight be designated as the Pilot-in-command of the flight: see the *Convention on International Civil Aviation*: *Annex 1 - International Standards and Recommended Practices - Personnel Licensing* (Chicago Convention), 7 December 1944, 15 UNTS 295 (entered into force 4 April 1947), see Annex I (Personnel Licensing, 10th ed., 2006). Although the Captain of an aircraft is ordinarily the Pilot-in-command, this is not necessarily always the case.

[17] Mr. Kelly turned 60 on April 30, 2005, and was forced to retire from Air Canada on May 1, 2005. As was the case with Mr. Vilven, there was no issue as to Mr. Kelly's capacity to fly safely, and the parties acknowledge that the only reason for the termination of his employment was the application of the mandatory retirement provisions found in the governing pension plan and collective agreement.

[18] Like Mr. Vilven, Mr. Kelly is entitled to receive substantial pension benefits for the rest of his life.

[19] Mr. Kelly was also able to continue his flying career after leaving Air Canada. He initially worked on contract as a First Officer with Skyservice Airlines. At the time of the original Tribunal hearing, he was working for Skyservice as a Captain and Pilot-in-command, flying routes, including international routes, on Boeing 757's.

III. The Human Rights Complaints

[20] Mr. Vilven filed his complaint against Air Canada with the Canadian Human Rights Commission in August of 2004. His complaint asserted that by forcing him to retire at age 60, Air Canada violated sections 7 and 10 of the *CHRA*. The full text of the relevant statutory provisions is attached as an appendix to these reasons.

[21] Mr. Kelly's human rights complaint was filed on March 31, 2006 and was brought against both Air Canada and ACPA. His complaint alleged discrimination on the basis of age, contrary to the provisions of sections 7, 9 and 10 of the Act.

[22] Both complaints were referred to the Canadian Human Rights Tribunal by the Commission, and the two cases were heard and decided together.

[23] In the course of the parties' oral submissions, I was advised that the Tribunal has now held a hearing in relation to 68 additional complaints brought by former Air Canada pilots who were forced to retire against their will. The Tribunal currently has its decision with respect to that case under reserve. I was also advised that there is another "large group" of former Air Canada pilots whose human rights complaints have been referred to the Tribunal by the Canadian Human Rights Commission, and still another "large group" of former Air Canada pilots who have age discrimination complaints pending before the Commission.

IV. Procedural History

[24] In order to put the issues into context, it is necessary to understand the procedural history giving rise to the applications currently before the Court.

[25] The original hearing into Messrs. Vilven and Kelly's complaints took place in 2007. ACPA was granted "interested party" status before the Tribunal in relation to Mr. Vilven's complaint. The Tribunal also granted interested party status to the "Fly Past 60 Coalition", a group of current and former Air Canada pilots who are united in their goal of eliminating mandatory retirement at Air Canada.

[26] In advance of the Tribunal hearing, the Fly Past 60 Coalition served a Notice of Constitutional Question on the federal and provincial Attorneys General, advising that the constitutionality of paragraph 15(1)(c) of the *CHRA* was in issue in the proceeding. As was noted earlier, paragraph 15(1)(c) of the Act provides that it is not a discriminatory practice if an individual's employment is terminated "because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual".

[27] In a decision rendered in August of 2007, the Tribunal dismissed Messrs. Vilven and Kelly's human rights complaints: *Vilven v. Air Canada*; *Kelly v. Air Canada and Air Canada Pilots Association*, 2007 CHRT 36 (Tribunal decision #1). The Tribunal found that 60 was the normal age of retirement for persons working in similar positions, and further found that paragraph 15(1)(c) of the Act did not contravene subsection 15(1) of the *Charter*. Because of its finding on the section 15 *Charter* issue, the Tribunal did not have to decide whether paragraph 15(1)(c) of the *CHRA* could be justified under section 1 of the *Charter*.

[28] On judicial review, I found that although there were errors in the Tribunal's analysis, the finding that 60 was the normal age of retirement for individuals employed in positions similar to those occupied by Messrs. Vilven and Kelly prior to their retirement was reasonable: *Vilven* #1 at para. 174.

[29] However, as noted earlier, I concluded that paragraph 15(1)(c) of the Act violated subsection 15(1) of the *Charter*, as it denies the equal protection and equal benefit of the law to workers over the normal age of retirement for similar positions. Consequently, I quashed the

Tribunal's decision as it related to the *Charter* issue, and remitted the matter to the Tribunal for it to determine whether paragraph 15(1)(c) of the Act could be demonstrably justified as a reasonable limit in a free and democratic society: *Vilven* #1, at para. 340.

[30] In the event that the Tribunal determined that paragraph 15(1)(c) of the *CHRA* was not saved under section 1 of the *Charter*, I directed that it address the merits of Messrs. Vilven and Kelly's human rights complaints. This would require the Tribunal to consider Air Canada's argument that requiring that all of its pilots be younger than 60 constituted a *bona fide* occupational requirement within the meaning of paragraph 15(1)(a) of the *CHRA*: *Vilven* #1, at para. 341.

V. <u>**The Tribunal's Second Decision**</u>

[31] In August of 2009, the Tribunal issued a second decision with respect to Messrs. Vilven and Kelly's human rights complaints: *Vilven v. Air Canada*; *Kelly v. Air Canada and Air Canada Pilots Association*, 2009 CHRT 24 (Tribunal decision #2).

[32] In assessing whether paragraph 15(1)(c) of the *CHRA* was saved under section 1 of the *Charter*, the Tribunal applied the test articulated by the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7. The *Oakes* test requires that two criteria be satisfied: the objective of the law must relate to a societal concern that is "pressing and substantial", and the means used to attain the objective must be "proportional".

[33] The Tribunal noted that in order to be proportional, the measures selected "must be rationally connected to the objective and should impair as little as possible the right or freedom in

question. It also requires that there be proportionality between the objectives and the effects": Tribunal decision #2 at para. 12, citing *Oakes* at para. 70.

[34] The Tribunal recognized that in cases such as *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, [1990] S.C.J. No. 122, and *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451, [1990] S.C.J. No. 123, the Supreme Court of Canada had found that provisions in the Ontario and British Columbia human rights codes limiting the protection of the legislation to those under 65 were reasonable limitations within the meaning of section 1 of the *Charter*.

[35] The Tribunal also noted that the majority judgment in *McKinney* accorded a high degree of deference to the Legislature, as the issue of mandatory retirement involved a complex balancing of competing interests upon which expert opinion was divided. The Tribunal went on, however, to observe that several more recent decisions had determined that the social and economic context had changed sufficiently since *McKinney* and *Harrison* were decided as to render those decisions no longer applicable to present day circumstances: Tribunal decision #2, at paras. 18 and 19.

[36] The Tribunal compared the factual and social context of this case to that which was before the Supreme Court in *McKinney*, finding that the evidence before it demonstrated that mandatory retirement was no longer as prevalent as it had been when *McKinney* was decided. At the time of the hearing, only three provinces allowed for the imposition of mandatory retirement. In all of the other provinces, mandatory retirement was either prohibited, or was permitted only where it was based on a *bona fide* occupational requirement or *bona fide* pension or retirement plan: Tribunal decision #2, at paras. 26 and 27.

[37] The Tribunal observed that the abolition of mandatory retirement in these provinces had not spelled the end of deferred compensation, pension and benefit schemes, and seniority arrangements: Tribunal decision #2, at paras. 29 and 34. The Tribunal also noted that the expert evidence before it called into question the concerns identified by the Supreme Court in *McKinney* as to the potential negative consequences that could flow from the abolition of mandatory retirement for matters such as pension plans and deferred compensation schemes. Consequently, the Tribunal concluded that paragraph 15(1)(c) of the *CHRA* could not be justified under any of the elements of the *Oakes* test.

[38] It was thus necessary for the Tribunal to go on to consider whether Air Canada and ACPA had demonstrated that mandatory retirement at 60 constituted a *bona fide* occupational requirement for Air Canada pilots.

[39] In answering this question, the Tribunal applied the test established by the Supreme Court in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)*, [1999] 3 S.C.R. 3, [1999] S.C.J. No. 46 at para. 54.

[40] According to the Tribunal, neither Messrs. Vilven and Kelly nor the Commission disputed that the first two components of the *Meiorin* test had been satisfied: that is, that the mandatory retirement provisions of the Air Canada pension plan and the Air Canada/ACPA collective agreement had been adopted for a purpose that was rationally connected to the performance of the

job, and that the provisions had been adopted in the honest and good faith belief that they were necessary to the fulfillment of a legitimate work-related purpose.

[41] The "real issue" for the Tribunal was whether Messrs. Vilven and Kelly could be accommodated without causing undue hardship to Air Canada and/or ACPA: Tribunal decision #2, at paras. 82-83.

[42] After examining the evidence adduced by the applicants in this regard, the Tribunal found that neither Air Canada nor ACPA had established that the retirement of Air Canada pilots at age 60 constituted a *bona fide* occupational requirement. Consequently, Messrs. Vilven and Kelly's human rights complaints were deemed to have been substantiated, and the Tribunal retained jurisdiction to deal with the issue of remedy.

VI. Issues

[43] There are two issues on these applications for judicial review. The first is whether the Tribunal erred in finding that paragraph 15(1)(c) of the *CHRA* is not a reasonable limit justifiable in a free and democratic society within the meaning of section 1 of the *Charter*.

[44] The second issue is whether the Tribunal erred in determining that Air Canada had not established that the mandatory retirement age provisions of the Air Canada Pension Plan and the Air Canada/ACPA collective agreement constituted a *bona fide* occupational requirement.

VII. Standard of Review

[45] Messrs. Vilven and Kelly, Air Canada and ACPA all agree that the Tribunal's finding as to whether paragraph 15(1)(c) of the *CHRA* is saved by section 1 of the *Charter* is reviewable against the standard of correctness. The Commission takes no position on the *Charter* issue.

[46] I agree that correctness is the appropriate standard with respect to this aspect of the Tribunal's decision. *Charter* questions must be decided consistently and correctly: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, at paras. 58 and 163, [2008] S.C.J. No. 9 (QL); *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504 at para. 32. That said, purely factual findings made by the Tribunal in the course of its constitutional analysis are entitled to deference: see, for example, *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R. 407, at para. 26.

[47] Messrs. Vilven and Kelly, the Commission and Air Canada also agree that the Tribunal's finding as to whether Air Canada had established a *bona fide* occupational requirement defence is reviewable on the reasonableness standard. ACPA takes no position on the *bona fide* occupational requirement issue.

[48] I agree that reasonableness is the applicable standard of review with respect to this aspect of the Tribunal's decision. The question of whether a *bona fide* occupational requirement defence has been made out in a particular case is a question of mixed fact and law, requiring the Tribunal to apply its enabling legislation to the facts before it. Such a finding attracts judicial deference: *Brown v. Canada (National Capital Commission)*, 2009 FCA 273, [2009] F.C.J. No. 1196, at para. 5.

[49] In applying the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within the range of possible acceptable outcomes which are defensible in light of the facts and the law: see *Dunsmuir*, at para. 47, and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 59.

VIII. Is Paragraph 15(1)(c) of the *Canadian Human Rights Act* a Reasonable Limit in a Free and Democratic Society?

[50] Before examining this issue, it should be noted that ACPA served a Notice of Constitutional Question on the Federal and Provincial Attorneys General pursuant to the provisions of section 57 of the *Federal Courts Act*, R.S., 1985, c. F-7, advising that the constitutional validity of paragraph 15(1)(c) of the *CHRA* is in issue in these applications. None of the Attorneys General have elected to participate in these proceedings.

[51] There is no question that the Canadian Human Rights Tribunal has the power to decide *Charter* questions, as the *CHRA* statutorily empowers the Tribunal to decide questions of law: see subsection 50(2), and *Nova Scotia (Workers' Compensation Board) v. Martin*, above, at para. 3.

[52] The parties agree that the onus of justifying the limitation on Messrs. Vilven and Kelly's equality rights rests on Air Canada and ACPA: see *Stoffman v. Vancouver General Hospital,* [1990] 3 S.C.R. 483, [1990] S.C.J. No. 125, at para. 50. The standard of proof under section 1 of the *Charter* is the ordinary civil standard, that is, the balance of probabilities: *Oakes*, at para. 67.

[53] There is also no dispute that the *Oakes* test applied by the Tribunal in deciding whether paragraph 15(1)(c) of the *CHRA* can be justified under section 1 of the *Charter* is the appropriate test.

A. *The Supreme Court of Canada's Mandatory Retirement Jurisprudence*

[54] The issue of mandatory retirement has been considered by the Supreme Court of Canada on a number of occasions in the last 30 years. Before applying the *Oakes* test to the facts of this case, and in order to put that discussion into context, it is helpful to start by looking at what the Supreme Court has said on the subject.

i) *Ontario (Human Rights Commission) v. Etobicoke*

[55] Mandatory retirement first came before the Supreme Court in the early 1980's in *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202, [1982] S.C.J. No. 2. The appellants in that case were firemen employed by the Borough of Etobicoke. Each had filed a complaint under the *Ontario Human Rights Code*, R.S.O. 1970, c. 318, because he had been forced to retire at age 60 pursuant to the collective agreement governing the terms of his employment.

[56] The *Ontario Human Rights Code* provided that the prohibition on age discrimination did not apply in cases where age could be shown to be a *bona fide* occupational requirement for the position in question. A human rights Board of Inquiry determined that the municipality had not established the existence of a *bona fide* occupational requirement for its firefighters. That decision was overturned by the Ontario Divisional Court, and the Divisional Court's decision was subsequently confirmed by the Ontario Court of Appeal.

[57] In restoring the decision of the Board of Inquiry, the Supreme Court found that the evidence adduced by the employer failed to establish that being under 60 was a *bona fide* occupational requirement. The Court observed that everyone ages chronologically at the same rate, but that individuals may age in a "functional sense" at very different and largely unpredictable rates. The Court went on to observe that in cases where the employer's concern is one of productivity rather than safety, "it may be difficult, if not impossible, to demonstrate that a mandatory retirement at a fixed age, without regard to individual capacity, may be validly imposed under the Code": at p. 209.

[58] The Court rejected the employer's argument that the mandatory retirement age at issue should be considered to be a *bona fide* occupational requirement as it had been agreed to as part of a collective agreement: at p. 212. As the Code had been enacted for the benefit of both the community at large and of its individual members, the Supreme Court was of the view that its protection could not be waived or varied by private contract: at pp. 213-214.

ii) ***McKinney v. University of Guelph***

[59] The issue of mandatory retirement was back before the Supreme Court in the early 1990's in a series of cases brought under section 15 of the *Charter*: *McKinney*; *Harrison*; *Stoffman*; *Douglas Kwantlen Faculty Assn. v. Douglas College* [1990] S.C.J. No. 124; [1990] 3 S.C.R. 570.

[60] The judgments in all four cases were rendered at the same time, with *McKinney* as the lead decision. Air Canada and ACPA argue that *McKinney* was binding on the Tribunal, and should have dictated a finding by the Tribunal that paragraph 15(1)(c) of the *CHRA* was saved by section 1 of

the *Charter*. By failing to follow *McKinney*, the applicants say that the Tribunal erred in law. In light of this argument, it is necessary to examine the Court's reasoning in *McKinney* in some detail.

[61] The appellants in *McKinney* were university professors at four Ontario universities who were forced to retire at age 65, in accordance with the universities' mandatory retirement policies. As in the present case, the professors were unable to seek recourse under human rights legislation, because subsection 9(a) of the *Ontario Human Rights Code*, 1981, S.O. 1981, c. 53, limited the protection against age discrimination in employment afforded by the Code to those between the ages of 18 and 65.

[62] The majority judgment held that universities do not form part of "government", and that the reach of the *Charter* is limited to government action. However, the Court went on in *obiter* to examine the universities' retirement policies on the assumption that the universities were government actors, finding them to be justifiable.

[63] Insofar as the constitutionality of subsection 9(a) of the *Ontario Human Rights Code* was concerned, the Supreme Court was unanimous in finding that the statutory provision in issue violated subsection 15(1) of the *Charter*, as it deprived individuals of a benefit under the Code on the basis of an enumerated ground. The Court was, however, divided on the question of whether the provision was justifiable under section 1 of the *Charter*.

[64] Justice La Forest wrote the majority judgment, with Chief Justice Dickson and Justice Gonthier concurring. Justices Cory and Sopinka each wrote separate reasons, concurring in the

result. Justices Wilson and L'Heureux-Dubé each wrote dissenting judgments disagreeing with the majority as to whether subsection 9(a) of the Code could be justified under section 1.

[65] Justice La Forest began by reviewing the history and role of mandatory retirement in Canada. He observed that by 1970, public and private pension plans had been established to provide income security after the age of 65 and that as of 1990, mandatory retirement was "part of the very fabric of the organization of the labour market in this country": at para. 84.

[66] The objectives of the legislation were described by Justice La Forest as being an effort to balance the Legislature's concern for denying protection beyond age 65 against the fear that such a change could result in delayed retirement and delayed benefits for older workers. Concern was also expressed as to the potential impact that a change would have for labour markets and pensions. In Justice La Forest's view, these objectives were pressing and substantial.

[67] The majority also found that subsection 9(a) of the Code was rationally connected to these objectives. In this regard, Justice La Forest observed that "there is nothing irrational in a system that permits those in the private sector to determine for themselves the age of retirement suitable to a particular area of activity": at para. 101.

[68] In relation to the issue of minimal impairment, Justice La Forest noted that where the Legislature was faced with competing socio-economic theories and social science evidence, it was entitled to choose between them and to proceed cautiously in effecting change. The question for the Court was whether the government had a *reasonable basis* for concluding that the legislation

impaired the relevant right as little as possible, in light of the government's pressing and substantial objectives: at para. 123, emphasis added.

[69] In addressing this question, Justice La Forest described the issue of mandatory retirement as being a complex socio-economic one, which involved "the basic and interconnected rules of the workplace throughout the whole of our society": at para. 96. He explained that mandatory retirement was part of "a complex, interrelated, lifetime contractual arrangement involving something like deferred compensation", particularly in union-organized workplaces, where "seniority serves as something of a functional equivalent to tenure": at para. 108.

[70] Justice La Forest further observed that the ramifications that the abolition of mandatory retirement would have for the organization of the workplace, and for society in general, were things that could not readily be measured: at para. 104.

[71] Finally, Justice La Forest found that there was proportionality between the effects of subsection 9(a) of the Code on the guaranteed right, and the objectives of the provision. He observed that a Legislature is not obliged to deal with all aspects of a problem at once, and that it should be permitted to take incremental measures in relation to issues such as mandatory retirement: at para. 129.

[72] Justices Cory and Sopinka agreed in their concurring reasons that subsection 9(a) of the Code was saved under section 1 of the *Charter*.

[73] In contrast, Justice Wilson observed that subsection 9(a) of the Code did not only allow for mandatory retirement; it also permitted age discrimination in the employment context in all its forms for those over the age of 65. As a consequence, she was of the view that the rational connection branch of the *Oakes* test had not been met: at para. 350.

[74] More importantly for our purposes, Justice Wilson found that the legislation did not meet the minimal impairment component of the *Oakes* test. She noted that older workers would suffer disproportionately greater hardship as a result of the infringement of their equality rights. She also observed that women are negatively affected by mandatory retirement, as they often have interrupted work histories as a result of their having assumed childcare responsibilities, with the resultant loss of pensionable earnings: at paras. 351-353.

[75] Justice Wilson recognized that mandatory retirement requirements are often the product of collective bargaining. However, she also observed that even if it were acceptable for citizens to bargain away their fundamental human rights in exchange for economic gain, the fact was that the majority of working people in Ontario did not have access to such beneficial contractual arrangements: at para. 352.

[76] Justice L'Heureux-Dubé agreed with Justice Wilson that subsection 9(a) of the Code could not be justified under section 1 of the *Charter*. She found that there was no convincing evidence that mandatory retirement was intimately related to the tenure system. In her view, the value of tenure was threatened, not by the aging process, but by the incompetence of individual workers. Discrepancies between the physical and intellectual abilities of older workers versus younger

workers were compensated for by older workers' increased experience and wisdom, as well as the skills they had acquired over time. Consequently she found there to be no pressing and substantial objective addressed by the Universities' mandatory retirement policy: at paras. 389-393.

[77] Justice L'Heureux-Dubé was further of the view that the means chosen by the Legislature were too intrusive. Individuals over 65 were excluded from the protection of the Code solely because of their age, without regard to their individual circumstances. She noted that the adverse effects of mandatory retirement are most painfully felt by the poor, and that women are particularly negatively affected as they are less likely to have accumulated adequate pensions: at paras. 398-399.

[78] In the absence of a reasonable justification for a legislative scheme permitting compulsory retirement at age 65, Justice L'Heureux-Dubé would have struck out subsection 9(a) of the Code in its entirety as unconstitutional.

[79] At the same time that it rendered judgment in *McKinney*, the Supreme Court of Canada also released its decisions in the three companion cases of *Harrison*, *Stoffman* and *Douglas College*. As these cases relied heavily on the reasoning in *McKinney*, I will refer to each of them only briefly.

iii) *Harrison v. University of British Columbia*

[80] *Harrison* involved a challenge to the University of British Columbia's mandatory retirement policy. There was also a challenge to the constitutionality of the definition of "age" in section 1 of the British Columbia *Human Rights Act*, S.B.C. 1984, c. 22, which limited the protection of the Act to those between the ages of 45 and 65.

[81] The majority decision held that because the facts, issues and constitutional questions in *Harrison* were similar to those considered in *McKinney, Harrison* was governed by that case. As a consequence, *Harrison* adds little to the analysis. However, it does bear noting that Justices Wilson and L'Heureux-Dubé once again dissented on the section 1 issue.

iv) *Douglas/Kwantlen Faculty Assn. v. Douglas College*

[82] The appeal in *Douglas College* involved another challenge to a mandatory retirement provision in a collective agreement. The case was disposed of on jurisdictional grounds, the question being whether the arbitrator had jurisdiction to decide *Charter* issues. The Court determined that the arbitrator did indeed have jurisdiction to decide *Charter* issues. However, as the arbitrator had not considered whether the breach of section 15 of the *Charter* was justified under section 1 of the *Charter*, the Court did not deal with this question.

v) *Stoffman v. Vancouver General Hospital*

[83] *Stoffman* involved a challenge brought by doctors with admitting privileges at the Vancouver General Hospital. A hospital Medical Staff Regulation stipulated that doctors had to retire at the age of 65, unless they were able to demonstrate that they could offer something unique to the hospital.

[84] The doctors were not hospital employees, and thus did not benefit from the protection against age-based employment discrimination provided by the British Columbia *Human Rights Act*.

The Supreme Court found that the doctors were also unable to claim the protection of the *Charter*, as hospitals were not part of government.

[85] Even if the *Charter* had applied, the majority would have found that the discriminatory mandatory retirement Regulation would have been saved by section 1 for the reasons given in *McKinney*. Justices Wilson, L'Heureux-Dubé and Cory dissented.

vi) *Dickason v. University of Alberta*

[86] Two years after rendering its decisions in *McKinney* and its companion cases, the issue of mandatory retirement in the university setting was back before the Supreme Court in *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103, [1992] S.C.J. No. 76.

[87] The issue in *Dickason* was whether *McKinney* fully decided "whether a mandatory retirement policy in a private employment setting can be justified pursuant to the provisions of s. 11.1 of the *IRPA* [*Individual's Rights Protection Act*, R.S.A. 1980, c. I-2]?": at para. 33. Once again, the majority and dissenting judgments revealed deep divisions within the Supreme Court on this issue.

[88] As in *McKinney*, the appellant in *Dickason* was a tenured professor who was forced to retire at age 65, in accordance with a clause in her collective agreement. Dr. Dickason filed a complaint with the Alberta Human Rights Commission alleging that the mandatory retirement provision of the collective agreement violated the *IRPA*.

[89] Unlike the Ontario and British Columbia human rights legislation at issue in *McKinney* and *Harrison*, the *IRPA* did not limit its protection against age-based employment discrimination to those under the age of 65. Rather, section 11.1 of the *Individual's Rights Protection Act* prohibited such discrimination unless an employer could demonstrate that it was "reasonable and justifiable in the circumstances". Dr. Dickason did not challenge the constitutional validity of section 11.1 under the *Charter*, but rather the university's claim that the mandatory retirement requirement in issue was reasonable and justifiable.

[90] In rejecting Dr. Dickason's appeal from the dismissal of her human rights complaint, Justice Cory (writing for a majority including Justices La Forest, Gonthier and Iacobucci), discussed the difference between the rights conferred by human rights legislation and those conferred by the *Charter*. He noted that human rights legislation is aimed at regulating the action of private individuals, whereas the *Charter*'s goal is to regulate government action: at para. 18.

[91] As a consequence, although the decision in *McKinney* provided guidance, Justice Cory held that it did not determine the outcome of Dr. Dickason's case, as no deference was owed to the policy choices of the university as a private institution: at para. 22.

[92] While recognizing that parties may not generally contract out of human rights statutes, Justice Cory noted that the mandatory retirement provision at issue was arrived at through the collective bargaining process. In his view, this could provide evidence of the reasonableness of a practice which appeared on its face to be discriminatory: at para. 39.

[93] With this in mind, Justice Cory examined whether the objectives of promoting tenure, academic renewal, planning and resource management, and retirement with dignity justified the placing of age limits on the substantive rights to equal treatment: at para. 33. The evidence regarding the role of mandatory retirement in this context was very similar to that which was before the Court in *McKinney*, and the majority concluded that the mandatory retirement policy was reasonable and justifiable.

[94] Justices L'Heureux-Dubé and McLachlin dissented, finding the university's mandatory retirement policy to be neither reasonable nor justifiable. Given that parties generally cannot contract out of human rights legislation, the dissenting judges were of the view that the fact that the mandatory retirement requirement was found in a collective agreement was not evidence of the reasonableness of the discriminatory practice in Dr. Dickason's case. While accepting that this could be a factor to consider in exceptional circumstances, the collective agreement would nevertheless have to be carefully scrutinized in order to ensure that it was truly freely negotiated, and did not discriminate unfairly against a minority of the union membership: at para. 118.

[95] Justice Sopinka concurred with Justices L'Heureux-Dubé and McLachlin, holding that Dr. Dickason's appeal should be allowed on the basis that the Board of Inquiry had found only a weak connection between the University's objective and its mandatory retirement policy. The Board had also found that there were other, more reasonable ways for the University to achieve its objectives, and that no valid reason for disturbing these factual findings had been demonstrated.

vii) *New Brunswick v. Potash Corporation of Saskatchewan Inc.*

[96] As will be discussed below, there have been calls in recent years for the Supreme Court of Canada to revisit the issue of mandatory retirement. This was explicitly recognized by the Court itself in *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc*., 2008 SCC 45, [2008] 2 S.C.R. 604.

[97] The Supreme Court left the door open for a reconsideration of mandatory retirement in the appropriate case: at para. 4. However, the facts of the *Potash* case did not present the proper opportunity for such a reconsideration, as no constitutional challenge had been made to the relevant provision of the New Brunswick *Human Rights Code*, R.S.N.B. 1973, c. H-11.

B. Why the Supreme Court's Decision in *McKinney* does not Determine the Result of this Case

[98] Air Canada and ACPA argue that the Supreme Court's decision in *McKinney* was binding on the Tribunal, and, as such, should have dictated a finding that paragraph 15(1)(c) of the *CHRA* was saved by section 1 of the *Charter*. According to Air Canada and ACPA, there are no factual or evidentiary differences in this case that are sufficiently material as to justify a different conclusion on the section 1 issue.

[99] The applicants contend that the only real change that had taken place between the time of the Supreme Court's decision in *McKinney* and the hearing before the Tribunal in this case was that mandatory retirement had been abolished in Ontario, a development that occurred *after* the termination of Messrs. Vilven and Kelly's employment with Air Canada. This single development did not, in the applicants' view, permit the Tribunal to refuse to follow *McKinney*.

[100] Our legal system operates on the principle of *stare decisis*. That is, in the interest of providing certainty to the law, decisions of appellate courts are binding on trial courts and should ordinarily be followed in cases involving similar facts.

[101] While recognizing that Supreme Court of Canada decisions are unquestionably binding on both the Tribunal and on this Court, there are four reasons why the Supreme Court's decisions in *McKinney* and its companion cases should not dictate the result of this case. These are:

1. The significant differences between the legislative provisions in issue;
2. The clear indication in *McKinney* that the Supreme Court did not intend that the decision be the final word on the subject of mandatory retirement for all time;
3. The differences in the evidentiary records that were before the Supreme Court and the Tribunal; and
4. The developments in public policy that have occurred since *McKinney* was decided.

[102] Each of these reasons will be discussed in turn.

i) ***The Differences Between the Legislative Provisions***

[103] While there are similarities between paragraph 15(1)(c) of the *CHRA* and the provisions of the Ontario and British Columbia human rights legislation that were at issue in *McKinney* and *Harrison*¸ there are also significant differences in the legislation.

[104] The *Ontario Human Rights Code* provision under consideration in *McKinney* contained a general prohibition against age discrimination in employment. “Age” was defined in section 9 of the Code as being “an age that is eighteen years or more and less than sixty-five years”. As a result, those over the age of 65 did not enjoy the protection of the Code.

[105] The provision of the British Columbia *Human Rights Act* at issue in *Harrison* defined “age” as being “an age of 45 years or more and less than 65 years”, with a similar result.

[106] There are undoubtedly similarities between these provisions and paragraph 15(1)(c) of the *CHRA*, which provides that:

15. (1) It is not a discriminatory practice if …	**15.** (1) Ne constituent pas des actes discriminatoires : ….
(*c*) an individual’s employment is terminated because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual …	*c*) le fait de mettre fin à l’emploi d’une personne en appliquant la règle de l’âge de la retraite en vigueur pour ce genre d’emploi …

[107] None of these legislative provisions mandate retirement at a specified age. All are permissive provisions which limit the protection offered by relevant legislation in the employment context.

[108] ACPA and Air Canada submit that paragraph 15(1)(c) of the *CHRA* is more readily defensible, as it is narrower than section 9 of the *Ontario Human Rights Code*. As Justice Wilson

observed in her dissenting judgment in *McKinney*, section 9 of the Code permits all forms of workplace age discrimination against those over 65, and not just their mandatory retirement: at para. 350. In contrast, the exception created by paragraph 15(1)(c) of the *CHRA* relates only to the issue of mandatory retirement.

[109] I agree that in this respect, paragraph 15(1)(c) of the *CHRA* is narrower than section 9 of the *Ontario Human Rights Code*. However, there are other significant differences between paragraph 15(1)(c) of the *CHRA*, and the provisions of the Ontario and British Columbia human rights legislation that were in issue in *McKinney* and *Harrison* that have a bearing on whether paragraph 15(1)(c) is saved by section 1 of the *Charter*.

[110] First of all, the legislative history and objectives of each provision is different. Justice La Forest discussed the legislative history and objectives of section 9 of the *Ontario Human Rights Code* in *McKinney*. While noting that concern had been expressed by legislators for not affording protection in the employment sector to those over 65, in the end, "other considerations predominated". These included "the potential for delayed retirement and delayed benefits, as well as the effect on hiring and personnel practices, and the impact on youth unemployment": at para. 94.

[111] In contrast, when the *CHRA* was before Parliament, Minister of Justice Ron Basford and Assistant Deputy Minister Barry Strayer testified that the intent of paragraph 15(1)(c) was to leave the issue of a mandatory retirement age in the private sector to be negotiated between employers and employees: see *Vilven* #1 at paras. 159-161 and 243-247.

[112] Moreover, in both the Ontario and British Columbia human rights legislation, the provincial Legislatures specifically identified the age at which the protection afforded by the law should cease being available to employees. Parliament did not make such a policy choice in enacting paragraph 15(1)(c). Rather, it elected to delegate the choice of age at which employees will cease to enjoy the protection of the *CHRA* to employers employing a particular class of workers.

[113] That is, it is employers who will decide what the "normal age of retirement" will be for various types of positions. This decision may be arrived at through the collective bargaining process, or may result from the unilateral imposition of employer retirement policies. In practice, paragraph 15(1)(c) of the *CHRA* applies primarily to private sector employers, as the federal government abolished mandatory retirement for its employees in the 1980's.

[114] There is another difference between the legislation at issue in this case and that at issue in *McKinney*. In *McKinney*, the Supreme Court identified 65 as the "normal age of retirement" in Canadian society: at para. 106. Thus the legislative provisions at issue in both *McKinney* and *Harrison* conformed to this societal norm. In contrast, paragraph 15(1)(c) of the *CHRA* permits the imposition of retirement on employees at an age below 65, so long as it accords with the "normal age of retirement" for a particular type of position.

[115] The younger the mandatory age of retirement, the greater the adverse effects will be for those who have been unable to accumulate sufficient financial resources or pensionable earnings prior to being compelled to retire. The labour economists testifying before the Tribunal agreed that this group will be disproportionately made up of women and immigrants.

[116] Further, as I observed in *Vilven* #1, paragraph 15(1)(c) of the *CHRA* is an unusual provision to find in human rights legislation, in that it allows for federally-regulated employers to discriminate against their employees on the basis of age, as long as that discrimination is pervasive within a particular industry: at para. 1.

[117] The delegation of the choice of the permissible mandatory retirement age to private sector industry players has another consequence for federally-regulated employees - one not felt by those working in either Ontario or British Columbia at the time that *McKinney* and *Harrison* were decided.

[118] That is, employees in both Ontario and British Columbia could readily have discovered the age at which they would cease to enjoy the protection of the relevant provincial human rights legislation. In contrast, paragraph 15(1)(c) of the *CHRA* does not clearly inform employees of their rights. The uncertainty and practical difficulties that the wording of paragraph 15(1)(c) creates are illustrated by the facts of this case.

[119] In order to understand his or her rights, a federally-regulated employee would have to know which positions were "similar to the position of that individual". This would require the employee to properly identify the appropriate comparator group. This is not an easy task, even for legally-trained individuals familiar with human rights principles.

[120] Indeed, in this case, the Tribunal determined that the appropriate comparator group for the purposes of the paragraph 15(1)(c) analysis was "pilots who fly with regularly scheduled, international flights with […] major international airlines": see Tribunal decision #1 at para. 55.

[121] On judicial review, I concluded that the Tribunal had erred in principle in coming to this conclusion, with the result that its choice of comparator was unreasonable. I found that the proper comparator should be "pilots working for Canadian airlines who fly aircraft of varying sizes and types, transporting passengers to both domestic and international destinations, through Canadian and foreign airspace": *Vilven* #1, at para. 112.

[122] Even if the individual was able to properly identify the appropriate comparator group, and to identify which positions were similar to his or her own job, the employee would then have to assemble the necessary information as to the number of individuals occupying similar positions with other employers. The individual would also have to be able to find out what the retirement policies were governing these other employees. This would be necessary to determine whether there was a "normal age of retirement" for these types of positions, and what that age was.

[123] Numerical information as to the number of individuals employed in specific positions is often highly sensitive proprietary information that may not be readily accessible to employees of other companies. Indeed, there was evidence before the Tribunal in this case as to the difficulties that Messrs. Vilven and Kelly encountered in trying to gather this type of information from Air Canada's competitors. By the time the case came before the Tribunal, the record in this regard was still not complete.

[124] There is a further consideration that distinguishes paragraph 15(1)(c) of the *CHRA* from the provisions of the Ontario and British Columbia human rights legislation at issue in *McKinney* and *Harrison*. That is, the upper age limit on the protection against age discrimination specified in the provincial legislation applied equally to all employees working in the province in question. In contrast, the age limit contemplated by paragraph 15(1)(c) of the *CHRA* may vary from industry to industry and from position to position.

[125] Moreover, unlike the provincial legislation at issue in *McKinney* and *Harrison*, paragraph 15(1)(c) of the *CHRA* permits a single dominant player within an industry to effectively set the normal age of retirement for the entire industry. Once again, this distinguishing feature is illustrated by the facts of this case.

[126] Other Canadian airlines do not require that their pilots retire at age 60. At the time that Messrs. Vilven and Kelly were forced to retire from Air Canada, several Canadian airlines allowed their pilots to fly until they were 65, and one had no mandatory retirement policy whatsoever: *Vilven* #1, at para. 173.

[127] However, Air Canada occupies a dominant position within the Canadian airline industry, employing the majority of pilots flying aircraft of varying sizes and types, transporting passengers to both domestic and international destinations through Canadian and foreign airspace. As a result, Air Canada (with ACPA) is able to set the industry norm, and can effectively determine the ‘normal

age of retirement' for all Canadian pilots for the purposes of paragraph 15(1)(c) of the Act: see *Vilven* #1, at para. 171.

[128] In other words, paragraph 15(1)(c) of the Act allows Air Canada and ACPA's own discriminatory conduct to provide them with a defence to Messrs. Vilven and Kelly's human rights complaints: see *Vilven* #1, at para. 313.

[129] None of these issues were considered by the Supreme Court in *McKinney* and *Harrison* in determining whether the legislation at issue in those cases was demonstrably justifiable under section 1 of the *Charter*. The differences between the provisions of the Ontario and British Columbia human rights legislation and paragraph 15(1)(c) of the *Canadian Human Rights Act* are sufficiently material as to justify the finding that the Supreme Court's decision in *McKinney* should not automatically dictate the result of a section 1 *Charter* analysis in this case.

ii) *McKinney did not Purport to be the Final Word on the Subject of Mandatory Retirement*

[130] The second reason for concluding that *McKinney* does not dictate the result in this case is that the majority decision in *McKinney* did not purport to be the final word on the subject of mandatory retirement for all time.

[131] The constitution is a "living tree capable of growth and expansion within its natural limits". The result of this is that constitutional rights are subject to changing judicial interpretations over time: see *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 at p. 136 (P.C.), per Lord Sankey.

[132] However, as the Ontario Superior Court observed in *Bedford v. Canada (Attorney General)*, 2010 ONSC 4264, [2010] O.J. No. 4057, while the Supreme Court of Canada has the power to revisit its earlier decisions, "lower courts must only do so in very limited circumstances": at para. 78.

[133] As to what those limited circumstances may be, the Court in *Bedford* quoted comments in *Wakeford v. Canada (Attorney General)* (2001), 81 C.R.R. (2d) 342, [2001] O.J. No. 390 (Ont. Sup. Ct.), aff'd (2001), 156 O.A.C. 385, leave to appeal to S.C.C. refused, [2002] S.C.C.A. No. 72. There, Justice Swinton stated that where a decision of the Supreme Court is squarely on point, "there must be some indication - either in the facts pleaded or in the decisions of the Supreme Court - that the prior decision may be open for reconsideration...: at para.14.

[134] As was explained earlier, I am not persuaded that *McKinney* and the other Supreme Court mandatory retirement jurisprudence is "squarely on point". In any event, the Supreme Court clearly indicated in *McKinney* that it did not intend that its judgment on the section 1 issue be the final word on the subject.

[135] Justice La Forest observed that "the ramifications of mandatory retirement on the organization of the workplace and its impact on society generally are not matters capable of precise measurement". He went on to state that "the effect of its removal by judicial fiat is even less certain". He noted that decisions made in relation to such matters "must inevitably be the product of

a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society, and other components": all quotes from *McKinney* at para. 104.

[136] In discussing the expert evidence provided by labour economists with respect to the potential consequences of abolishing mandatory retirement, Justice La Forest observed that mandatory retirement could not be looked at in isolation, and that, according to the experts, "the repercussions of abolishing mandatory retirement would be felt 'in all dimensions of the personnel function: hiring, training, dismissals, monitoring and evaluation, and compensation'": at para. 109. Consequently, Justice La Forest stated that "it should not be altogether surprising that the Legislature opted for a cautious approach to the matter": at para. 112.

[137] However, in the very next paragraph, Justice La Forest went on to note that mandatory retirement had been abolished in a number of jurisdictions, albeit by legislative choice rather than judicial fiat, and that the apprehended effects had not resulted. He observed that "we do not really know what the ramifications of these new schemes will be and *the evidence is that it will be some 15 to 20 years before a reliable analysis can be made*": at para. 113, emphasis added.

[138] Thus, Justice La Forest's statement that he was "not prepared to say that the course adopted by the Legislature […] is not one that reasonably balances the competing social demands which our society must address" was specifically made in the social and historical context of the early 1990's: at para. 123. He clearly left the issue open for revisitation in the future, when reliable evidence became available as to what actually happened when mandatory retirement was abolished.

[139] Where earlier Supreme Court decisions can and should be revisited, "such revisitations must necessarily commence at the trial court level": *Leeson v. University of Regina*, 2007 SKQB 252, 301 Sask. R. 316, at para. 9.

[140] This case thus falls within the exceptional circumstances discussed in *Wakeford*. It was open to the Tribunal to revisit the issue of mandatory retirement as it related to paragraph 15(1)(c) of the *Canadian Human Rights Act*, in light of more recent evidence.

[141] This then takes us to the third distinguishing feature of this case, which is the differences in the evidentiary records that were before the Supreme Court in *McKinney* and the Tribunal in this case.

iii) The Differences in the Evidentiary Records

[142] Supreme Court jurisprudence may also be revisited where there are "new facts that may have called into question the basis for the Supreme Court decision": see *Bedford*, at para. 80.

[143] In *Leeson*, the Court considered when it is appropriate for a lower court to revisit the decisions of a higher court. It is noteworthy that this discussion took place in relation to a *Charter* challenge brought by university professors to a provision of *The Saskatchewan Human Rights Code*, S.S.1979, c. S-24.1, limiting the protection against age discrimination provided by the Code to those under 65. This was essentially the issue that was before the Supreme Court of Canada in *McKinney*.

[144] The Court addressed the professors' argument that the social, political and economic assumptions underlying the *McKinney* decision were no longer valid. In this regard, the Court stated that "When such change is alleged, and there are at least some facts alleged which support such change, it is not appropriate to prevent the matter from proceeding on the basis of *stare decisis*": *Leeson*, at para. 9. The Court went on, however, to dismiss the professors' *Charter* challenge on other grounds.

[145] It has now been some 18 years since *McKinney* was decided, and approximately 24 years since the evidentiary record would have been assembled in that case. The Supreme Court did not know what the ramifications of abolishing mandatory retirement would be when it decided *McKinney*. As will be discussed further on in these reasons, there is now expert evidence available as to the impact that the abolition of mandatory retirement has actually had for traditional labour market structures, including deferred compensation and pension schemes, seniority and tenure systems, and so on.

[146] Consequently, I am satisfied that there are new facts available which call into question the factual underpinning of the Supreme Court's decision in *McKinney*.

iv) The New Developments in Public Policy

[147] *Bedford* also stated that Supreme Court jurisprudence could be revisited where there were "new developments in public policy … that may have called into question the basis for the Supreme Court decision": at para. 80.

[148] There have been developments in both public policy and non-*Charter* human rights jurisprudence that further call into question the basis for the Supreme Court decisions in *McKinney* and related cases.

[149] Numerous studies have been carried out since *McKinney* with respect to the effects of abolishing mandatory retirement in Canada. Indeed, the author of the majority decision in *McKinney* - Justice La Forest himself - examined the issue in his role as Chair of the Canadian Human Rights Act Review Panel. This Panel recommended 10 years ago that there should no longer be blanket exemptions for mandatory retirement policies in the *Canadian Human Rights Act*: see the Report of the Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision*, (Ottawa: Canadian Human Rights Act Review Panel, June 2000), at p.119.

[150] While recognizing that further study was required in order to develop alternatives to mandatory retirement, the Report of the Canadian Human Rights Act Review Panel emphasized that such studies should keep equality issues in mind. Significantly, the Report says that "Employers should not be able to justify forcing someone to retire *simply because this has been the normal age of retirement for similar jobs*" (emphasis added). According to the authors, "This is a very arbitrary approach that incorporates the types of historical assumptions that human rights legislation is supposed to eliminate": at p.121.

[151] The Report does accept that mandatory retirement may be justified in certain workplaces, citing the Canadian Forces as an example. However, it recommends that "In the absence of blanket

mandatory retirement defences in the Act, the government should require employers to justify their mandatory retirement policies with a *bona fide* occupational requirement": at pp.120-121.

[152] The Report of the Canadian Human Rights Act Review Panel reflects the fact that societal attitudes towards age discrimination have evolved since *McKinney* was decided. As the Ontario Superior Court observed in *Assn. of Justices of the Peace of Ontario v. Ontario (Attorney General)*, (2008), 92 O.R. (3d) 16, [2008] O.J. No. 2131, ("*Justices of the Peace*"), "society's understanding of age discrimination, prohibited by the *Charter*, has evolved to the extent that practices considered acceptable 20 years ago are now prohibited": at para. 177.

[153] In addition, post-*McKinney* Supreme Court of Canada human rights jurisprudence in the non-*Charter* context has reinforced the need for employers to avoid generalized assumptions as to the capacity of individual employees.

[154] That is, in *Meiorin*, cited above, and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868, [1999] S.C.J. No.73 ("*Grismer*"), the Supreme Court restated the test for discrimination, and imported the duty to accommodate into cases of direct discrimination under human rights codes.

[155] In so doing, the Court emphasized the need for individualized assessments, in order to avoid stereotyping based upon proscribed grounds. In this regard, the Court stated that employers "must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship": *Meiorin* at para. 62.

[156] These circumstances further support the view that the Supreme Court's decision in *McKinney* should not dictate the result of a section 1 *Charter* analysis in this case.

v) *Other Post-McKinney Mandatory Retirement Jurisprudence*

[157] Before leaving this issue, I would note that my conclusion that the Supreme Court's decisions in *McKinney* and its companion cases do not require a finding that paragraph 15(1)(c) of the *CHRA* is saved by section 1 of the *Charter* is reinforced by a review of several lower court post-*McKinney* decisions.

[158] These cases deal either with the constitutional validity of mandatory retirement policies or of legislation, and, in one case, deal specifically with the constitutional validity of paragraph 15(1)(c) of the *Canadian Human Rights Act* itself. In each of these cases, superior or appellate Courts in three different provinces have concluded that the contextual assumptions upon which the Supreme Court's decision in *McKinney* was founded are no longer valid.

a) *Greater Vancouver Regional District Employees' Union v. Greater Vancouver Regional District*

[159] The first of these decisions is the judgment of the British Columbia Court of Appeal in *Greater Vancouver Regional District Employees' Union v. Greater Vancouver Regional District*, 2001 BCCA 435, 206 D.L.R. (4th) 220. This case did not involve a *Charter* challenge to human rights legislation, but rather the review of an arbitrator's decision striking down an employer's mandatory retirement policy.

[160] In dismissing the employer's appeal, the Court held that the mandatory retirement policy was discriminatory, and that the employer had not met its burden of establishing that the policy was justified under section 1 of the *Charter*. In coming to this conclusion, the Court was not persuaded that *McKinney* and subsequent decisions had decided that "all mandatory retirement policies in the public sector are saved under s.1 of the *Charter* simply because they do not contravene relevant provincial human rights legislation": *Greater Vancouver*, at para. 120.

[161] Of particular significance are the comments in *Greater Vancouver* with respect to the ongoing relevance of the *McKinney* decision. In this regard, the Court observed that *McKinney* was not intended to be a final determination of the mandatory retirement question, and that, as I have noted earlier, there were intimations in the reasons of the majority that the issue should be revisited in the future: at para. 28.

[162] The majority decision in *Greater Vancouver* goes on to observe that "Since it is now 11 years since *McKinney* was decided, and since the issue of mandatory retirement is one of considerable importance and concern in our society, I respectfully suggest that the time for revisiting the issue is upon us": at para. 28.

[163] Under the heading "Time for Reconsideration", the majority in *Greater Vancouver* conclude with the following *cri de cœur* urging the Supreme Court of Canada to reconsider the issue of mandatory retirement:

> Eleven years have now passed since *McKinney* was decided. The demographics of the workplace have changed considerably, not only with respect to the university community, but also in the workplace at large. At least two other countries, Australia and New Zealand

> have abolished mandatory retirement. Recent studies have been done on the effect of abolishing mandatory retirement in Canada and elsewhere. (See, for example, The *Report of the Canadian Human Rights Act Review Panel* […] and Ontario Human Rights Commission, *Time for Action: Advancing Human Rights for Older Ontarians* (Toronto: Queen's Printer for Ontario, 28 June 2001). The extent to which mandatory retirement policies impact on other equality rights, and on the mobility of the workforce, have become prominent social issues. The social and legislative facts now available may well cast doubt on the extent to which the courts should defer to legislative decisions made over a decade ago. The issue is certainly one of national importance.

b) *Assn. of Justices of the Peace of Ontario v. Ontario (Attorney General)*

[164] Seven years later, the Ontario Superior Court was called upon to consider a constitutional challenge to legislation requiring that Justices of the Peace retire at age 70, rather than age 75, as is the case for judges: *Justices of the Peace*, above.

[165] To the extent that much of the decision focuses on mandatory retirement as it relates to judicial independence, the decision is not directly on point. That said, the Court goes through a detailed discussion of the "striking change" that had taken place in Ontario with respect to mandatory retirement since the time that *McKinney* was decided, in both legislation and public attitudes: see paras. 33-45. The Court observed that where mandatory retirement had once been generally accepted as a social norm, "it is now the exception, applicable to only a select few occupations for which it is viewed as necessary": at para. 33.

[166] After reviewing various studies and legislative initiatives advocating the abolition of mandatory retirement in Ontario, the Court concluded its analysis by observing that since *McKinney* was decided, "there has been a sea change in the attitude to mandatory retirement in Ontario, led by

the efforts of the [Ontario Human Rights] Commission". This attitudinal change had culminated in legislative reform, with the Ontario Legislature having recognized that "mandatory retirement is a serious form of age discrimination", leading to its abolition in both the public and private sectors in that province: at para. 45.

c) *CKY-TV v. Communications, Energy and Paperworkers Union of Canada, Local 816*

[167] The most recent and most directly relevant cases are a pair of decisions rendered first by a labour arbitrator, and then by the Manitoba Court of Queen's Bench, expressly dealing with the constitutionality of paragraph 15(1)(c) of the *CHRA*. Both decisions conclude that paragraph 15(1)(c) violates subsection 15(1) of the *Charter* and that it is not saved by section 1.

[168] *CKY-TV v. Communications, Energy and Paperworkers Union of Canada (Local 816) (Kenny Grievance)*, [2008] C.L.A.D. No. 92 is the arbitral decision dealing with the mandatory retirement of a maintenance technician with CKY-TV at age 65 in accordance with a company policy. The employee's union grieved the termination of his employment, also challenging the constitutionality of paragraph 15(1)(c) of the *CHRA*.

[169] In concluding that paragraph 15(1)(c) violated subsection 15(1) of the *Charter* and was not saved by section 1, Arbitrator Peltz found that the Supreme Court had proceeded on the basis of contextual assumptions in *McKinney*, which assumptions were no longer valid in light of the expert evidence before him.

[170] The arbitrator's section 1 analysis turned on the issue of minimal impairment, with the arbitrator concluding that the evidence before him did not establish that "there is a reasonable basis for believing that the employment regime of pensions, job security, good wages and reasonable benefits requires the maintenance of mandatory retirement at age 65 or a predominant age": at para. 216.

[171] The arbitrator's decision was subsequently confirmed by the Manitoba Court of Queen's Bench: see *CKY-TV v. Communications, Energy and Paperworkers Union of Canada, Local 816,* 2009 MBQB 252, [2009] M.J. No. 336. The Court agreed with the arbitrator that the employer had not satisfied the minimal impairment component of the *Oakes* test, in light of the evidence in the record regarding current social and economic conditions.

[172] The Court observed that the operation of paragraph 15(1)(c) was not limited to situations where unions or employees had negotiated or agreed to mandatory retirement at any particular age. Rather, the exception to the prohibition on age discrimination created by paragraph 15(1)(c) went "far beyond limiting the discriminatory practice to those situations where contracts are truly negotiated": at para. 32.

[173] Indeed, the Court found that paragraph 15(1)(c) "purports to permit an employer to terminate a person's employment simply by establishing or proving a 'normal age of retirement' for workers in similar positions". As a consequence, the Court was satisfied that the arbitrator's conclusion on the issue of minimal impairment was correct: at para. 32.

d) *Bell v. Canada (Canadian Human Rights Commission)*; *Cooper v. Canada (Canadian Human Rights Commission)*

[174] Before leaving this issue, there is one other post-*McKinney* decision that bears comment. This is the decision of the Supreme Court in *Bell v. Canada (Canadian Human Rights Commission)*; *Cooper v. Canada (Canadian Human Rights Commission)*, [1996] S.C.J. No. 115 ("*Bell* and *Cooper*").

[175] *Bell* and *Cooper* is not technically a mandatory retirement decision, inasmuch as the issue before the Supreme Court was whether either the Canadian Human Rights Commission or the Tribunal had jurisdiction to consider the constitutional validity of a provision of the *CHRA*.

[176] What is noteworthy, however, is that the statutory provision at issue in *Bell* and *Cooper* was paragraph 15(1)(c) of the Act, and that the case arose in the context of human rights complaints brought by two former Canadian Airlines pilots. Messrs. Bell and Cooper alleged that they had been the victims of age discrimination when they were forced to retire from Canadian Airlines at the age of 60, in accordance with the provisions of their collective agreement.

[177] The human rights complaints were investigated by the Commission, and the investigator found that 60 was the normal age of retirement for airline pilots. However, before a decision could be made by the Commission with respect to the complaints, the Supreme Court released its decision in *McKinney*. The Commission subsequently advised the complainants that a Tribunal inquiry into their complaints was not warranted, and that the Commission was bound by *McKinney*.

[178] As noted earlier, the issue that ultimately came before the Supreme Court was a jurisdictional one. The majority of the Court found that neither the Commission nor the Tribunal had the jurisdiction to consider the constitutional validity of paragraph 15(1)(c) of the *CHRA*. Consequently, the majority did not address the significance of *McKinney* for Messrs. Bell and Cooper's human rights complaints.

[179] In their dissenting judgment, Justices McLachlin and L'Heureux-Dubé found that both the Commission and the Tribunal had the power to consider whether the *Charter* rendered the normal age of retirement defence invalid.

[180] More importantly for the purposes of this case, the dissenting judges rejected the airline's argument that *McKinney* provided a complete answer to Messrs. Bell and Cooper's human rights complaints. They noted that "Everyone agrees that the issue of whether a section of the *Canadian Human Rights Act* has been invalidated by s. 15 of the *Charter* and s. 52 of the *Constitution Act*, 1982 is an important issue for the appellants and for Canadians generally": at para. 69.

[181] Justices McLachlin and L'Heureux-Dubé did not accept the airline's contention that because *McKinney* held that age 65 was the normal age of retirement for the university professors, it necessarily followed that a statute providing for retirement at the normal age for the occupation in question must also be saved under section 1.

[182] According to the dissenting judges, "this argument oversimplifies the process envisaged under s. 1 of the Charter". They stated that "Even if one were to accept the doubtful submission that

the conclusion that the infringement in *McKinney* was justified under s. 1 of the *Charter* solely on the ground that this was the normal age of retirement, one cannot conclude that that factor alone would suffice in all cases to justify an infringement of s. 15": at para. 106.

[183] Justices McLachlin and L'Heureux-Dubé held that section 1 "is about much more than what is usual or 'normal'". They were of the view that a usual practice "may be unjustifiable, having regard to the egregiousness of the infringement or the insubstantiality of the objective alleged to support it". As a result, each case had to be examined in light of its own circumstances: at para. 106.

[184] Consequently, the dissenting judges found that the Commission had erred in concluding that *McKinney* presented a complete answer to Messrs. Bell and Cooper's human rights complaints.

[185] It is thus clear that for at least two judges of the Supreme Court, the decision in *McKinney* does not provide a complete answer to a challenge to the constitutional validity of paragraph 15(1)(c) of the *CHRA*.

C. Is Paragraph 15(1)(c) of the *CHRA* Justifiable Under Section 1 of the *Charter*?

[186] Having thus determined that *McKinney* does not provide a complete answer to Messrs. Vilven and Kelly's *Charter* challenge, the question for this Court is whether the Tribunal's finding that paragraph 15(1)(c) of the *CHRA* is not saved by section 1 of the *Charter* is correct.

i) The Section 1 Analytical Framework

[187] As was previously noted, the parties agree that the *Oakes* test should be applied by the Court in determining whether paragraph 15(1)(c) of the *CHRA* is saved by section 1 of the *Charter*. In order to satisfy this test, Air Canada and ACPA must demonstrate that:

> (1) the objective of the legislation is pressing and substantial; and that
> (2) the impairment of the right is proportional to the importance of the objective in that
>> (a) the means chosen are rationally connected to the legislative objective;
>> (b) the means chosen impairs the Charter right minimally or "as little as possible"; and
>> (c) there is a proportionality between any deleterious effects of the legislation and its salutary objective, so that the attainment of the legislative goal is not outweighed by the abridgment of the right in question.

See *Oakes* at paras. 69 and 70. See also *R. v. Edwards Books & Art Ltd*., [1986] 2 S.C.R. 713, [1986] S.C.J. No. 70 (QL); *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, [1995] S.C.J. No. 68; *Irwin Toy v. Québec (Attorney General)*, [1989] 1 S.C.R. 927, [1989] S.C.J. No. 36.

[188] The starting point of a section 1 inquiry is to identify the objectives of the law, in order to determine whether these objectives are sufficiently important as to warrant the limitation of a constitutional right: see *Stoffman*, above, at para. 50.

[189] In order to identify the objectives of the law, the Court must examine the nature of the social problem that the legislation addresses. The context of the impugned legislation "is also important in order to determine the type of proof which a court can demand of the legislator to justify its

measures under section 1": see *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, [1998] S.C.J. No. 44, at paras. 87 and 88. As the Supreme Court observed in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, [1997] S.C.J. No. 86, "where the legislation under consideration involves the balancing of competing interests and matters of social policy, the *Oakes* test should be applied flexibly, and not formally or mechanistically": at para. 85.

[190] The Supreme Court also observed in *Eldridge* that the application of the *Oakes* test "requires close attention to the context in which the impugned legislation operates": at para. 85.

[191] Relevant contextual factors may include the nature of the harm addressed, the vulnerability of the group protected, subjective fear and apprehension of harm, and the nature and importance of the infringed activity: see *R. v. Bryan*, 2007 SCC 12, [2007] 1 S.C.R. 527, at para. 10. See also *Thomson Newspapers Co.*, and *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827.

[192] Although this *Charter* challenge arises in the context of the forced retirement of two Air Canada pilots, I agree with the parties that my section 1 analysis should not be restricted to this context. Messrs. Vilven and Kelly were not denied the protection of the *CHRA* because they were airline pilots working for Air Canada, but because they had reached the "normal age of retirement" for similar positions, as contemplated by paragraph 15(1)(c) of the *CHRA*.

[193] As the Supreme Court observed in *McKinney*, to limit a section 1 analysis to the specific factual context in which the challenge arises would be inconsistent with the *Oakes* test, which

requires a consideration of whether the measures adopted have been carefully designed to achieve the objective in question. Paragraph 15(1)(c) of the *CHRA* is not restricted to the airline industry, and while evidence relating to the specific situation of Air Canada pilots may "serve as an example to demonstrate the reasonableness of the objectives, it must not be confused with those objectives": *McKinney*, at para. 91.

[194] With these principles in mind, I now turn to consider paragraph 15(1)(c) of the *CHRA* in light of the *Oakes* test.

ii) *What are the Objectives of Paragraph 15(1)(c) of the CHRA*?

[195] The first element of the *Oakes* test requires the Court to identify the objectives of the legislative provision in question. I identified the objectives of paragraph 15(1)(c) of the *Canadian Human Rights Act* in *Vilven* #1 in the following terms:

> [243] The Tribunal described the purpose of paragraph 15(1)(c) of the *Canadian Human Rights Act* as being "to strike a balance between the need for protection against age discrimination and the desirability of those in the workplace to bargain for and organize their own terms of employment …" : at para. 98.
>
> [244] The Tribunal's description of the purpose of the provision is accurate, as far as it goes. A more fulsome description of the purpose of the impugned legislation was provided by the arbitrator in the *CKY-TV* case cited earlier. In this regard, the arbitrator observed that the legislative objective underlying paragraph 15(1)(c) of the Act "was to protect a longstanding employment regime".
>
> [245] Referring to the comments of Minister Basford cited earlier in these reasons, the arbitrator noted that the Minister had made reference to the "'many complex social and economic factors' involved in mandatory retirement", leading the arbitrator to conclude that "the government's stated preference was to continue the traditional approach whereby the issue in the private sector was

> addressed between employers and employees": *CKY-TV*, at para.. 210.
>
> [246] The arbitrator further held that the objective of paragraph 15(1)(c) of the Act was to allow for the continuation of a socially desirable employment regime, which included pensions, job security, wages and benefits. This was to be achieved by allowing mandatory retirement "if the age matched the predominant age for the position": *CKY-TV*, at para.. 211.
>
> [247] It is clear from the statements made by Minister Basford and Assistant Deputy Minister Strayer at the time that the *Canadian Human Rights Act* was enacted that paragraph 15(1)(c) of the Act was intended to create an exception to the quasi-constitutional rights otherwise provided by the Act, so as to allow for the negotiation of mandatory retirement arrangements between employers and employees, particularly through the collective bargaining process.

[196] No appeal was taken from my decision in *Vilven* #1, and ACPA and Air Canada do not now take issue with my characterization of Parliament's objectives in enacting paragraph 15(1)(c) of the *CHRA*. Rather, their argument is that the Tribunal erred by failing to find that these objectives were pressing and substantial.

iii) ***Are The Objectives of Paragraph 15(1)(c) of the CHRA Pressing and Substantial?***

[197] The Tribunal found that Parliament's objectives in enacting paragraph 15(1)(c) of the *CHRA* were neither pressing nor substantial, as the alternatives to mandatory retirement used in other jurisdictions preserve the benefits of current labour market structures, such as deferred compensation and pension schemes, without discriminating on the basis of age. In light of this, the Tribunal asked how the goal of permitting freedom of contract could be sufficiently important as to justify overriding a constitutional right: Tribunal decision #2, at para. 45.

[198] The Tribunal further found that the link between mandatory retirement and the benefits traditionally associated with it was not as strong as was once believed: at para. 47. As these benefits could be achieved without mandatory retirement, the Tribunal held that it was "difficult to see how permitting it to be negotiated in the workplace is important enough to warrant the violation of equality rights that was identified by the Federal Court in the present case": at para. 49.

[199] Having regard to the aging of the workforce, and the fact that many individuals want or need to continue working, the Tribunal concluded that preventing, rather than permitting, age discrimination after the normal age of retirement has become a pressing and substantial need in society: at para. 48.

[200] In my view, the Tribunal erred by conflating elements of the proportionality analysis with its assessment of whether Parliament's objectives in enacting paragraph 15(1)(c) of the *CHRA* were pressing and substantial.

[201] I have previously found that the objective of paragraph 15(1)(c) was to permit the negotiation of mandatory retirement arrangements between employers and employees, particularly through the collective bargaining process, so as to allow for the preservation of socially desirable employment regimes which include matters such as pensions, job security, wages and benefits. Such an objective continues to be a pressing and substantial one in our society. Indeed, I note that this point was conceded by the union in *CKY-TV*.

[202] The means chosen by Parliament to achieve this objective was the enactment of the

permissive provision in the *CHRA* that allows mandatory retirement where the retirement age matches the "normal age of retirement" for similar positions. Whether the means chosen to attain the objectives of paragraph 15(1)(c) can still be shown to be rationally connected to the preservation of socially desirable employment regimes in light of current social science evidence is another question altogether, one that properly forms part of the proportionality analysis.

[203] Similarly, the aging of the workforce and the fact that many individuals may want or need to continue working are matters that should properly form part of the minimal impairment analysis. These matters also factor into the assessment of whether there is proportionality between the deleterious effects of the legislation and its salutary objectives.

[204] Having concluded that Parliament's objectives in enacting paragraph 15(1)(c) of the *CHRA* are still pressing and substantial, it remains to be determined whether the means employed by Parliament to achieve this objective are proportional, having regard to the remaining elements of the *Oakes* test.

iv) *The Proportionality Component of the Oakes Test*

[205] Once the objectives of the legislation in issue have been identified and are determined to be pressing and substantial, the impugned law is then subjected to the proportionality test. This assesses whether the means chosen by Parliament to achieve its objectives are proportional or appropriate to the ends. Context infuses every aspect of this component of the *Oakes* test: *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] S.C.J. No. 27, at para. 195.

[206] At this stage of the analysis, the objectives of the legislation are to be balanced against "the nature of the right it violates, the extent of the infringement and the degree to which the limitation furthers other rights or policies of importance in a free and democratic society": *Stoffman*, at para. 50, per Justice Wilson dissenting, but not on this point.

[207] Put another way, the task for the Court at this stage of the inquiry is to determine whether impugned legislation is "carefully designed, or rationally connected, to the objective". Legislation "must impair the right in issue as little as possible", and the effect of the legislation "must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights": see *R. v. Edwards Books*, above, at para.117.

v) *Rational Connection*

[208] The first question, then, is whether there is a rational connection between the legislative objective and the provision in the *CHRA* that permits mandatory retirement at the "normal age of retirement" for similar positions.

[209] As Chief Justice Dickson observed in *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, [1990] S.C.J. No. 129, "... as long as the challenged provision can be said to further *in a general way* an important government aim it cannot be seen as irrational": at para. 56, emphasis added.

[210] Justice Wilson observed in her dissenting opinion in *Stoffman* that the rational connection element of the proportionality test is meant to "engage the Court in an examination of whether government is proceeding logically in the pursuit of its aims". She noted that "all the rational connection branch of s. 1 requires is a demonstration that there is some logical connection, *however slight*, between the objective and the means by which it is sought to be achieved" [emphasis added]. She did, however, go on to note that "the quality and extent of the connection becomes crucial" in relation to the last two elements of the *Oakes* test: all quotes at para.118.

[211] The Supreme Court has recently stated that the party invoking section 1 of the *Charter* must show that it is "*reasonable to suppose* that the limit may further the goal, not that it *will* do so.": *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 48, emphasis added.

[212] In this case, the Tribunal noted my observation in *Vilven* #1 that the 'normal age of retirement' rule in paragraph 15(1)(c) allows a dominant player in an industry to set the mandatory retirement age for the entire industry. According to the Tribunal, the result is that employees in smaller companies, who have not negotiated mandatory retirement in exchange for wage and pension benefits, could still be subject to the mandatory retirement age set by the dominant industry player: at paras. 54-56.

[213] The Tribunal concluded that the 'normal age of retirement' criterion was not rationally connected to the goal of allowing for negotiated mandatory retirement, as it permitted mandatory

retirement to be imposed upon workers without negotiation, as long as the retirement age corresponded to the industry norm.

[214] Keeping in mind Chief Justice Dickson's admonition in *Taylor* that a legislative provision cannot be seen to be irrational as long as it can be said to further an important government aim *in a general way*, I am satisfied that there is indeed a logical connection between paragraph 15(1)(c) of the *CHRA* and the objectives that it seeks to accomplish. I note that my conclusion in this regard is consistent with the finding of the Manitoba Court of Queen's Bench in *CKY-TV*: at para. 27.

[215] Moreover, it is clear that in at least some workplaces, mandatory retirement is negotiated through the collective bargaining process in exchange for wage, pension, and other benefits. To the extent that paragraph 15(1)(c) eliminates a legal barrier to mandatory retirement, it is rationally connected to the legislative objective of preserving socially desirable employment regimes that are beneficial to both employers and employees.

[216] As the Tribunal noted, there is a real question as to the extent to which mandatory retirement is a necessary and integral part of such labour market structures. However, the fact that mandatory retirement may not be essential to the preservation of socially desirable employment regimes does not mean that paragraph 15(1)(c) of the *CHRA* fails the rational connection test, as mandatory retirement is logically connected to the maintenance of such schemes: see *McKinney*, at para. 63.

[217] As was noted earlier, the connection between impugned legislation and its objectives need only be slight. The quality and extent of the connection are relevant, and indeed crucial

considerations, but the place for such considerations to be taken into account is in relation to the second and third elements of the *Oakes* proportionality test, to which I now turn.

vi) ***Minimal Impairment***

[218] The next stage of the *Oakes* analysis requires the Court to examine whether paragraph 15(1)(c) of the *CHRA* impairs the *Charter* rights of workers over the normal age of retirement for their type of position minimally or "as little as possible": *R. v. Edwards Books*, above, at para. 117.

a) The Applicable Legal Principles

[219] As the Supreme Court observed in *Health Services and Support*, the contextual factors relevant to a particular case affect the overall degree of deference to be afforded to the government in determining whether the legislative measures in issue are demonstrably justified: at para. 195. Greater deference should be shown to Parliament where the Court is examining a legislative provision that attempts to strike a balance between the claims of competing groups on the basis of conflicting social science evidence, as opposed to cases involving a contest between an individual and the State: see *Irwin Toy Ltd.*, above, at para. 79 and *RJR-MacDonald*, above, at para. 135.

[220] When dealing with such polycentric issues, "considerable flexibility must be accorded to the government to choose between various alternatives": *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 222, [1991] S.C.J. No. 41, at para. 47. This is especially so when dealing with policy issues in the field of labour relations, which are generally best left to the political process: *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, [2001] 3 S.C.R. 209, at para. 257.

[221] As the Supreme Court observed in *McKinney*, the question under the relaxed minimal impairment test articulated in *Irwin Toy* is "whether the government had *a reasonable basis* for concluding that it impaired the relevant right as little as possible given the government's pressing and substantial objectives": at para. 68, emphasis added.

[222] This does not "absolve the judiciary of its constitutional obligation to scrutinize legislative action to ensure reasonable compliance with constitutional standards". It does, however, require that the reviewing court utilize greater circumspection in such cases: *McKinney*, at para. 104.

[223] The question of minimal impairment, once decided, is not necessarily cast in stone for all time. Rather, it must be assessed in the context of the current social and historical context: see *McKinney*, at para. 123.

[224] As the British Columbia Court of Appeal observed in *Greater Vancouver*, the Legislature may have had limited facts at its disposal, such that no legislative deference will be appropriate. Alternatively, the Court may be presented with arguments that were not considered by the Legislature in making its policy choices: at para. 84.

[225] Thus the question for this Court is whether, in light of the evidence before it, the Tribunal was correct in finding that Air Canada and ACPA had failed to demonstrate that the government continued to have a reasonable basis for concluding that paragraph 15(1)(c) of the *CHRA* interferes as little as possible with the equality rights of workers over the normal age of retirement, having

regard to the government's pressing and substantial objectives: see the arbitrator's decision in *CKY-TV* at para. 216, and the Manitoba Court of Queen's Bench decision at para. 31.

b) The Tribunal's Findings with Respect to the Minimal Impairment Issue

[226] The Tribunal found that paragraph 15(1)(c) did not minimally impair older workers' equality rights as far less intrusive options could be, and are used, rather than simply allowing for mandatory retirement. These other legislative options include *bona fide* occupational requirement and *bona fide* retirement or pension plan justifications. According to the Tribunal, the use of these types of less intrusive measures have not caused the collapse of employee pension and benefit schemes in the jurisdictions where they were in effect. The Tribunal did, however, find that a more carefully tailored provision might satisfy the minimal impairment component of the *Oakes* test: Tribunal decision #2, at paras. 57-64.

c) Air Canada and ACPA's Arguments with Respect to Minimal Impairment

[227] Air Canada and ACPA submit that the Tribunal erred by requiring that the government select the least intrusive possible option, rather than one that fell within a range of reasonable options. They say that the Supreme Court had already determined in *McKinney* and *Harrison* that limiting the availability of mandatory retirement to cases where age could be shown to be a *bona fide* occupational requirement could not satisfy the objectives of similar provisions in Ontario and British Columbia human rights legislation.

[228] The applicants further submit that the fact that other jurisdictions may have adopted different approaches to the issue of mandatory retirement simply shows that some provincial

legislatures have struck a different balance in relation to a complex set of competing values: citing *McKinney*, at para. 123.

[229] The task of the Tribunal was not, the applicants say, to step into the shoes of Parliament, and reweigh the pros and cons of mandatory retirement in light of the available social science evidence. Rather, the question for the Tribunal was whether the government had a reasonable basis for concluding that the impugned legislation impaired the relevant right as little as possible, having regard to the government's pressing and substantial objectives: citing *McKinney*, at para.112, and *Irwin Toy*, at para. 81.

[230] The applicants contend that the Tribunal also erred by failing to give due consideration to the existence of the collective agreement freely negotiated between Air Canada and ACPA. They point out that the Supreme Court recognized in *Dickason* that collective agreements authorizing mandatory retirement can represent carefully constructed, fairly negotiated bargains between employer and employees, which can be indicative of the reasonableness of the practice.

[231] Air Canada and ACPA point out that in *Health Services and Support*, the Supreme Court affirmed that values such as human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy are all complemented and promoted by collective bargaining: at para. 81.

[232] The applicants contend that the Tribunal disregarded the benefits conferred by the collective agreement and the fact that the agreement reflected *Charter* values, including dignity of the

individual. The Tribunal also failed to properly consider the fact that the collective agreement provided evidence of the reasonableness of the mandatory retirement policy.

[233] Instead, the applicants say that the Tribunal approached its minimal impairment analysis as if it had a free hand in directing what Parliament's choices should have been. In so doing, the Tribunal disregarded the admonition of the Supreme Court in *McKinney* that decision-makers should not lightly use the *Charter* to second-guess legislative decisions as to how quickly it should proceed in moving forward toward the ideal of equality: citing *McKinney*, at para. 131.

d) The Expert Evidence

[234] As the Supreme Court observed in *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees (N.A.P.E.)*, 2004 SCC 66, [2004] 3 S.C.R. 381, the evidence led in support of a section 1 justification will be very important to the outcome where the Court is dealing with matters that require close attention to context: at para. 55.

[235] I will therefore start my analysis by examining the evidence that was before the Tribunal in relation to the minimal impairment issue. This primarily took the form of expert evidence from labour economists led by Air Canada and the Commission with respect to the justification for mandatory retirement. Neither side contested the expertise of the opposing witness in labour economics, specifically the economic theory underlying mandatory retirement. ACPA and Messrs. Vilven and Kelly chose not to lead any expert evidence on this issue.

[236] Air Canada's expert was Dr. H. Lorne Carmichael, a Professor of Economics at Queen's University. Dr. Carmichael holds a PhD in Economics from Stanford University, and chairs the undergraduate studies program at Queen's. Dr. Carmichael has written extensively on labour market institutions, and has also edited several leading economics journals.

[237] The Commission's expert was Dr. Jonathan Kesselman. Dr. Kesselman is a professor in the Public Policy Program at Simon Fraser University, and holds a Canada Research Chair in Public Finance. He has worked and published in the field for many years, and has also edited several leading journals in the field of public policy and taxation.

[238] In order to put the evidence of the experts into context, it is helpful to start by recalling some of the key findings in the majority decision in *McKinney* with respect to the issue of minimal impairment.

[239] Justice La Forest observed that by 1990, roughly 50% of the Canadian work force held positions that were subject to mandatory retirement, and that approximately two-thirds of collective agreements provided for mandatory retirement at the age of 65: at para. 83. Sixty-five had become the "normal" age of retirement in Canada, and had become "part of the very fabric of the organization of the labour market in this country": at para. 84. Mandatory retirement had profound implications for the structuring of pension plans, for fairness and security of tenure in the workplace, and for work opportunities for others.

[240] Justice La Forest acknowledged that age had not been historically recognized as an unacceptable ground of discrimination, although he recognized that there had been "a profound alteration in society's view of age discrimination in recent years and, in consequence, of mandatory retirement": at paras. 85-86.

[241] In finding that the Legislature had a reasonable basis for concluding that subsection 9(a) of the Code impaired older workers' right to equality as little as possible, Justice La Forest characterized the issue of mandatory retirement as "a complex socio-economic problem that involves the basic and interconnected rules of the workplace throughout the whole of our society": at para. 96. Mandatory retirement is part of "a complex, interrelated, lifetime contractual arrangement involving something like deferred compensation", particularly in union-organized workplaces, where "seniority serves as something of a functional equivalent to tenure": at para. 108.

[242] Justice La Forest observed that the ramifications that abolishing mandatory retirement would have for the organization of the workplace, and for society in general, were things that could not readily be measured: at para. 104. He anticipated, however, that evidence as to the actual impact of the abolition of mandatory retirement would be available in 15-20 years, in light of the fact that by 1990, mandatory retirement had been abolished in several provinces: at para. 113.

[243] The evidence of the labour economists in this case was given with the benefit of two decades of experience as to the impact that the abolition of mandatory retirement in Canada has actually had for organization of the workplace, including its impact on matters such as deferred compensation and seniority, pension and benefit schemes. This evidence seriously calls into

question the assumption underlying the majority decision in *McKinney* that mandatory retirement is inextricably linked to the preservation of these beneficial employment regimes.

[244] According to Dr. Kesselman, the real-world experience in the jurisdictions where mandatory retirement has been abolished for some time has shown that the abolition of mandatory retirement has not, in fact, led to the end of such beneficial workplace arrangements. None of the adverse consequences that have traditionally been expected to flow from the abolition of mandatory retirement have actually materialized in jurisdictions such as Manitoba and Quebec, where mandatory retirement was abolished many years ago.

[245] Dr. Kesselman explained that one of the principal justifications for mandatory retirement has traditionally been that it allows for older employees to benefit from deferred compensation. Deferred compensation is the practice of paying workers less than their productivity would warrant in the earlier years of their employment, and more than their productivity would justify in the employees' later years. As part of such arrangements, most deferred compensation systems (including Air Canada's) provide pensions and other post-retirement benefits, the value of which increase with years of service.

[246] Deferred compensation systems benefit both employers and employees. Employees' earnings rise over time. This promotes loyalty, as workers will want to stay with their employer for a long time in the expectation of rich salary and pension benefits down the road. This in turn encourages employers to invest in employee training, in the knowledge that employees will be around long enough to allow the employers to reap the rewards of their investment.

[247] Another traditional justification for mandatory retirement is that the existence of a fixed mandatory retirement age allows employers to plan for employee turn-over, and frees up positions for younger workers. It avoids the need for close and potentially demeaning performance monitoring for employees whose productivity may have declined with age. It also imposes a cap on the number of years in which an older employee's pay can exceed his or her productivity, thereby encouraging more efficient agreements.

[248] Dr. Kesselman says that there are three flaws in the traditional justification for mandatory retirement.

[249] The first flaw is that it assumes that agreements allowing for mandatory retirement are consensual arrangements between contracting parties. Dr. Kesselman says that in actual fact, most mandatory retirement provisions have their source in collective agreements rather than individual employment contracts. This allows the will of the majority to trump the equality rights of individual employees who may need or want to continue working after the mandatory age of retirement.

[250] Dr. Kesselman's thesis is borne out by the facts of this case. That is, 25% of Air Canada pilots supported the abolition of mandatory retirement in the referendum carried out by ACPA shortly before the Tribunal hearing. Nevertheless, the mandatory retirement provision was retained in the Air Canada/ACPA collective agreement in accordance with the wishes of the majority.

[251] Dr. Kesselman confirmed Justice L'Heureux-Dubé's observation in *McKinney* that the group of employees who will want and need to continue working will be disproportionately made up of women who may have entered the workforce late, or who may have taken time away from the paid workforce because of family responsibilities. Recent immigrants will also be disproportionately negatively affected by mandatory retirement policies because of their late entry into the Canadian workforce. Both groups may be unable to accumulate the necessary pensionable earnings as to allow them to retire with the financial security available to others.

[252] Dr. Kesselman points out that people who want or need to continue working will also face difficulties obtaining alternate employment after their forced retirement because of societal attitudes towards older workers, and because it may be uneconomical for new employers to provide them with the necessary training. These negative financial consequences may be all the more severe for women, because of their longer life expectancy.

[253] According to Dr. Kesselman, the second flaw in the traditional justification for mandatory retirement relates to the benefits that it purportedly confers on both employers and employees.

[254] Mandatory retirement is said to benefit younger workers because it frees up jobs. However, Dr. Kesselman points out that Canada is currently facing a shortage of skilled workers. As a consequence, the economy would actually benefit from experienced older workers being encouraged to continue working.

[255] Moreover, Dr. Kesselman says that experience has shown that the number of workers who

would actually continue working is relatively small. Unconstrained by mandatory retirement policies, two-thirds of employees still choose to retire before age 65, with the average age of retirement being 61. Empirical research suggests that there would be little effect on job creation for younger workers if mandatory retirement were abolished.

[256] As for the benefit of avoiding potentially demeaning performance monitoring for those employees whose productivity may have declined with age, Dr. Kesselman observes that there is no evidence that ability or productivity abruptly declines at a specific age. He points out, somewhat ironically, that the mean age of the judges deciding *McKinney* was 65 years of age, and that several of the judges were over that age.

[257] Experience and reliability can compensate for declining abilities, says Dr. Kesselman. Moreover, employees whose abilities are in fact declining will be the ones most likely to choose voluntary retirement.

[258] Dr. Kesselman also points out that employers already need to have reliable performance monitoring systems in place, and that such systems are all the more necessary for workers who have many years in the workforce ahead of them. More importantly, he notes that there is no evidence that costly new performance monitoring systems have in fact been implemented in jurisdictions that have abolished mandatory retirement.

[259] Dr. Kesselman says that mandatory retirement is not essential to the maintenance of deferred compensation schemes, given the evidence indicating that few workers would actually

choose to continue working. If three to ten percent of employees over 65 were to continue working for an additional three years, the average length of a career would only rise by one to four months - hardly enough to upset deferred compensation schemes.

[260] Dr. Kesselman also questions the premise that deferred compensation provides a useful incentive for employers to invest in training their employees at the beginning of their careers, allowing employers to benefit from that investment over the career of the individual. He notes that the more rapid obsolescence of skills in today's workplace means that employee training has become an ongoing process.

[261] The third flaw in the traditional economic analysis of mandatory retirement identified by Dr. Kesselman is that it fails to consider the cost that compulsory mandatory retirement imposes on the rest of society.

[262] Older employees forced to leave their employment pay less in income and other taxes. Some begin drawing public pension benefits earlier than they might otherwise have done, and fewer benefits get clawed-back through the tax system. The decrease in tax revenues and increase in public pension claims will impose a bigger drain on systems already under strain as the population ages. In this regard, Dr. Kesselman notes that while only 7.6% of the Canadian population was over 65 in the mid-1960s, they made up 12% of the population by 2004 and are projected to make up 23% of the population by 2030.

[263] Other costs to the public purse include increased demands on the health-care system by employees who have lost their private, work-related supplemental insurance coverage, and by individuals whose loss of employment results in them qualifying for means-based benefits. Dr. Kesselman also points to research indicating that physical and mental inactivity can contribute to a variety of health problems, imposing a further strain on the public purse.

[264] Dr. Kesselman says that to the extent that mandatory retirement decreases tax revenues and increases public expenditures, it will put upward pressure on income tax rates for Canadians. These pressures will increasingly be felt as baby-boomers leave the workforce. The aging of the workforce combined with increasing life expectancies means that mandatory retirement will have a much greater adverse impact on the economy in the future than it has in the past.

[265] Dr. Kesselman identifies several ways in which compensation, pension and employee benefit plans can be modified so as to allow for the continued employment of older workers. These include eliminating long term disability insurance for employees over the age of 65 and reducing coverage for employer-paid life insurance.

[266] Dr. Kesselman says that "the case for allowing [compulsory mandatory retirement] to continue is based on economic analysis that presumes markets always produce desirable results": Johnathan R. Kesselman, "*Mandatory Retirement and Older Workers: Encouraging Longer Working Lives*" (2004) 200 C.D. Howe Institute Commentary 1, at p. 18. This presumption, he says, was accepted by the Supreme Court of Canada in *McKinney*, which found age discrimination in the form of mandatory retirement to be justifiable on the grounds of its asserted economic benefits.

[267] However, Dr. Kesselman observes that market forces once perpetuated discrimination on the basis of sex and race in hiring and compensation practices. Indeed, it was not so long ago that married women in Canada were forced out of the workplace by market pressures in order to free up positions for men. As Dr. Kesselman points out, it is no different to say that older workers should be compelled to leave the workforce to create positions for younger workers.

[268] The burden is, of course, on Air Canada and ACPA to demonstrate that paragraph 15(1)(c) of the *CHRA* is a reasonable limit in a free and democratic society, and that the government continues to have a reasonable basis for believing that it impairs the *Charter* rights of workers over the normal age of retirement for their type of position "minimally" or "as little as possible". With this in mind, it is necessary to examine what Dr. Carmichael had to say about the economic theory justifying the continued perpetuation of mandatory retirement for federally-regulated employees.

[269] Dr. Carmichael describes mandatory retirement as an institution that has evolved in labour markets where employees - often represented by strong unions - have been free to negotiate their own employment conditions with employers. These negotiations result in arrangements that are beneficial to both sides, particularly when viewed over the entire life-cycle of individual careers.

[270] The benefits that Dr. Carmichael says flow from labour market structures that include mandatory retirement are many of the same advantages identified by the Supreme Court of Canada in *McKinney*. As these have already been discussed at some length earlier in these reasons, I will review Dr. Carmichael's evidence on this point somewhat briefly.

[271] Dr. Carmichael says that mandatory retirement is an integral part of the overall package of benefits and obligations that comprise the employment relationship. This package includes seniority and deferred compensation systems, whereby employees are able to earn higher wages, receive better employment security and opportunities and better pensions over time. Mandatory retirement opens up job opportunities for younger workers, facilitates planning by both employers and employees, allows for less stringent monitoring of older workers, and allows employees to leave the workforce with dignity. According to Dr. Carmichael, mandatory retirement is the *quid pro quo* for these benefits, and that the interdependence of mandatory retirement and deferred compensation schemes "is evident from the data".

[272] Insofar as the aging of the population is concerned, Dr. Carmichael says that older workers do not necessarily have to leave the workforce after being forced to retire from their jobs. Workers may find alternate employment, and may even be able to continue working for their former employer under renegotiated conditions that better reflect the workers' current productivity.

[273] While recognizing that mandatory retirement can have an adverse differential impact on women and immigrants, Dr. Carmichael says that good public policy requires that the effects of an institution be evaluated for all of the groups affected, and that some balance be maintained.

[274] The groups that would benefit most from the abolition of mandatory retirement are older workers who have already benefited from the seniority system. According to Dr. Carmichael, this group is predominately made up of men from the baby boom generation, many of whom do not

need the money. Those who would lose out would be younger men and women, as well as those who entered the workforce later in life. According to Dr. Carmichael, there are better ways to address the plight of this latter group, such as financial support and the recognition of foreign credentials for immigrants.

[275] Dr. Carmichael agrees with Dr. Kesselman that abolishing mandatory retirement will not have a major impact on the average age of retirement in the economy as a whole, as most individuals will choose to retire at the same age as would otherwise have been imposed upon them. It could, however, have a more significant impact in relation to airline pilots, given their high rate of pay and significant level of job satisfaction.

[276] Dr. Carmichael also agrees with Dr. Kesselman that the costs associated with the elimination of mandatory retirement would be "relatively small": transcript, at p.1524.

[277] It was evident from the cross-examination of Dr. Carmichael that the philosophical underpinning of his opinion is his belief that mandatory retirement is something that is "freely negotiated" by knowledgeable individuals. Indeed, Dr. Carmichael stated that he "would always support something that had been freely negotiated": transcript, at p.1537.

[278] Dr. Carmichael conceded that an agreement between two groups could cause hardship to third parties, and that society may legitimately refuse to enforce such agreements. However, he says that no third parties are hurt when an employer and a union negotiate a collective agreement that involves mandatory retirement. Workers enter into arrangements that positively affect their own

future compensation and job security, and their welfare has to be judged over the entire life-cycle of their careers: Carmichael Report, at pp. 8-10.

[279] However, as was noted earlier, Dr. Carmichael acknowledged that mandatory retirement can indeed have an adverse differential impact on women and immigrants, whose interests may be "lost in the mix": transcript at p. 1573. He believes that may be the strongest argument advanced against mandatory retirement. At the same time, he states that "it is not clear that it discriminates against women as a group": Carmichael Report at pp.1 and 13.

[280] With this understanding of the expert evidence, I turn now to the application of the minimal impairment test.

e) The Application of the Minimal Impairment Test

[281] I recognize at the outset that significant deference is to be shown to Parliament where the Court is examining a legislative provision that attempts to strike a balance between the claims of competing groups on the basis of potentially conflicting social science evidence. That said, as was noted earlier, this deference does not absolve the Court of its constitutional obligation to scrutinize legislative action to ensure reasonable compliance with *Charter* standards.

[282] As the Supreme Court observed in *RJR-MacDonald*, "Deference must not be carried to the point of relieving the government of the burden which the *Charter* places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable": at para. 136.

[283] While Chief Justice McLachlin recognized the role of Parliament to choose the appropriate response to social problems, she nevertheless went on in *RJR-MacDonald* to observe that it was the role of the courts to determine whether Parliament's choice fell within the limiting framework of the Constitution. In this regard she cautioned that "To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded": at para. 136.

[284] The question, then, is whether the government continues to have a reasonable basis for concluding that paragraph 15(1)(c) of the *CHRA* minimally impairs the rights of workers over the normal age of retirement for their positions.

[285] ACPA and Air Canada argue that this is indeed the case, particularly in light of the fact that since *McKinney* was decided, the Supreme Court has itself recognized the importance of collective bargaining and its role as a *Charter* value.

[286] While acknowledging the importance of collective bargaining as a *Charter* value, it must also be recognized that paragraph 15(1)(c) of the *CHRA* does not permit mandatory retirement at a specific age to be imposed *only* in cases where it has been freely negotiated, either as a term in an individual's employment contract, or through the collective bargaining process. Indeed, as long as the age selected by an employer conforms to the "normal age of retirement" for a particular class of positions, paragraph 15(1)(c) permits employers to unilaterally impose mandatory retirement on unwilling employees.

[287] It is true mandatory retirement is often a feature of unionized workplaces, and can be negotiated through the collective bargaining process in exchange for benefits such as good pensions and employment security. However, it must also be recognized that a significant number of federally-regulated employers (such as the entire banking industry) are not unionized.

[288] Moreover, even in cases such as this one, where the mandatory retirement provision in the Air Canada/ACPA collective agreement was freely negotiated between an employer and a strong union, it can nevertheless be imposed on the one-quarter of ACPA members who voted against the preservation of mandatory retirement. This was referred to by Dr. Carmichael as the "tyranny of the majority" argument.

[289] Dr. Carmichael says that this "is a strange argument, given that all of our valued democratic institutions are based on the idea that collective decisions should be guided by the wishes of the majority": Carmichael report, at page12.

[290] While this is unquestionably true in many contexts, it is nevertheless a basic principle of Canadian law that the fundamental human rights of individuals cannot be compromised simply because a majority may not believe them to be worthy of recognition.

[291] If it were otherwise, there would be no obligation on an employer to accommodate an employee whose religious beliefs precluded work on Saturdays, if the majority of the individual's co-workers were unwilling to accept any modifications to their own work schedules so as to allow

for the accommodation of the individual: see *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, [1990] S.C.J. No. 80.

[292] Nor would there be any obligation on the government to provide sign-language interpretation for deaf patients dealing with health-care providers, if the majority of taxpayers did not believe that such services should be paid out of the public purse: see *Eldridge*, above.

[293] As the British Columbia Court of Appeal observed in *Greater Vancouver*, the problem with according too much deference to the demands of organized labour in examining a section 1 justification for a breach of section 15 equality rights is that collective bargaining may "focus on majority rule, rather than on the protection of minority rights": at para. 83.

[294] The Court went on in *Greater Vancouver* to note that not every provision of a collective agreement will necessarily protect minority rights. The Court observed that "little credence" would be given to legislative or labour preferences "if the groups subjected to discriminatory treatment were women or ethnic minorities". Why, then, the Court asks, "should the courts give credence to these views where the group discriminated against is the elderly and where the sole basis of discrimination is that they are elderly?": at para. 83.

[295] As Justice Cory observed in *Dickason*, a collective agreement can provide evidence of the reasonableness of a practice which appears on its face to be discriminatory. He went on to qualify this statement, however, by noting that not only would it have to be shown that the agreement was

indeed freely negotiated, but also that it did not discriminate unfairly against individuals on the basis of a proscribed ground: at para. 39.

[296] Moreover, as Justices L'Heureux-Dubé and McLachlin noted in *Bell* and *Cooper*, the involvement of unions in determining what will be a "normal age of retirement" does not automatically guarantee that it is justifiable. They observed that "there may be many reasons why a union does not take up a particular cause. The concern may be of interest only to a minority of its members, or the union may have other more important issues on the bargaining table": at para.107.

[297] In this case, Dr. Carmichael and Dr. Kesselman agree that mandatory retirement provisions in collective agreements such as that between Air Canada and ACPA have an adverse differential impact on both women and immigrants. Dr. Carmichael suggests that rather than limiting the freedom of employers and employees to negotiate mandatory retirement, programs could be designed to compensate these groups for the financial disadvantages resulting from forced retirement. However, as the Tribunal observed, not only is it questionable whether financial aid would provide a sufficient degree of income security, more importantly, Dr. Carmichael's suggestion "does not address, and indeed may even exacerbate the loss of dignity and pride that flows from being unemployed": Tribunal decision #2, at para. 69.

[298] By the time the Tribunal heard Messrs. Vilven and Kelly's human rights complaints, mandatory retirement had been abolished in the Province of Ontario, and several other provinces only allowed for compulsory retirement at a specified age in cases where employers could demonstrate that it was based on *bona fide* retirement or pension plans, or *bona fide* occupational

requirements. As a consequence, mandatory retirement is no longer as integral to the organization of the Canadian labour market as it was in 1990, when *McKinney* was decided.

[299] Air Canada and ACPA argue that the fact that mandatory retirement had been abolished in Ontario should not have been considered by the Tribunal, as it occurred in 2006 - *after* the termination of Messrs. Vilven and Kelly's employment with Air Canada. According to the applicants, the question of whether or not paragraph 15(1)(c) of the *CHRA* is a reasonable limit in a free and democratic society should have been assessed as of 2003 and 2005.

[300] The ongoing constitutional validity of legislation is surely a matter best determined on the basis of up-to-date evidence. As the Supreme Court observed in *Irwin Toy Ltd.*, above, once the legislative objective has been characterized, "the government surely can and should draw upon the best evidence *currently available*" to prove that this original objective remains pressing and substantial: at para. 66. One can infer from this that this "best evidence" standard could be used in the minimal impairment and proportionality stages of the *Oakes* test as well: see Matthew Taylor and Mahmud Jamal, *The Charter of Rights in Litigation: Direction from the Supreme Court of Canada*, loose-leaf (Aurora: Canada Law Book, 1990) s. 6:12, p. 6-78.

[301] This view is borne out when one examines the way in which social science evidence has been treated by the Supreme Court in section 1 cases. For example, the professor in *Dickason* was forced to retire on June 30, 1985. However, the Supreme Court considered journal articles from 1986 and 1988 in its decision. Similarly, the professors in *McKinney* were forced to retire in 1985

and 1986, but the Court considered several journal articles from 1987 to 1989 in assessing the constitutionality of the legislation.

[302] Moreover, the Supreme Court held in *McKinney* that the issue of minimal impairment must be assessed in the *current social and historical context*: at para. 123.

[303] Even if I am wrong in this regard, and the Tribunal should not have considered the after-the-fact abolition of mandatory retirement in Ontario, the evidence adduced by Air Canada and ACPA simply did not establish that the negative consequences for employment regimes apprehended by the Supreme Court in its mandatory retirement jurisprudence have materialized in the other Canadian jurisdictions where mandatory retirement has long been abolished.

[304] Dr. Kesselman says that experience in the years since *McKinney* has shown that the abolition of mandatory retirement has not had any demonstrable negative impact on beneficial workplace arrangements such as deferred compensation and pension schemes, seniority systems and the like. This leads him to conclude that mandatory retirement is not in fact integral to the preservation of these labour market structures in the way that it was understood to be at the time that *McKinney* was decided.

[305] Dr. Carmichael takes issue with this conclusion, arguing that "it is evident from the data" that mandatory retirement is indeed integrally connected to beneficial employment regimes. The data that he cites to support his view is found in a 1981 American study entitled "*Mandatory Retirement Study: Final Report* (Washington: Urban Institute,1981), and in a Canadian study by

Gunderson and Pesando entitled "*The Case for Allowing Mandatory Retirement*", (1988) 14 Canadian Public Policy, at pp. 32-39.

[306] Although I have not been provided with the actual studies relied upon by Dr. Carmichael, the studies do not appear to have been based upon long-term, real-life experience. I say this because, according to Dr. Carmichael's own report, the American study was carried out *before* mandatory retirement was abolished in the United States. The Canadian study was published in 1988 - before the decision of the Supreme Court of Canada in *McKinney*, and before reliable evidence was available as to the actual, non-speculative and non-theoretical consequences of the abolition of mandatory retirement in Canada.

[307] Indeed, in *McKinney*, the Supreme Court relied heavily on work by Gunderson and Pesando in coming to the conclusion that the permissive legislative provision at issue in that case was saved by section 1 of the *Charter*. However, as was discussed earlier in these reasons, the Court was clearly troubled by the fact that reliable evidence regarding the actual impact that the abolition of mandatory retirement had in fact had for deferred compensation and other beneficial employment regimes was not yet available.

[308] Dr. Kesselman's evidence thus calls into question a major underlying premise of Dr. Carmichael's evidence - namely that mandatory retirement is an integral part of traditional labour market structures that include seniority systems, deferred compensation and pension schemes and the like, and is essential to the preservation of these arrangements for the benefit of employees and employers alike.

[309] We now have long-term, real-life experience in Canadian jurisdictions where mandatory retirement has been abolished. This experience goes back more that 25 years in the cases of Manitoba and Québec. Thus the actual impact of the abolition of mandatory retirement in these jurisdictions could be evaluated, and evidence adduced as to the consequences that the abolition of mandatory retirement has actually had for matters such as seniority systems, deferred compensation and pension schemes.

[310] Dr. Carmichael did not identify any significant negative consequences that have actually come to pass in those jurisdictions where mandatory retirement has been prohibited for some time. Indeed, he appeared to concede in cross-examination that mandatory retirement is *not* essential to the maintenance of mutually advantageous labour market structures: see transcript, at p.1556.

[311] The onus is on ACPA and Air Canada to demonstrate that Parliament continues to have a reasonable basis for believing that paragraph 15(1)(c) minimally impairs the rights of those affected by it. One would have thought that if there was current empirical evidence available to demonstrate the negative effects that the abolition of mandatory retirement has in fact had for beneficial workplace arrangements, it would have been put before the Tribunal by the applicants in order to show that mandatory retirement is indeed integral to the preservation of these labour market structures. It was not.

[312] It was also evident from Dr. Carmichael's testimony that his opinion was based upon his belief that older workers have already enjoyed their share of the benefits associated with

employment arrangements involving seniority and deferred compensation systems. In his view, the concern should be for younger workers. He testified that "I don't think the baby-boomers need any more benefits, they have done extremely well. I think we should be more concerned about the people who follow behind them and how they are going to do": transcript, at p.1542.

[313] I would first note that there has been no suggestion that "younger workers" constitute a historically disadvantaged group who are being targeted by the legislation. Moreover, the Supreme Court held in *McKinney* that the plight of younger workers was a matter that should not be accorded a central role in the debate on mandatory retirement: at para.102.

[314] Justice La Forest observed that if a free and democratic society's values include respect for the inherent dignity of the individual and a commitment to social justice and equality, then forcing older workers to retire in order to free up positions for younger workers would itself be discriminatory. This is because "it assumes that the continued employment of some individuals is less important to those individuals, and of less value to society at large, than is the employment of other individuals, solely on the basis of age": *McKinney*, at para. 97.

[315] Furthermore, Dr. Carmichael himself conceded that the abolition of mandatory retirement would not significantly change the age at which most individuals would choose to retire, and that it would have little impact on the average age of retirement in the economy as a whole. As a result, the number of employment opportunities for younger workers would not be greatly affected by the abolition of mandatory retirement.

[316] I do accept Dr. Carmichael's point that a higher than average percentage of Air Canada pilots may wish to continue working, given their high rate of pay and significant level of job satisfaction. I also recognize that there are some unique features of Air Canada pilot positions - particularly with respect to the steepness of the wage curve and the extent to which the positions are in demand.

[317] However, what is at issue here is not a *Charter* challenge to the mandatory retirement provisions of the Air Canada pension plan and the Air Canada/ACPA collective agreement, but rather a challenge to the permissive provision of the *CHRA* that allows for the promulgation of such arrangements. Indeed, Air Canada and ACPA agree that the Court's section 1 analysis should not be limited to the specific context of Air Canada pilots.

[318] Air Canada and ACPA argue that the fact that most people would not change their behaviour and choose to retire at an older age if mandatory retirement was no longer permitted means that only a few people are actually negatively affected by paragraph 15(1)(c) of the *CHRA*. With respect, in examining the issue of minimal impairment, it is the quality of the impact on the *Charter* rights of older workers that is in issue, and not the number of older workers who would otherwise have wished to continue working.

[319] Dr. Carmichael also testified before the arbitrator in *CKY-TV*. The arbitrator described his evidence in that case as providing "a coherent defence of mandatory retirement". The arbitrator noted that "the employment life cycle and the regime of pensions, security and favourable compensation were seen for many years as an integrated whole", and that mandatory retirement

assisted employers in managing salary expenses and planning their financial obligations: at para. 217. This was the view espoused by the Supreme Court at the time that *McKinney* was decided.

[320] However, as the arbitrator observed, Dr. Carmichael's position is sound, "but only on the premise that mandatory retirement is necessary to the realization of all the foregoing": at para. 217. As was explained earlier in these reasons, the evidence in this case does not establish that mandatory retirement is in fact an integral and necessary part of traditional labour market structures, as was previously believed. Nor does it demonstrate that employment regimes that include seniority, pension, deferred compensation and the like have been negatively affected in the Canadian jurisdictions in which mandatory retirement has been prohibited for many years.

[321] In *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, the Supreme Court stated that the minimal impairment test is intended to determine whether there is an efficiency between the infringing measure and the justified purpose. The question at this stage of the analysis is whether the impugned provision infringes the relevant *Charter* rights to the minimum extent possible, while still fulfilling the justified purpose: at para. 124.

[322] If permitting the negotiation of mandatory retirement is not necessary in order to maintain the longstanding and beneficial employment regimes described by Dr. Carmichael and discussed by the Supreme Court in *McKinney*, there is little efficiency between the infringing measure and the justified purpose, and the legislation does not fulfill that purpose. Thus it cannot be said that older workers' *Charter* rights are minimally impaired by the legislation.

f) Conclusion on the Minimal Impairment Issue

[323] While accepting that the government is entitled to a significant degree of deference in legislating in this area, the evidence before the Tribunal did not demonstrate that the government continues to have reasonable basis for concluding that allowing parties to negotiate mandatory retirement arrangements is necessary for the achievement of the objectives of paragraph 15(1)(c) of the *CHRA*, to the extent that these objectives relate to the preservation of mutually-beneficial labour market structures.

[324] Consequently, I find that the Tribunal was correct in finding that ACPA and Air Canada have not established that older workers' *Charter* rights are minimally impaired by paragraph 15(1)(c) of the *Canadian Human Rights Act*. Parliament's objectives can be attained without impairing the *Charter* rights of workers over the normal age of retirement to the extent permitted by paragraph 15(1)(c) of the *CHRA*.

[325] Before leaving this issue, I would note that I do accept that there could potentially be specific employment situations where mandatory retirement could be demonstrably necessary for the maintenance of a particular negotiated package of rights and benefits. As the arbitrator observed in *CKY-TV*, "A more carefully tailored version of section 15(1)(c), which limited the exception to those kinds of circumstances, might pass the section 1 test": at para. 218. That is, however, an issue for another day.

[326] In light of my conclusion with respect to the minimal impairment issue, it is not necessary to examine the Tribunal's finding with respect to the proportionality between the effects of paragraph

15(1)(c) of the *CHRA* and the objectives of the legislation. I will do so, however, in case a reviewing Court takes a different view of the minimal impairment issue.

vii) *Proportionality between the Effects of the Legislation and its Objectives*

[327] In *R. v. Edwards Books*, the Supreme Court described this final element of the proportionality component of the *Oakes* test as requiring the Court to determine whether the effects of the legislation "so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights": at para.117.

[328] There was criticism of this formulation, which was viewed by some as simply duplicating what had already been accomplished through the first two elements of the proportionality analysis. More recent Supreme Court jurisprudence has reformulated this component of the *Oakes* test so as "to give it a distinct scope and function": see *Thomson Newspapers Co.*, at paras.123-124.

[329] The Supreme Court observed in *Thomson Newspapers* that the focus of the first two steps of the *Oakes* proportionality analysis "is not the relationship between the measures and the *Charter* right in question, but rather the relationship between the ends of the legislation and the means employed". In contrast, this last stage of the proportionality analysis allows the Court to "assess, in light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the Charter": at para.125.

[330] This analysis involves many of the same considerations that were discussed in connection with the issue of minimal impairment, albeit through the lens described in *Thomson Newspapers Co.*: see *McKinney*, at para. 126.

[331] The Tribunal found that allowing the negotiation of mandatory retirement in the workplace provides “a powerful bargaining chip” for unions and employees. It allows them to negotiate “a number of important benefits including deferred compensation, the equitable distribution of benefits and job advancement opportunities”. According to the Tribunal, mandatory retirement also “allows employers to plan for the flow of labour into a workplace, to manage wage bills and to plan their financial obligations: Tribunal decision #2, at para. 66.

[332] At the same time, the Tribunal found that depriving individuals over the normal age of retirement of the protection of the *CHRA* produced significant deleterious effects that outweighed the benefits generated by paragraph 15(1)(c) of the *CHRA*: Tribunal decision #2, at paras. 65-70.

[333] The Tribunal noted that Dr. Kesselman and Dr. Carmichael agreed that mandatory retirement had a particularly negative impact on people who needed to work past the normal age of retirement - a group predominantly made up of women and immigrants. These individuals face considerable hardship when they are forced to retire, as they have not had the time to accumulate significant pension benefits. They may also face significant difficulties finding alternate employment that fully utilizes their skills and experience. This results in “a heavy personal and financial blow to the individual”: see Tribunal decision #2, at para. 68.

[334] The Tribunal rejected Dr. Carmichael's claim that it would be better to create programs to compensate these individuals for the financial disadvantages that result from mandatory retirement, rather than eliminating the freedom to negotiate mandatory retirement. As was noted earlier, the Tribunal questioned whether financial aid would provide a sufficient degree of income security. Moreover, Dr. Carmichael's proposal did not address and could even exacerbate the loss of dignity and pride that flows from being unemployed: Tribunal decision #2, at para. 69.

[335] Paragraph 15(1)(c) of the *CHRA* has the effect of depriving individuals of legal redress for the harm suffered when they are forced to retire at the "normal age of retirement". In the Tribunal's view, the negative effects of depriving individuals of the protection of a quasi-constitutional statute outweighed the positive benefits associated with paragraph 15(1)(c) of the Act: Tribunal decision #2, at para.70.

[336] The Tribunal concluded its *Charter* analysis by observing that "perhaps one of the most disturbing aspects of this provision was the one first noted by the Court in *Vilven* [#1]: it allows employers to discriminate against their employees on the basis of age so long as that discrimination is pervasive in the industry": at para. 70.

[337] The Tribunal was correct in its assessment of the proportionality issue.

[338] The focus of the analysis at this stage of the inquiry is on whether the salutary benefits of the impugned legislation outweigh its deleterious effects. The Tribunal described the benefits of

paragraph 15(1)(c) of the *CHRA* for both employers and employees. Some of these benefits are enjoyed by employees throughout the life-cycle of their employment.

[339] It has not, however, been established that such beneficial employment regimes require that parties be free to negotiate employment terms that include mandatory retirement in order for such regimes to continue. Indeed, the evidence before the Tribunal clearly demonstrated that the benefits of such regimes have continued in jurisdictions where mandatory retirement has been eliminated.

[340] In the absence of evidence that any of the benefits associated with traditional labour market structures have been lost in provinces that have abolished mandatory retirement, how can it be said that the benefits associated with permitting mandatory retirement outweigh its deleterious effects?

[341] It is also important to have regard to the nature of the interest affected, in assessing whether the salutary benefits of paragraph 15(1)(c) outweigh its deleterious effects. For individuals over the normal age of retirement, the interest at stake is the ability of the individual to continue working in the career of his or her choice. As I said in *Vilven* #1, "the importance of this interest cannot be overstated", as "Canadian jurisprudence is replete with references to the crucial role that employment plays in the dignity and self-worth of the individual": at para. 293.

[342] For example, in *Reference re Public Sector Employee Relations Act (Alberta)* [1987] 1 S.C.R. 313, [1987] S.C.J. No.10, the Supreme Court of Canada stated that "Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society": at para. 91.

[343] Indeed, the majority in *McKinney* observed that "In a work-oriented society, work is inextricably tied to the individual's self-identity and self-worth": at para. 93. With this in mind, Justice La Forest went on to draw a link between mandatory retirement and the loss of an individual's self-worth, identity and emotional well-being, stating that "Mandatory retirement takes this away, on the basis of a personal characteristic attributed to an individual solely because of his association with a group": *McKinney*, at para. 52.

[344] There are other deleterious effects associated with paragraph 15(1)(c) of the *CHRA*. Unlike the situation facing the Supreme Court in *McKinney* and *Harrison*, Parliament has not itself chosen what the appropriate age of retirement should be for federally-regulated employees. Instead, it has left it to private parties to decide what the "normal age of retirement" should be for specific types of positions. As was explained earlier, this can create uncertainty as to the scope of employees' rights under the *CHRA*, as it may be very difficult for an individual to ascertain exactly what the normal age of retirement is for his or her particular type of position.

[345] There is no doubt that collective bargaining is itself a *Charter* value, and that this is a consideration that must be weighed in the mix. However, while a mandatory age of retirement may be freely negotiated in some cases through the collective bargaining process in exchange for other employment benefits, paragraph 15(1)(c) of the *CHRA* does not require that this be so.

[346] Moreover, paragraph 15(1)(c) does not just permit the unilateral imposition of mandatory retirement by employers on unwilling employees, it also allows for the dominant player in an

industry to set the industry norm. In other words, paragraph 15(1)(c) allows a single private sector employer to determine the extent of the quasi-constitutional rights of an entire class of federally-regulated employees.

[347] Air Canada and ACPA argue that a company's role as a dominant industry player is not cast in stone for all time, and that the "normal age of retirement" may change as companies come and go. While this may be true, it also undermines one of the claimed salutary effects of paragraph 15(1)(c) of the *CHRA* - namely the certainty that a fixed retirement age provides to employers, allowing them to plan for the flow of labour, and to manage wages and other financial obligations.

[348] Also troubling is the fact that even in industries that are not dominated by a single player, age-based discrimination is permitted by paragraph 15(1)(c) of the *CHRA*, as long as that discrimination is pervasive within an industry.

[349] As a result, the Tribunal was correct in finding that the benefits that accrue from paragraph 15(1)(c) of the *CHRA* are outweighed by its deleterious effects, when measured by the values underlying the *Charter*.

viii) *Conclusion on the Charter Issue*

[350] I found in *Vilven #1* that paragraph 15(1)(c) of the *CHRA* violates subsection 15(1) of the *Charter*, as it denies the equal protection and equal benefit of the law to workers over the normal age of retirement for similar positions.

[351] For the reasons given in this case, I find that the Tribunal was correct in concluding that Air Canada and ACPA had not satisfied the onus on them to demonstrate that paragraph 15(1)(c) of the *CHRA* is saved under section 1 of the *Charter*. Air Canada and ACPA have not shown that the broadly-worded exception to the otherwise discriminatory practice of mandatory retirement contained in paragraph 15(1)(c) of the *CHRA* is a reasonable limit justifiable in a free and democratic society.

IX. <u>Is Age a *Bona Fide* Occupational Requirement for Air Canada Pilots?</u>

[352] Having concluded that paragraph 15(1)(c) of the *CHRA* does not provide Air Canada and ACPA with a defence to Messrs. Vilven and Kelly's human rights complaints, the next question is whether the Tribunal's finding that Air Canada had not established that being under 60 was a *bona fide* occupational requirement for its pilots was reasonable.

A. *Legal Principles Governing Bona Fide Occupational Requirements*

[353] Paragraph 15(1)(a) of the *CHRA* provides that it is not a discriminatory practice if "any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement".

[354] The test to be applied for determining whether an employer has established a *bona fide* occupational requirement is that articulated by the Supreme Court of Canada in *Meiorin*, above, at para. 54.

[355] That is, an employer must establish on a balance of probabilities that:

> (1) The employer adopted the standard for a purpose rationally connected to the performance of the job;
>
> (2) The employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
>
> (3) The standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

[356] The first and second steps of the *Meiorin* test require an assessment of the legitimacy of the standard's general purpose, and the employer's intent in adopting it. This is to ensure that, when viewed both objectively and subjectively, the standard does not have a discriminatory foundation. The third element of the *Meiorin* test involves the determination of whether the standard is required to accomplish a legitimate purpose, and whether the employer can accommodate the complainant without suffering undue hardship: *McGill University Health Centre v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 S.C.R. 161, at para.14.

[357] As the Supreme Court of Canada observed in *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, [2008] 2 S.C.R. 561, the use of the word "impossible" in connection with the third element of the *Meiorin* test had led to a certain amount of confusion. The Court clarified that what is required is "not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship, which can take as many forms as there are circumstances": at para.12.

[358] As to the scope of the duty to accommodate, the Supreme Court stated that "The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work: *Hydro-Québec*, at para.16.

B. *The Tribunal's Decision*

[359] Because Canada is a signatory to the Chicago Convention, Air Canada is governed by the standards and recommended practices developed by ICAO.

[360] Air Canada's position before the Tribunal was that it could not accommodate pilots over the age of 60 without experiencing undue hardship in light of the constraints imposed on it by the ICAO standards governing international flights. According to Air Canada, being able to fly lawfully over foreign countries is an integral part of the pilot job at Air Canada.

[361] ACPA submitted that the abolition of the mandatory retirement provision in the Air Canada pension plan and the Air Canada/ACPA collective agreement would cause undue hardship to its members as it would limit the number of positions available to pilots under 60 years of age and would dilute their seniority. It would, moreover, interfere with the ability of younger pilots to plan for their retirement, which would in turn have a negative effect on pilot morale.

[362] Prior to November of 2006, ICAO's standards stipulated that Pilots-in-command over the age of 60 could not fly internationally. There was, however, no mandatory upper age limit for First

Officers, although ICAO recommended that individuals over the age of 60 not be permitted to co-pilot aircraft engaged in international air transport operations.

[363] The ICAO standards were amended on November 23, 2006. As of that date, ICAO's rules provided that Pilots-in-command under the age of 65 could fly internationally, as long as one of the pilots in a multi-pilot crew was under 60 (known as the "over/under rule"). ICAO also recommended, but did not require, that First Officers cease commercial flying after reaching age 65.

[364] The Tribunal found that there was no bar to Mr. Vilven flying internationally as an over-60 First Officer under the pre-November 2006 ICAO standards, and that Air Canada had not offered any evidence to show that allowing him to do so would cause it any undue hardship.

[365] While accepting that Mr. Kelly could not have flown as a Captain/Pilot-in-command between the time that he turned 60 in 2005 and November of 2006, the Tribunal found that there was no reason why he could not have continued to fly for Air Canada as a First Officer.

[366] Consequently, the Tribunal found that Air Canada and ACPA had not established a *bona fide* occupational requirement defence for their discriminatory conduct in relation to either Mr. Vilven or Mr. Kelly during the period up to November of 2006.

[367] Air Canada's evidence on the issue of undue hardship concentrated on the period after November of 2006 and came primarily from Captain Steven Duke. Captain Duke is a "Six Sigma Black Belt for Flight Operations" at Air Canada, a management position that he had held since

2006. Six Sigma is a business improvement process adopted by Air Canada. The description of Captain Duke as a "Black Belt" recognizes his expertise in this process.

[368] The focus of Captain Duke's evidence was on the impact that having pilots over the age of 60 would have for Air Canada's operations - particularly as it related to the issue of pilot scheduling - in light of Air Canada's international obligations.

[369] According to Captain Duke, the requirements of the over/under rule meant Air Canada could only accommodate a very limited number of potentially restricted pilots before pilot scheduling would become unworkable. "Potentially restricted pilots" were described by the Tribunal as Captains over 60 and under 65 and First Officers over 60.

[370] The Tribunal accepted that Air Canada could not schedule Pilots-in-command over 65 years of age to fly internationally, as this would prevent Air Canada from flying many of its international routes: Tribunal decision #2, at para.100.

[371] However, the Tribunal found that there were numerous deficiencies in Captain Duke's evidence with respect to the scheduling difficulties that would result if Air Canada were required to accommodate pilots over the age of 60 who were not flying as Pilots-in-command. This led the Tribunal to conclude that Captain Duke's evidence was not sufficient to establish undue hardship to Air Canada: Tribunal decision #2 at para.122.

[372] Insofar ACPA was concerned, the Tribunal examined the issue of hardship to the union in

light of the principles articulated by the Supreme Court in *Central Okanagan School District v. Renaud*, [1992] 2 S.C.R. 970, [1992] S.C.J. No. 75. The Tribunal had particular regard for the effect that accommodative measures would have had on other ACPA members.

[373] The Tribunal found that there was no evidence to show that a delay in the career progression and salary increases of younger pilots would cause substantial interference with the rights of these employees: Tribunal decision #2, at para.140. According to the Tribunal, forcibly retiring older workers in order to make way for younger workers would itself be discriminatory, as it assumed that the continued employment of older individuals is less important to those individuals and of less value to society at large than the continued employment of younger individuals.

[374] Seniority at Air Canada determines, amongst other things, the equipment that a pilot will fly on and the schedule that he or she will receive. The Tribunal did not accept ACPA's argument that accommodating over-60 pilots would dilute the seniority rights of under-60 pilots, particularly with respect to scheduling, while giving the seniority rights of over-60 pilots full measure, all to the detriment of pilot morale.

[375] The Tribunal found that there may be ways to address the scheduling problems that would potentially arise from the implementation of the over/under rule. For example, the Tribunal said that rather than requiring under-60 First Officers to accommodate the over-60 Captains, ACPA and Air Canada could agree that in the event of a scheduling problem, over-60 Captains would be required to bid into positions where they could be accommodated: Tribunal decision #2, at para. 149.

[376] The Tribunal also found that ACPA had failed to establish that the level of disruption and the inevitable prospect of interference with other employees' rights that would result from the removal of the mandatory retirement provision in the collective agreement constituted an undue hardship. ACPA has not challenged the Tribunal's *bona fide* occupational requirement finding in its application for judicial review.

C. *The Significance of the ICAO Standards*

[377] To properly understand Air Canada's position on the *bona fide* occupational requirement issue, and in order to put Captain Duke's evidence into context, it is first necessary to consider the significance of the changes to the ICAO standards that occurred after the termination of Messrs. Vilven and Kelly's employment.

[378] It will be recalled that as of November, 2006, ICAO's "over/under rule" permitted Pilots-in-command between the ages of 60 and 65 to continue to fly internationally, but only if one of the other pilots in a multi-pilot crew is under 60.

[379] The ICAO standards only apply to international flights. However, the vast majority of Air Canada flights have an international aspect to them. In fact, 86% of Air Canada flights are either to an international destination, or pass through foreign (primarily American) airspace, en route to a Canadian destination. Between 20 and 25% of the remaining 14% of Air Canada flights have an American airport as an alternate airport where planes are to land if, for example, weather precludes landing at the regularly-scheduled Canadian airport.

[380] The consequences of failing to comply with the over/under rule could potentially be severe for Air Canada, as contracting States may ground aircraft and deny entry into their airspace to any aircraft flown by pilots who do not meet ICAO standards.

D. ***Timing and the Duty to Accommodate***

[381] The first question for the Court to consider is when the issues of accommodation and undue hardship had to be assessed in relation to Messrs. Vilven and Kelly's human rights complaints.

[382] In some cases, it will not be appropriate to simply examine the situation as of the date of the termination of an individual's employment. For example, where an employee is dismissed because of health-related absenteeism, the employer's claim of undue hardship must be assessed globally, taking the entire situation leading up to the termination into account: see *Hydro-Québec*, at para. 21.

[383] In this case, Messrs. Vilven and Kelly had no need of any accommodation until such time as they reached the age of 60, at which point, their employment was terminated in accordance with the mandatory retirement provisions of the Air Canada pension plan and the Air Canada/ACPA collective agreement. I agree with Air Canada that in these circumstances, the issue of accommodation must first be assessed as of the date of termination. In the case of Mr. Vilven, this was 2003. In Mr. Kelly's case, it was 2005.

[384] I also agree with Air Canada that having regard to the systemic nature of Messrs. Vilven and Kelly's human rights complaints and the fact that the potential invalidation of the mandatory retirement provisions in the Air Canada Pension Plan and the Air Canada/ACPA collective

agreement would affect other Air Canada pilots, it was also appropriate for the Tribunal to examine the issue of undue hardship on a going-forward basis, taking into account the subsequent changes to the ICAO standards.

[385] Such a forward-looking examination was also necessitated by the fact that Messrs. Vilven and Kelly were seeking reinstatement into the positions that they would have held, had they not been required to retire at age 60.

E. *Factors to Consider in Relation to the Issue of Accommodation*

[386] Subsection 15(2) of the *CHRA* provides that in order to establish the existence of a *bona fide* occupational requirement or justification, "it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering *health, safety and cost*". [emphasis added].

[387] In assessing whether Air Canada could accommodate pilots over the age of 60, the Tribunal determined that it could look at matters other than health, safety and cost. The Tribunal observed that in *Meiorin*, the Supreme Court indicated that the factors to be considered in determining whether accommodation imposes undue hardship are not entrenched, unless they are expressly included or excluded by statute: Tribunal decision #2, at para. 78, citing *Meiorin*, at para. 63.

[388] The Tribunal further observed that in *McGill University Health Centre*, above, the Supreme Court emphasized that the factors that will support a finding of undue hardship should be applied with flexibility and common sense. The Court identified the cost of the possible accommodation,

employee morale and mobility, interference with other employees' rights, and disruption of the collective agreement as examples of factors that may be considered: Tribunal decision #2, at paras. 79 and 80, citing *McGill University Health Centre*, at para. 15.

[389] This was of particular significance as it related to the Tribunal's analysis of the undue hardship arguments advanced by ACPA, which were largely based upon the impact on the rights of other employees that would result from the accommodation of over-60 pilots. As mentioned earlier, ACPA has not challenged the Tribunal's bona fide occupational requirement finding.

[390] The undue hardship evidence adduced by Air Canada related primarily to operational considerations that would affect the company's costs. However, other forms of hardship were also identified by the company, primarily the impact that accommodating pilots over 60 would have on the seniority rights of other Air Canada employees. The question thus arises as to whether the Tribunal was statutorily limited to considering the factors of health, safety and cost in assessing whether a *bona fide* occupational requirement defence had been established.

[391] I recognize that in determining that it could look at matters other than health, safety and cost, the Tribunal was interpreting its enabling statute and was dealing with the scope of the duty to accommodate - a matter squarely within the Tribunal's expertise. As a result, its interpretation of subsection 15(2) of the *CHRA* is entitled to deference: see *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, at para. 34. Nevertheless, I am satisfied that the Tribunal's interpretation of this provision was unreasonable.

[392] It is true that the Supreme Court has identified matters such as employee morale and mobility, interference with other employees' rights, and disruption of the collective agreement as factors that may be considered in relation to the question of accommodation. The *McGill University Health Centre* decision relied upon by the Tribunal is an example of this. This was not, however, a decision under the *CHRA*, and did not involve a statutory provision such as subsection 15(2).

[393] As the Tribunal itself noted, the Supreme Court stated in *Meiorin* that the factors to be considered in determining whether accommodation imposes undue hardship "are not entrenched, *unless they are expressly included or excluded by statute*": at para. 63, emphasis added. In this case, Parliament has chosen to specifically identify the matters that may be taken into account by the Tribunal in an accommodation analysis: see Russel Zinn, *The Law of Human Rights in Canada: Practice and Procedure*, loose-leaf, (Aurora: Canada Law Book, 1996) at s. 14:60:2.

[394] Moreover, there are two different interpretative principles that were not addressed by the Tribunal, both of which suggest that the factors identified in subsection 15(2) of the *Canadian Human Rights Act* should be read as an exhaustive list. These are the principle of *expressio unius est exclusio alterius*; and the approach that is to be taken in interpreting human rights statutes.

[395] The "*expressio unius est exclusio alterius*" maxim refers to a general principle of statutory interpretation which suggests that to express one thing is to exclude another: see Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008) at p. 244.

[396] That is, the failure of Parliament to mention a thing in a list will give rise to the inference that it was deliberately excluded. As Professor Sullivan says, "The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature": at p. 244.

[397] In this case, a substantial body of Supreme Court jurisprudence had developed well before the addition of subsection 15(2) to the *CHRA* in 1998, with respect to the nature and scope of the duty to accommodate and the factors to be considered in assessing whether that duty had been fulfilled: see, for example, *Central Alberta Dairy Pool*, and *Renaud*, both previously cited. Parliament would thus have been well aware that factors such as impact on employee morale and interference with the rights of other employees had been identified as relevant considerations in an accommodation analysis.

[398] Nevertheless, in enacting subsection 15(2) of the *CHRA*, Parliament did not say that the Tribunal was to consider matters "*such as*" or "*including*" health, safety and cost, but chose instead to specifically identify the factors to be considered in relation to the question of accommodation as being these three specific matters. These circumstances give rise to a strong inference that Parliament intended the list set out in subsection 15(2) of the *CHRA* to be an exhaustive one.

[399] My conclusion that subsection 15(2) of the *Canadian Human Rights Act* should be interpreted as limiting the factors to be taken into account in an accommodation analysis to health, safety and cost is reinforced when the issue is examined in light of the principles to be applied when interpreting human rights legislation.

[400] That is, while the quasi-constitutional rights conferred by human rights legislation are to be broadly interpreted, this is not so with respect to the defences provided in the human rights statute in question. Defences to the exercise of those rights are to be interpreted narrowly: see *Brossard (Town) v. Québec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279, [1988] S.C.J. No. 79 (QL) at para. 56, and *Dickason*, at para. 17.

[401] As Justice Sopinka observed in *Zurich Insurance Co. v. Ontario (Human Rights Commission)* [1992] 2 S.C.R. 321, [1992] S.C.J. No. 63, human rights legislation is often "...the final refuge of the disadvantaged and the disenfranchised". He went on to observe that "As the last protection of the most vulnerable members of society, exceptions to such legislation should be narrowly construed ...": at para.18.

[402] That is not to say that matters such as employee morale and mobility, interference with other employees' rights, and disruption of a collective agreement could never be relevant in a claim under the *CHRA*. Rather, my interpretation of the legislation simply means that in order to be taken into account in an accommodation analysis, these matters must be of a sufficient gravity as to have a demonstrable impact on the operations of an employer in a way that relates to health, safety or cost.

[403] Before leaving this matter, I would acknowledge that the Superior Court of Québec came to a different conclusion in relation to this question in *Syndicat des employées et employés professionnelles et professionnels de bureau, section locale 434 (FTQ) c. Gagnon*, [2005] J.Q. no 9368, at para. 39. There, the Court stated that the list contained in paragraph 15(2) of the *CHRA* was

descriptive, rather than limiting. However, no reasons were provided for this conclusion, and I must respectfully disagree with it.

[404] Although I have found that the Tribunal erred in its interpretation of subsection 15(2) of the *CHRA*, as will be explained further on in these reasons, the determinative issue on the *bona fide* occupational requirement issue is the Tribunal's treatment of the evidence regarding cost-related operational matters affecting the Air Canada's ability to accommodate over-60 pilots in the post-November, 2006 period. Before going there, however, the Court must first consider the reasonableness of the Tribunal's *bona fide* occupational requirement finding as it relates to the pre-November, 2006 period.

F. *Accommodation in the Pre-November 2006 Period*

[405] The next question, then, is whether the Tribunal's finding that Air Canada had not established the existence of a *bona fide* occupational requirement defence for its discriminatory conduct *vis-à-vis* Messrs. Vilven and Kelly during the period prior to the changes to the ICAO standards in November of 2006 was reasonable.

[406] The primary thrust of Air Canada's argument as it related to the *bona fide* occupational requirement issue was that the Tribunal misunderstood and mischaracterized the evidence put forward by Captain Duke, and ignored important portions of that evidence.

[407] Captain Duke's evidence focused primarily on the operational and scheduling difficulties that Air Canada would encounter if mandatory retirement was abolished, in light of the post-2006

ICAO standards. Air Canada made only brief submissions to the Court with respect to the Tribunal's *bona fide* occupational requirement finding regarding the period before November of 2006.

i) ***The Accommodation of Mr. Vilven in the Pre-November 2006 Period***

[408] The burden is on the employer to produce concrete evidence to establish undue hardship: see *Hutchinson v. British Columbia (Ministry of Health) (No. 4)* (2004), 49 C.H.R.R. D/348, 2004 BCHRT 58, at paras. 69 and 230, and *Grismer*, above, at para. 41.

[409] The Tribunal found that Air Canada had not offered any evidence to show that allowing Mr. Vilven to continue flying as a First Officer after he turned 60 would have caused it any undue hardship in the pre-November 2006 period. Air Canada says that the Tribunal erred in this regard by only considering the situation of Mr. Vilven in its undue hardship analysis.

[410] By looking only at whether Mr. Vilven could have been accommodated, Air Canada says that the Tribunal asked itself the wrong question, given that what the complainants were seeking was the invalidation of the mandatory retirement requirement for all Air Canada pilots. Air Canada submits that the *Meiorin* test required the Tribunal to determine whether it would have been possible for Air Canada to accommodate not just the individual complainant, but *all* employees sharing the characteristics of the complainant, without imposing undue hardship upon the employer.

[411] Air Canada had, however, conceded before the Tribunal that nothing in the ICAO standards in effect at the time that Mr. Vilven was forced to retire from Air Canada in 2003 prevented over-60 First Officers from flying international flights: transcript, at p. 2170.

[412] Indeed, Air Canada could not point to any evidence in the record that would suggest that the answer would have been any different, depending on whether the Tribunal was considering Air Canada's ability to accommodate Mr. Vilven alone, or all over-60 First Officers in the period prior to November of 2006. Consequently, any error that the Tribunal may have committed in this regard was not material to the result.

[413] Given that the ICAO standards did not impose any mandatory restrictions on the ability of over-60 First Officers to continue flying, it follows that Mr. Vilven and other over-60 First Officers continued to be able to satisfy the requirements of their jobs, as long as they were able to meet Transport Canada's licensing requirements.

[414] As a result, the Tribunal's finding of liability on the part of Air Canada for the termination of Mr. Vilven's employment was reasonable. The reasonableness of the Tribunal's findings with respect to the ability of Air Canada to continue to accommodate Mr. Vilven and other over-60 First Officers after the coming into force of the new ICAO standards in November of 2006 will be addressed further on in these reasons.

ii) *The Accommodation of Mr. Kelly in the Pre-November 2006 Period*

[415] The Tribunal found that although Mr. Kelly could not have continued to fly as a Captain/Pilot-in-command after he turned 60 in 2005, there was no reason why he could not have continued to fly internationally for Air Canada as a First Officer. The Tribunal noted that Air Canada did not consider or offer such accommodation to Mr. Kelly, nor did ACPA make any efforts to seek such an accommodation for Mr. Kelly as it was required to do.

[416] As was the case with Mr. Vilven, Air Canada says that the Tribunal erred by only looking at whether Mr. Kelly could have been accommodated, rather than considering whether all over-60 Captains could have been accommodated by Air Canada.

[417] Where accommodation is required, the obligation is not on the employee to originate a solution. It is the employer who will be in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business: see *Renaud*, above, at para. 44.

[418] As the Supreme Court observed in the *Hydro-Québec* case, an employer has the duty to arrange the employee's workplace or duties so as to enable the employee to do his or her work, if it can do so without undue hardship: at para. 16.

[419] Where an employer has initiated an accommodation proposal that is reasonable and which would, if implemented, fulfill the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If the employee fails to take reasonable steps causing the

employer's proposal to founder, the employee's human rights complaint will be dismissed: *Renaud*, at para. 44.

[420] While the pre-2006 ICAO standards restricted the capacity in which Mr. Kelly could have continued to fly for Air Canada once he turned 60, there was no licensing or operational restriction that would have prevented him from using his considerable seniority to bid into pilot positions other than that of Captain/pilot-in-command, such as a First Officer position.

[421] Thus, as of the date of the termination of Mr. Kelly's employment in 2005, there was no legal impediment, other than the mandatory retirement provisions of the Air Canada pension plan and the Air Canada/ACPA collective agreement, that would have precluded him from remaining employed as a pilot with Air Canada.

[422] *Meiorin* imposes both procedural and substantive obligations on employers when dealing with discriminatory employment standards. One important question to be considered in determining whether these obligations have been satisfied is whether the employer has investigated alternative approaches that do not have a discriminatory effect. Another important question is whether there are different ways to perform the job, while still accomplishing the employer's legitimate work-related purpose: see *Meiorin*, at paras. 65-66.

[423] That is, it will be incumbent on an employer to show that it had considered and reasonably rejected all viable forms of accommodation: see *Grismer*, at para. 42.

[424] The evidence before the Tribunal was that Air Canada never considered whether it was possible to accommodate its over-60 Captains, including Mr. Kelly.

[425] We do not know whether flying as a First Officer would have been an acceptable alternative for Mr. Kelly. He may well have been willing to start flying as a First Officer after he turned 60, if the alternative was that he would have lost his job. We do not know for sure, however, because Mr. Kelly was never given that option. Indeed, no accommodation proposal was ever forthcoming from Air Canada.

[426] Air Canada had an obligation to arrange its employees' duties so as to enable them to do their work, if it could do so without undue hardship. Air Canada did not establish that allowing Mr. Kelly to have continued his pilot career with Air Canada, albeit in a different capacity, would have caused undue hardship to the company in the period leading up to November of 2006.

[427] Moreover, as was the case with Mr. Vilven, Air Canada has not pointed to concrete evidence to show that the answer would have been different, if the Tribunal had considered Air Canada's ability to accommodate all over-60 Captains in the period prior to November of 2006. Consequently, the Tribunal's finding of liability for the termination of Mr. Kelly's employment in 2005 was reasonable.

[428] The next issue, then, is the reasonableness of the Tribunal's findings with respect to the ability of Air Canada to continue to accommodate over-60 pilots after the coming into force of the new ICAO standards in November of 2006.

G. *Accommodation in the Post-November 2006 Period*

[429] As was noted earlier, Air Canada says that the Tribunal misunderstood and mischaracterized the evidence put forward by Captain Duke in support of its undue hardship argument. Air Canada also contends that the Tribunal ignored important portions of Captain Duke's evidence as to the operational and scheduling difficulties that would result if Air Canada were required to accommodate pilots over the age of 60. According to counsel for Air Canada, it is "wholly unsatisfactory that such an important issue be resolved on the basis of reasons that are flawed, unreasonable and inadequate".

[430] As will be explained further on in these reasons, Messrs. Vilven and Kelly also take the position that the Tribunal erred in its assessment of the *bona fide* occupational requirement issue, although they say that it ultimately got to the right result, albeit for the wrong reasons.

i) *The Tribunal's Treatment of Captain Duke's Evidence*

[431] The Tribunal recognized that Air Canada's ability to accommodate pilots over the age of 60 was "more problematic" under the post-November 2006 ICAO standards: Tribunal decision #2, at para. 95.

[432] Captain Duke's evidence focused on the impact that the elimination of mandatory retirement would have in relation to several different aspects of Air Canada's operations. One of the issues that he addressed was the uncertainty that could result with respect to the hiring and training of pilots if mandatory retirement were abolished at Air Canada. Captain Duke explained that it takes the

company about three months to schedule and train a pilot. As most Air Canada pilots now wait until they reach 60 to retire, this allows Air Canada to predict its staffing and training needs with a relative degree of certainty.

[433] Captain Duke testified that if mandatory retirement were abolished at Air Canada, the airline could be caught short if an over-60 pilot suddenly decided to retire, as nothing in the collective agreement requires pilots to give advance notice of when they intend to retire. According to Captain Duke, an unanticipated retirement could have a serious impact on the company's operations.

[434] Captain Duke conceded that this would not be an issue if Air Canada and ACPA were to agree to a requirement that pilots give a year's advance notice of their intention to retire, or if the Tribunal were to make such an order. While observing that such a requirement could potentially be difficult to enforce as it is hard to force someone to work if they do not want to, Captain Duke acknowledged that economic incentives could be created to encourage the giving of timely notice.

[435] Air Canada does not take issue with this assertion, but says that the Tribunal erred in failing to order that such a provision be included in the Air Canada/ACPA collective agreement. I am not persuaded that the Tribunal erred as alleged.

[436] As noted above, Captain Duke's evidence was that a notice requirement could either be imposed by the Tribunal, or could be negotiated by Air Canada and ACPA. The Tribunal observed that the burden was on Air Canada and ACPA to demonstrate that the renegotiation of the collective agreement would constitute undue hardship, and that it was not sufficient to merely assert that this is

so without producing evidence to back it up. The Tribunal went on to note that Captain Duke had testified that, with some cooperation from the union, the necessary changes to the workplace rules could indeed be made.

[437] The Tribunal was clearly satisfied that this was a matter that could be worked out between Air Canada and ACPA. As the Tribunal observed, Captain Duke himself had testified that "We are being pushed into a new world here and we are going together in this, so we have to make it work for everyone": transcript, at p. 1438.

[438] The Tribunal went on to note that "Presumably as a co-respondent and prompted by the Tribunal's decision, Air Canada would be motivated to cooperate in this process: see Tribunal decision #2, at paras. 153-154. As a matter of law, ACPA would also have an obligation to "make it work": see *Renaud*, above.

[439] The Tribunal accepted Captain Duke's evidence on a second point, namely that the post-November 2006 ICAO standards prevented Air Canada from using Captains over the age of 65 on its international flights. I do not understand Messrs. Vilven and Kelly to dispute this finding.

[440] The Tribunal did not address Captain Duke's evidence as it related to Air Canada's ability to have Captains over the age of 65 fly purely domestic routes, as Messrs. Vilven and Kelly had each indicated that they wanted to continue flying internationally. No issue was taken with respect to this point by Air Canada.

[441] The major focus of Captain Duke's evidence, and of the Tribunal's analysis, was on the ability of Air Canada to accommodate Captains and First Officers over the age of 60, in light of impact of the over/under rule on seniority and scheduling.

[442] Captain Duke presented demographic evidence that showed that within five years of the abolition of mandatory retirement at Air Canada, a very substantial percentage of Air Canada pilots would be over the age of 60, assuming that all of them continued working: see slides 60-68 of Captain Duke's PowerPoint presentation.

[443] Captain Duke says that Air Canada could only accommodate a very limited number of potentially restricted pilots (Captains over 60 but under 65, and First Officers over 60) before pilot scheduling would become unworkable because of the over/under rule.

[444] To demonstrate the difficulties that Air Canada would encounter if it were required to accommodate over-60 pilots, Captain Duke ran a series of experiments examining the scheduling consequences of having various percentages of A-340 Captains and First Officers being over the age of 60 in Vancouver and Toronto.

[445] He found that a schedule could be arrived at if 10% of A-340 Captains and First Officers in Vancouver were over 60. It would, however, result in a number of First Officers' seniority not being respected, with some pilots receiving materially lower quality monthly schedules, including being placed on reserve schedules rather than fixed flying schedules. Moreover, the utility of these

pilots in providing reserve coverage would be diminished by the fact that potentially restricted pilots could not replace a First Officer if the Captain on an international flight was over 60.

[446] No pilot schedule could be generated if the percentage of potentially restricted Captains in Vancouver was increased to 20%, and the percentage of potentially restricted First Officers was increased to 11%. This is because there simply would not be enough unrestricted pilots available to fly with the restricted pilots.

[447] Captain Duke's Toronto experiments demonstrated that no solution was possible if more than 30% of A-340 Captains and First Officers were potentially restricted. Similarly, no schedule could be generated if more than 20% of Captains and 40% of First Officers were potentially restricted.

[448] According to Captain Duke, additional pilots would have to be hired by Air Canada to ensure that all flights could be properly staffed. At the same time, the airline would have to continue paying the over-60 pilots whose services could not be used. The quality of the schedules generated for some pilots would also be negatively affected.

[449] The Tribunal identified several deficiencies in Captain Duke's evidence, which led the Tribunal to conclude that the evidence was not sufficient to establish undue hardship to Air Canada: Tribunal decision #2, at para.122. There are, however, a number of problems with the Tribunal's treatment of Captain Duke's evidence.

[450] For example, Captain Duke stated that although a scheduling solution could be found if only 10% of Vancouver pilots were “potentially restricted”, it would have resulted in some First Officers receiving materially lower quality monthly schedules.

[451] The Tribunal noted that “There is no evidence as to the actual number of restricted pilots included in the 10% cohort”: Tribunal decision #2, at para.122. However, Captain Duke’s experiment did not require consideration of the actual number of over-60 Captains and First Officers in Vancouver at the time. The purpose of the experiment was to determine whether a flight schedule could be produced if 10% of each group was potentially restricted.

[452] The Tribunal discounted Captain Duke’s evidence on this point on the basis that he had not explained how he had arrived at these conclusions: Tribunal decision #2, at para. 124. In actual fact, Captain Duke had explained that he had used Air Canada’s normal scheduling software, identified certain pilots as restricted under the ICAO standards, and then tried to generate hypothetical schedules in the same way that Air Canada currently generates real monthly schedules: transcript, at pp. 1409-1411.

[453] The Tribunal also found that there was “no evidence as to what is a materially lower quality schedule or why this is so”: Tribunal decision #2, at para. 125. However, Captain Duke had explained in his testimony that a “materially lower quality schedule” was one where senior pilots were awarded the reserve (or “on-call”) duty that would typically be awarded to more junior pilots, as opposed to a fixed, scheduled block of flying: transcript, at pp.1397-98 and 1410-1411, and slides 16-19 of Captain Duke’s PowerPoint presentation.

[454] Captain Duke explained that seniority determines the quality of the schedule that a pilot can obtain. More senior pilots can work fewer days in a month (potentially as few as eight) and can avoid working on weekends. Examples of actual pilot schedules of varying qualities (reflecting varying levels of seniority) were provided to the Tribunal.

[455] It is true that a tribunal is not required to refer to every piece of evidence in the record, and will be presumed to have considered all of the evidence that is before it: see, for example, *Hassan v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 946; 147 N.R. 317 (F.C.A.). That said, the more important the evidence that is not specifically mentioned and analyzed in the tribunal's reasons, the more willing a court may be to infer that the tribunal made an erroneous finding of fact without regard to the evidence: see *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425, 157 F.T.R. 35, at paras.14-17.

[456] Captain Duke's evidence was central to Air Canada's *bona fide* occupational requirement defence. Moreover, this is not merely a situation where the Tribunal failed to specifically refer to evidence contrary to its findings. Rather, the Tribunal stated quite categorically that there was "no evidence" on these points, giving rise to the inescapable inference that important portions of Captain Duke's evidence were overlooked.

[457] The Tribunal stated that "no explanation" had been provided for why it was that a schedule could not be generated when the Vancouver experiment shifted to 20% of Captains and 11% of First Officers being potentially restricted: Tribunal decision #2, at para.127. However, Captain

Duke explained why a schedule could not be generated in these circumstances: see transcript, at pp.1411-1417. It was open to the Tribunal to reject this explanation, but its statement that "no explanation" had been provided once again suggests that the evidence on this point was overlooked.

[458] The Tribunal also found that the evidence was "lacking" as to the potential cost that would be incurred by Air Canada if it were required to hire at least one additional pilot while continuing to pay reserve pilots whose services could not be utilized: Tribunal decision #2, at para. 126.

[459] However, Air Canada had actually provided detailed evidence as to the cost of hiring additional pilots in order to ensure that its reserve requirements were met. Captain Duke testified that the average salary and benefits for an Air Canada pilot is $177,000 per year. Mr. Harlan Clarke, the Manager, Labour Relations at Air Canada, explained the pay system and pay rates for Air Canada pilots under the terms of the Air Canada/ACPA collective agreement. Mr. Clarke also testified that reserve pilots are guaranteed a minimum payment of 71 hours of pay per month.

[460] No explanation was provided by the Tribunal as to why this evidence was "lacking". Thus this element of the Tribunal's decision thus lacks the transparency and accountability required of a reasonable decision.

[461] While agreeing that there were problems with the Tribunal's analysis, Messrs. Vilven and Kelly urge me to find that its overall conclusion that a *bona fide* occupational requirement defence had not been made out by Air Canada was reasonable. They say that all of the logistical and scheduling problems identified by Captain Duke could be eliminated if Air Canada simply required

that all over-60 pilots work as First Officers. If there were no over-60 Captains/Pilots-in-command, Messrs. Vilven and Kelly say that the over/under rule would never come into play.

[462] The difficulty with this argument is that the Tribunal did not offer it as a reason for rejecting Air Canada's *bona fide* occupational requirement defence. It did touch on possible changes that could be made to the duties of Captains/Pilots-in-command in order to address the scheduling problems that could result from accommodating over-60 pilots, but did so in the context of its undue hardship analysis as it related to ACPA: Tribunal decision #2, at paras.148-151.

[463] In reviewing a decision against the reasonableness standard, it is not the role of a reviewing Court to find facts, to reweigh them, or to substitute its decision for that of the Tribunal: see *League for Human Rights of B'Nai Brith Canada v. Odynsky*, 2010 FCA 307, 2010] F.C.J. No. 1424, at para. 85. See also *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 59.

[464] For these reasons, I find that the Tribunal's *bona fide* occupational requirement analysis was not reasonable as it related to Air Canada's ability to accommodate pilots over the age of 60 after November of 2006. Consequently, this aspect of the Tribunal's decision will be set aside.

[465] Before leaving the *bona fide* occupational requirement issue, there is one further matter that must be addressed, and that is a further error in the Tribunal's analysis identified by Messrs. Vilven and Kelly.

ii) ***The Tribunal's Finding Regarding the First Two Elements of the Meiorin Test***

[466] Messrs. Vilven and Kelly take issue with the Tribunal's statement that they had conceded that the first two requirements of the *Meiorin* test had been satisfied: see Tribunal decision #2, at para. 82. They contend they never conceded that the mandatory retirement provision of the Air Canada/ACPA collective agreement had been adopted for a rational purpose connected with the performance of the job, in the honest and good faith belief that it was necessary to the fulfillment of this work-related objective. Indeed, Messrs. Vilven and Kelly have advanced a number of arguments before this Court as to why the first two elements of the *Meiorin* test had not been satisfied by Air Canada.

[467] A review of the record discloses that a concession with respect to the first two elements of the *Meiorin* test was made before the Tribunal by counsel for the Canadian Human Rights Commission: transcript, at p.1984. No such concession appears to have been made by either Mr. Vilven or Mr. Kelly, or by the interested party, the Fly Past 60 Coalition.

[468] Complainants and the Commission have separate party status before the Tribunal: see subsection 50(1) of the *CHRA*. Interested party status may also be granted to third parties by the Tribunal: subsection 48.3(10). The Commission does not represent the interests of complainants before the Tribunal. Rather, the Commission is statutorily mandated to take such position before the Tribunal as, "in its opinion, is in the public interest having regard to the nature of the complaint": section 51. As a result, concessions made by the Commission are not binding on either the complainants or on interested parties.

[469] I have already found that the Tribunal's finding with respect to the *bona fide* occupational requirement issue as it related to the period before November of 2006 was reasonable. Consequently, any error on the part of the Tribunal with respect to the first two elements of the *Meiorin* test is immaterial as it relates to that time frame.

[470] However, I have found that there were a number of errors in the Tribunal's *bona fide* occupational requirement analysis as it related to the post-November 2006 period, rendering this aspect of the Tribunal's decision unreasonable.

[471] As a result, the question of whether being under 60 was a *bona fide* occupational requirement for Air Canada pilots after November of 2006 will be remitted to the same panel of the Tribunal, with the direction that the issue must be examined in light of all three elements of the *Meiorin* test.

X. <u>Remedy</u>

[472] There is a dispute between the parties as to the remedy that should be granted by the Court, in the event that I were to uphold the Tribunal's decision in relation to the *Charter* question, as I have in fact done.

[473] Shortly before the hearing of these applications for judicial review, Messrs. Vilven and Kelly brought a motion for leave to amend their memorandum of fact and law. They sought to include a request for a declaration that paragraph 15(1)(c) of the *CHRA* is inconsistent with the *Charter* and is of no force and effect by operation of subsection 52(1) of the *Constitution Act*, 1982.

[474] Messrs. Vilven and Kelly say that since the commencement of the human rights proceedings, they have sought an order directing Air Canada to cease applying the mandatory retirement provisions of the pension plan and collective agreement to *all* Air Canada pilots.

[475] It is evident from the affidavit sworn in support of the motion that the impetus for the respondents' last-minute motion was a further decision of the Tribunal dealing with the issue of the remedies that were to be granted to Messrs. Vilven and Kelly. This decision was issued a couple of weeks before the commencement of the hearing of these applications.

[476] In its most recent decision, the Tribunal refused to order Air Canada and ACPA to cease applying the mandatory retirement provisions of the collective agreement and Air Canada pension plan to all Air Canada pilots. In the Tribunal's view, Messrs. Vilven and Kelly were seeking to have the remedies granted by the Tribunal extend beyond their own individual complaints.

[477] Citing the decision of the Supreme Court of Canada in *Nova Scotia (Workers' Compensation Board) v. Martin*, above, the Tribunal observed that it did not have the power to make a general declaration of legislative invalidity. In the Tribunal's view, the appropriate remedy was for it to rescind the termination of Messrs. Vilven and Kelly's employment by ordering Air Canada to cease applying the mandatory retirement provisions of the pension plan to them. The Tribunal further ordered that the discriminatory practice be redressed by directing Air Canada to reinstate Messrs. Vilven and Kelly.

[478] Air Canada and ACPA oppose the motion on the basis that, as respondents to applications for judicial review, Messrs. Vilven and Kelly are not entitled to the declaratory relief that they are seeking. According to the applicants, if Messrs. Vilven and Kelly are successful in defending the applications, the only remedy available to the Court under section 18.1 of the *Federal Courts Act* is to dismiss the applications.

[479] The constitutional remedies available to administrative tribunals (including the Canadian Human Rights Tribunal) are limited. Tribunals do not have the power to grant general declarations of invalidity. A determination by a tribunal that a provision of its enabling statute is invalid pursuant to the *Charter* will not be binding on future decision-makers: see *Nova Scotia (Workers' Compensation Board) v. Martin*, at para. 31.

[480] This Court clearly possesses the jurisdiction to hear constitutional challenges in the context of applications for judicial review, and to grant declaratory relief in that regard: see *Moktari v. Canada (Minister of Citizenship and Immigration)*, [2000] 2 F.C. 341, [1999] F.C.J. No. 1864, (F.C.A.), and *Gwala v. Canada (Minister of Citizenship and Immigration)*, [1999] 3 F.C. 404, [1999] F.C.J. No. 792 (F.C.A.). It should be noted, however, that in both of these cases it was the *applicant* who was seeking the declaratory relief.

[481] The Court's power to grant declaratory relief is predicated upon there first being a finding that the tribunal in question erred in one of the ways identified in section 18.1(4) of the *Federal Courts Act*. This provision states that the Federal Court may grant relief (including declaratory relief) if it is satisfied that the federal board, commission or other tribunal erred.

[482] I have concluded that the Tribunal did not err in finding that paragraph 15(1)(c) of the *CHRA* is not saved by section 1 of the *Charter*. Consequently, the remedial powers conferred on the Court by subsection 18.1(3) of the *Federal Courts Act* are not engaged. The proper remedy is for the Court to dismiss Air Canada and ACPA's applications for judicial review insofar as they relate to the *Charter* issue.

[483] Messrs. Vilven and Kelly argue that despite the wording of section 18.1 of the *Federal Courts Act*, this Court nevertheless has the power to grant a general declaration of invalidity with respect to paragraph 15(1)(c) of the *CHRA* under subsection 52(1) of the *Constitution Act, 1982*. Subsection 52(1) states that "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." They have not, however, identified a single case where declaratory relief, whether constitutional or otherwise, has been granted to a *respondent* on an application for judicial review.

[484] Assuming, without deciding, that such a constitutional remedy could ever be granted to a responding party on an application for judicial review such as this, there are two reasons why I do not think it appropriate to do so here.

[485] The first is that what Messrs. Vilven and Kelly are really trying is to do is to mount a collateral attack on the Tribunal's remedial decision. That decision is not before me. If the respondents are not content with the remedies that were granted by the Tribunal, it is open to them to seek judicial review of the Tribunal's remedial decision.

[486] The second reason that I would decline to grant such relief is that although the federal and provincial Attorneys General would have been aware that constitutional validity of paragraph 15(1)(c) of the *CHRA* was at issue in this proceeding by virtue of the Notice of Constitutional Question served by ACPA, this Notice was served in the context of applications for judicial review brought by ACPA and Air Canada, and not by Messrs. Vilven and Kelly.

[487] In these circumstances, I do not believe that the Attorneys General could reasonably have anticipated that Messrs. Vilven and Kelly would be seeking a general declaration of invalidity with respect to paragraph 15(1)(c) of the *CHRA*. This is especially so in light of the fact that there was no reference to such relief being sought in Messrs. Vilven and Kelly's memorandum of fact and law.

[488] A general declaration of invalidity could potentially have widespread implications for many federally-regulated workplaces. Had the Attorneys General been aware that such relief was being sought by the respondents, it could well have affected their decisions as to whether or not to participate in this proceeding. It is entirely possible that one or more Attorneys General may have wished to make submissions, either with respect to the constitutional validity of the legislation generally, or as to whether any declaratory order should provide for a period of suspension and what that period should be.

[489] In the absence of any claim of prejudice on the part of Air Canada and ACPA resulting from the lateness of the motion, I would grant leave to Messrs. Vilven and Kelly to amend their

memorandum of fact and law to seek declaratory relief. However, for the reasons given, I decline to grant the relief sought by the amendment.

XI. Conclusion

[490] For these reasons I have concluded that the finding of the Canadian Human Rights Tribunal that paragraph 15(1)(c) of the *CHRA* is not a reasonable limit demonstrably justifiable in a free and democratic society as contemplated by section 1 of the *Charter* was correct. Consequently, ACPA's application for judicial review is dismissed in its entirety. Air Canada's application for judicial review is also dismissed, as it relates to the *Charter* issue.

[491] The Tribunal's finding that Air Canada had not established that being under the age of 60 was a *bona fide* occupational requirement for its airline pilots at the time that Messrs. Vilven and Kelly's employment was terminated in 2003 and 2005 respectively was reasonable. However, the Tribunal's finding that Air Canada had not established that age was a *bona fide* occupational requirement for its pilots in light of the post-November 2006 ICAO standards was not reasonable.

[492] As result, Air Canada's application for judicial review as it relates to the *bona fide* occupational requirement issue will be allowed in part. The question of whether Air Canada has established that age was a *bona fide* occupational requirement for its airline pilots after November of 2006 is remitted to the same panel of the Tribunal, if available, for re-determination on the basis of the existing record, in light of all three elements of the *Meiorin* test.

XII. Costs

[493] As success in this matter was divided, each party should bear its own costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. ACPA's application for judicial review is dismissed.

2. Air Canada's application for judicial review is dismissed, as it relates to the section 1 *Charter* issue.

3. Air Canada's application for judicial review is granted, in part, as it relates to the Tribunal's finding that Air Canada had not demonstrated that age was a *bona fide* occupational requirement for its pilots.

4. The question of whether age was a *bona fide* occupational requirement for Air Canada pilots after November of 2006 is remitted to the same panel of the Tribunal, if available, for re-determination in accordance with these reasons, on the basis of the existing record.

5. Each party shall bear their own costs.

"Anne Mactavish"

Judge

APPENDIX

Canadian Human Rights Act, R.S.C. 1985, c.H-6

3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.	**3.** (1) Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, l'état de personne graciée ou la déficience.
7. It is a discriminatory practice, directly or indirectly,	**7.** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :
(a) to refuse to employ or continue to employ any individual, or	a) de refuser d'employer ou de continuer d'employer un individu;
(b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.	b) de le défavoriser en cours d'emploi.
9. (1) It is a discriminatory practice for an employee organization on a prohibited ground of discrimination	**9.** (1) Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour une organisation syndicale :
(a) to exclude an individual from full membership in the organization;	a) d'empêcher l'adhésion pleine et entière d'un individu;
(b) to expel or suspend a member of the organization; or	b) d'expulser ou de suspendre un adhérent;
(c) to limit, segregate, classify or otherwise act in relation to an individual in a way that would deprive the individual of employment opportunities, or limit employment opportunities or otherwise adversely affect the status of the individual, where the individual is a member of the organization or where any of the obligations of the organization pursuant to a collective	c) d'établir, à l'endroit d'un adhérent ou d'un individu à l'égard de qui elle a des obligations aux termes d'une convention collective, que celui-ci fasse ou non partie de l'organisation, des restrictions, des différences ou des catégories ou de prendre toutes autres mesures susceptibles soit de le priver de ses chances d'emploi ou d'avancement, soit de limiter ses

agreement relate to the individual.

chances d'emploi ou d'avancement, ou, d'une façon générale, de nuire à sa situation.

(2) Notwithstanding subsection (1), it is not a discriminatory practice for an employee organization to exclude, expel or suspend an individual from membership in the organization because that individual has reached the normal age of retirement for individuals working in positions similar to the position of that individual.

(2) Ne constitue pas un acte discriminatoire au sens du paragraphe (1) le fait pour une organisation syndicale d'empêcher une adhésion ou d'expulser ou de suspendre un adhérent en appliquant la règle de l'âge normal de la retraite en vigueur pour le genre de poste occupé par l'individu concerné.

10. It is a discriminatory practice for an employer, employee organization or employer organization

10. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite et s'il est susceptible d'annihiler les chances d'emploi ou d'avancement d'un individu ou d'une catégorie d'individus, le fait, pour l'employeur, l'association patronale ou l'organisation syndicale :

(a) to establish or pursue a policy or practice, or

a) de fixer ou d'appliquer des lignes de conduite;

(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

b) de conclure des ententes touchant le recrutement, les mises en rapport, l'engagement, les promotions, la formation, l'apprentissage, les mutations ou tout autre aspect d'un emploi présent ou éventuel.

15. (1) It is not a discriminatory practice if

15. (1) Ne constituent pas des actes discriminatoires :

(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement;

a) les refus, exclusions, expulsions, suspensions, restrictions, conditions ou préférences de l'employeur qui démontre qu'ils découlent d'exigences professionnelles justifiées;

[…]

[…]

(c) an individual's employment is terminated because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual;

c) le fait de mettre fin à l'emploi d'une personne en appliquant la règle de l'âge de la retraite en vigueur pour ce genre d'emploi;

[…]

[…]

(2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a bona fide occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a bona fide justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

(2) Les faits prévus à l'alinéa (1)a) sont des exigences professionnelles justifiées ou un motif justifiable, au sens de l'alinéa (1)g), s'il est démontré que les mesures destinées à répondre aux besoins d'une personne ou d'une catégorie de personnes visées constituent, pour la personne qui doit les prendre, une contrainte excessive en matière de coûts, de santé et de sécurité.

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B.

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

1. La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

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

15. 1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

FEDERAL COURT

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STYLE OF CAUSE:	AIR CANADA PILOTS ASSOCIATION v. ROBERT NEIL KELLY ET AL (T-1615-09) AIR CANADA v. GEORGE VILVEN ET AL (T-1606-09)
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	November 22, 23 & 24, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	Mactavish J.
DATED:	February 3, 2011

APPEARANCES:

Mr. Bruce Laughton	FOR THE APPLICANT (Air Canada Pilots Association)
Mr. Raymond D. Hall Mr. David Baker	FOR THE RESPONDENTS (Robert Neil Kelly and George Vilven)
Mr. Daniel Poulin	FOR THE RESPONDENT (Canadian Human Rights Commission)
Mr. Gavin MacKenzie Ms. Christianna Scott	FOR THE RESPONDENT (Air Canada)

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