Federal Court of Appeal  Cour d'appel fédérale

Date: 20120717

Docket: A-107-11

Citation: 2012 FCA 209

CORAM: **PELLETIER J.A.**
LAYDEN-STEVENSON J.A.*
GAUTHIER J.A.

BETWEEN:

AIR CANADA PILOTS ASSOCIATION

Appellant

and

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

Respondents

ATTORNEY GENERAL OF CANADA

Respondent
(as of right
Under section 57 of
The *Federal Courts Act*)

Heard at Ottawa, Ontario, on November 22, 2011.

Judgment delivered at Ottawa, Ontario, on July 17, 2012.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: GAUTHIER J.A.
NOT TAKING PART IN THE JUDGMENT: LAYDEN-STEVENSON J.A.*

* Layden-Stevenson J.A. was unable to participate in the Court's deliberations and died on June 27, 2012. This judgment and the reasons are issued under ss. 45(3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

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REASONS FOR JUDGMENT

PELLETIER J.A.

INTRODUCTION

[1] This appeal deals with whether paragraph 15(1)(*c*) of the *Canadian Human Rights Act*, R.S.C. 1985 c. H-5 (*CHRA*), which allows for discrimination on the basis of age, can be demonstrably justified as a reasonable limitation prescribed by law pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms* , Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c.11, [the *Charter*]. Paragraph 15(1)(*c*) permits mandatory retirement at the normal age of retirement for persons occupying similar positions.

[2] The Supreme Court considered the issue of mandatory retirement in the case of *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, [1990] S.C.J. No. 122 [*McKinney*]. In that case, the Court decided that a particular provision of the *Ontario Human Rights Code, 1981*, S.O. 1981, c.53 [*Code*], which permitted mandatory retirement beginning age 65 was a breach of the constitutional protection against age-based discrimination. However, the Court went on to find that the provision was nonetheless constitutionally valid as a result of being saved by s. 1 of the *Charter*.

[3] Given this decision, it is my view that the question before us is whether both the Canadian Human Rights Tribunal (the Tribunal) which considered the complaints of two Air Canada pilots who were forced to retire at age 60, and the Federal Court, which judicially reviewed the Tribunal's decision, were bound to follow *McKinney* in disposing of the constitutional challenge to paragraph 15(1)(c) of the *CHRA*. For the reasons that follow, I find that, according to the doctrine of *stare decisis*, *McKinney* was a binding precedent that the Tribunal and the Federal Court ought to have followed. I would therefore allow the appeal, set aside the decision of the Federal Court and return the matter to the Tribunal with a direction to dismiss the complaints.

FACTS

[4] George Vilven and Robert Neil Kelly (the Pilots) are two former Air Canada pilots who were forced to retire at age 60 due to the mandatory retirement provisions in both their collective agreement and in their pension plan.

[5] Both filed complaints with the Canadian Human Rights Commission (the Commission) as a result of their mandatory retirement. Mr. Vilven filed his complaint against Air Canada in 2004 while Mr. Kelly filed his complaint against both Air Canada and the Air Canada Pilots Association (the Association) in 2006. The Commission referred both complaints to the Tribunal which heard them together in 2007.

[6] At the Tribunal hearing, Air Canada and the Association relied on the exception to the prohibition against age-based discrimination in the employment context, which is found at paragraph 15(1)(*c*) of the *CHRA*. The provision states as follows:

15. (1) It is not a discriminatory practice if . . .	**15.** (1) Ne constituent pas des actes discriminatoires : […]
(*c*) an individual's employment is	*c*) le fait de mettre fin à l'emploi d'une

terminated because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual;	personne en appliquant la règle de l'âge de la retraite en vigueur pour ce genre d'emploi;

[7] The Pilots, in turn challenged the constitutionality of this provision.

[8] The Tribunal dismissed the Pilots' constitutional challenge: *Vilven v. Air Canada; Kelly v. Air Canada and Air Canada Pilot's Association*, 2007 CHRT 36. It found that 60 was the normal retirement age for persons working in similar positions, so that the Pilots' mandatory retirement was not a discriminatory practice within the meaning of the *CHRA*. The Tribunal also found that paragraph 15(1)(*c*) did not violate the guarantee of equal treatment found at s. 15 of the *Charter*. As a result, the Tribunal did not have to decide if paragraph 15(1)(*c*) could be saved under s. 1 of the *Charter*.

[9] The Pilots sought judicial review of the Tribunal's decision. In a decision reported as *Vilven v. Air Canada*, 2009 FC 367, [2009] F.C.J. No. 475 [*Vilven*], the Federal Court found that paragraph 15(1)(*c*) violated s. 15 of the *Charter* and returned the matter to the Tribunal for a decision as to whether the provision could be justified under s. 1 of the *Charter*.

[10] The Tribunal resumed its examination of the Pilots' complaint. In a second decision reported as *Vilven v. Air Canada; Kelly v. Air Canada and Air Canada Pilots Association*, 2009 CHRT 24, the Tribunal decided that paragraph 15(1)(*c*) was not saved by s. 1 of the *Charter*.

[11] The second decision of the Tribunal was also the subject of an application for judicial review. In a decision reported as *Air Canada Pilots Association v. Kelly*, 2011 FC 120, [2011] F.C.J. No. 152, [*Kelly*], the Federal Court found that paragraph 15(1)(*c*) was not saved by s.1 of the *Charter*. However, on the issue of remedy, the Federal Court declined to grant a declaration of invalidity with respect to paragraph 15(1)(*c*) on the basis that, absent a finding of error on the part of the Tribunal, the Court's remedial jurisdiction found at s. 18.1(3) of the *Federal Courts Act* R.S.C. 1985, c. F-7, was limited, in the case of a respondent, to dismissing the application for judicial review.

[12] The Association appealed from the Federal Court's finding that paragraph 15(1)(*c*) of the *CHRA* was not saved by s. 1 of the *Charter*, while the Pilots cross-appealed from the Court's refusal to grant a declaration of invalidity. In support of their position with respect to a declaration of invalidity, the Pilots also filed a notice of constitutional question with respect to paragraph 15(1)(*c*) of the *CHRA*. As a result, the Attorney General of Canada (the Attorney General) participated in the appeal as of right, pursuant to s. 57(4) of the *Federal Courts Act*.

THE ISSUES RAISED BY THE APPEAL

[13] In its Memorandum of Fact and Law, the Association attacks two aspects of the Federal Court's decision: the finding that paragraph 15(1)(*c*) did not minimally impair the Pilots' right to be free from discrimination, and the finding that the benefits achieved by paragraph 15(1)(*c*) were not proportional to its deleterious effects. Air Canada adopted the Association's position.

[14] In effect, the Association challenged the Federal Court's application of the test set out in the Supreme Court of Canada decision *R. v. Oakes*, [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7, to the facts of the case. In doing so, the Association relied heavily on the Supreme Court's decision in *McKinney* but stopped short of arguing that the Federal Court was bound by that case.

[15] The Attorney General, on the other hand, took the position that the *McKinney* decision was binding authority and that the Federal Court erred in not following it. Even though the Attorney General was a late addition to the litigation, his argument with respect to the binding effect of the *McKinney* decision was not new. Both the Tribunal and the Federal Court had considered *McKinney* and its surrounding jurisprudence in their decisions, in one capacity or another.

[16] On the issue of the cross-appeal, the Attorney General agreed with the Pilots that, assuming the correctness of the Federal Court's decision on the merits of the s. 1 argument, the latter erred in holding that it lacked the jurisdiction to grant a declaration of invalidity.

[17] The Pilots supported the Federal Court's decision on the merits in all respects but argued that it had erred with respect to its remedial jurisdiction.

ANALYSIS

[18] As I have already indicated, I believe that the issue that effectively disposes of the appeal is whether *McKinney* was binding on the Tribunal and on the Federal Court. For the reasons that follow, I believe that it is binding, and as a result, that both the Tribunal and the Federal Court erred in concluding that paragraph 15(1)(*c*) of the *CHRA* was not saved by s.1 of the *Charter*. This conclusion disposes of both the appeal and the cross-appeal.

The Tribunal's analysis of *McKinney*

[19] As indicated earlier, *McKinney* was briefly considered in the Tribunal's reasons. The Tribunal noted that, in *McKinney*, the Supreme Court accorded a high degree of deference to the legislator on the basis that, in a democratic society, complex social questions on which expert opinions were divided were best left to the legislature.

[20] The Tribunal then considered jurisprudence that did not follow *McKinney*. It cited a recent arbitral decision, *CKY-TV v. Communications, Energy and Paperworkers Union of Canada, Local 816 (Kenny Grievance)*, 2008 175 L.A.C. (4th) 29, [2008] C.L.A.D. No. 92, in which the constitutionality of paragraph 15(1)(*c*) of the *CHRA* was challenged. The arbitrator found that the *McKinney* decision was based on contextual assumptions that were not borne out by the expert evidence that was put before him. As a result, the arbitrator did not follow *McKinney*.

[21] The Tribunal also referred to two other cases that indicated that the social and economic context had changed sufficiently since *McKinney* was decided so as to render that decision inapplicable to the present circumstances: *Association of Justices of the Peace of Ontario v. Ontario (Attorney General)*, (2008), 92 O.R. (3d) 16 (Ont. Sup. Ct), and *Greater Vancouver Regional District Employees Union v. Greater Vancouver Regional District*, 2001 BCCA 435, [2001] B.C.J. No. 2026.

[22] Having considered this jurisprudence, and without ever addressing the question of whether it was bound by *McKinney*, the Tribunal proceeded on the basis that it was not, and went on to analyze the constitutionality of s. 15 (1)(*c*) under s.1 of the *Charter*.

The Federal Court's analysis of *McKinney*

[23] In sharp contrast to the Tribunal's decision, the Federal Court conducted a detailed analysis as to why *McKinney* did not apply to the case before it.

[24] The first reason put forward by the Federal Court for not following *McKinney* was the difference in the statutory provisions in question. Among these was the difference in the legislative history and objectives. In the Court's view, the objectives of the legislature in enacting the impugned portions of the *Code* included avoiding "the potential for delayed retirement and delayed benefits" as well as accounting for "the effect on hiring and personnel practices and the impact on

youth unemployment": see *Kelly*, cited above, at para. 110. In contrast, the Federal Court described the objective of paragraph 15(1)(*c*) of the *CHRA* as allowing "the issue of a mandatory retirement age in the private sector to be negotiated between employers and employees": see *Kelly*, cited above, at para. 111.

[25] In order to simplify the analysis which is set out later in these reasons, I propose to deal with the Federal Court's comments on the difference in the legislative provisions at this point.

[26] I believe that the following statement, found at paragraph 96 of the Supreme Court's reasons, is a fuller statement of the Ontario legislature's objectives in drafting the *Code* as it did:

> As already mentioned, the Legislature was not operating in a vacuum. Mandatory retirement has long been with us; it is widespread throughout the labour market; it involves 50 per cent of the workforce. The Legislature's concerns were with the ramifications of changing what had for long been the rule on such important social issues as its effect on pension plans, youth employment, the desirability of those in the workplace to bargain for and organize their own terms of employment, the advantages flowing from expectations and ongoing arrangements about terms of employment, including not only retirement, but seniority and tenure and, indeed, almost every aspect of the employer-employee relationship. These issues are surely of "pressing and substantial [concern] in a free and democratic society".

In my view, there is no meaningful distinction to be drawn with respect to the objectives of the *Code* and the *CHRA*.

[27] The Federal Court went on to note another difference between the two legislative provisions, which is the mechanism for deciding the age at which mandatory retirement becomes permissible. In the case of the *Code*, the age at which the protection against age-based discrimination is lost is defined by statute as age 65. In contrast, in the *CHRA*, Parliament "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": see *Kelly*, cited above, at para. 112.

[28] I agree that the determination of the age at which mandatory retirement is allowable is arguably a material difference between the two legislative provisions. But it is important to keep in mind that both provisions are permissive; they permit mandatory retirement, they do not require it. The Federal Court was inclined to view paragraph 15(1)(*c*) as putting the determination of the age of mandatory retirement in the hands of employers: see *Kelly*, cited above, at para. 112. The difference between the two provisions lies in the determination of the age at which it becomes permissible, not in the mechanics of its implementation. Under one legislative scheme or the other, mandatory retirement will normally either be imposed by the employer, or will be a term of a collective agreement negotiated between the employer and the employees' bargaining agent. In the case of senior employees, there could be individual agreements as to the date of retirement. There is therefore no distinction between the two provisions in terms of how mandatory retirement is implemented. The relevant difference lies rather in the determination of the age at which it becomes permissible.

[29] The Federal Court found a further distinction between the two legislative provisions in terms of an employee's ability to know whether his or her mandatory retirement is consistent with the relevant human rights legislation. In the case of the *Code*, the age threshold is set by legislation. In the case of the *CHRA*, the Federal Court was of the view that employees could not easily know the age at which they could be subject to mandatory retirement:

> 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 right principles.
>
> *Kelly*, cited above, at para. 119

[30] With respect, the Federal Court has confused two issues: an individual's knowledge of the factual circumstances which may give rise to a claim that his or her rights have been violated, and the legal analysis required to determine if those rights have, in fact, been violated. Employees in particular occupations move from one employer to another, bringing with them their knowledge of employment practices, which they share with other employees who have knowledge of other workplace practices. Unions who negotiate for a particular occupational group make it their business to know what the norm is with respect to the terms and conditions of employment for that group so as to bargain collective agreements which are equal to or better than that industry's norms. It would be a rare case in which an employee in a given occupational group was unaware of either the normal retirement age for that group or the range of the variation on that issue as between employers.

[31] This is a different question from that of determining the appropriate comparator group for the purposes of establishing discrimination. In order to bring a complaint, employees do not have to engage in the legal analysis which a tribunal will employ in determining whether they have been victims of discrimination.

[32] The Federal Court also noted that because paragraph 15(1)(*c*) of the *CHRA* permits mandatory retirement at an age less than 65, its adverse effects will be greater on those whose labour force participation has been shorter or interrupted, primarily women and immigrants.

[33] No matter the age at which mandatory retirement becomes permissible, persons with shorter or interrupted labour force participation will be disadvantaged. Depending upon where the line is drawn, the composition of the group that is adversely affected will vary, perhaps to the point of amounting to systemic discrimination. However, the presence of a group of persons who are differentially adversely affected is not a point of distinction between the different ages at which mandatory retirement becomes permissible, but rather is a point of distinction between mandatory retirement at any age and no mandatory retirement at all.

[34] In summary, it is my view that of all the factors identified by the Federal Court related to the difference in wording of the *CHRA* and the *Code*, only the difference in the manner of determining the age at which mandatory retirement becomes permissible is a possible point of distinction between this case and *McKinney*.

[35] The Federal Court also invoked three other grounds which, in its view, set this case apart from *McKinney*. First among these is the argument that the Supreme Court itself did not consider its decision in *McKinney* to be the last word on the subject of mandatory retirement. The Federal Court noted comments of the majority in *McKinney* highlighting the uncertain consequences of abolishing mandatory retirement on other aspects of workplace organization. Particular emphasis

was placed on the following statement: "we do not really know what the ramifications of these new schemes will be *and the evidence is that it will be some 15 or 20 years before a reliable analysis can be made": Kelly*, cited above, at para. 137 (original emphasis). The Federal Court was of the view that the issue had been left open to be revisited at a later point in time when reliable evidence became available with respect to the actual experience in those jurisdictions that had abolished mandatory retirement.

[36] The Federal Court also identified the differences in the evidentiary record as a reason for distinguishing the case at hand from *McKinney*. The principal difference in the evidentiary record was the presence of expert reports that addressed the effects of abolishing mandatory retirement in jurisdictions that had done so. In short, the Federal Court found that there were "new facts which call into question the factual underpinning of the Supreme Court's decision in *McKinney*": *Kelly*, cited above, at para. 146.

[37] Finally, the Federal Court identified new developments in public policy as a further reason for not following *McKinney*. The Court observed that La Forest J. himself, in his capacity as Chair of the Canadian Human Rights Review Panel, had participated in the writing of *Promoting Equality: A New Vision* (Ottawa: Canadian Human Rights Act Review Panel, June 2000). That report, while recognizing that the issue required further study, recommended that there should no longer be blanket exemptions for mandatory retirement in the *CHRA*. In the Federal Court's view, this report reflected the change in societal attitudes to mandatory retirement since *McKinney* was decided.

[38] In addition, the Federal Court reviewed the jurisprudence of various courts on the subject of mandatory retirement, including many of the same cases referred to by the Tribunal, in order to show that judicial attitudes to mandatory retirement had also evolved over time.

[39] These, then, were the reasons given by the Federal Court for refusing to follow the Supreme Court's decision in *McKinney*.

Standard of Review

[40] In an appeal of a judicial review, the role of this Court is to determine whether the reviewing court identified the proper standard of review and then applied it correctly. In practice, this means that the appellate court applies the normal rules of appellate review as articulated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235: see *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at para. 43. The scope and application of the doctrine of *stare decisis* is a question of law for which the standard of review is correctness.

Stare Decisis

[41] The Ontario Court of Appeal recently considered the application of *stare decisis* in a similar context. In *R. v. Bedford*, 2012 ONCA 186, [2012] O.J. No.1296, [*Bedford*], the issue was whether the Supreme Court's decision in *Reference re ss. 193 and 195.1(1)(c) of he Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, [1990] S.C.J. No. 52, [the *Prostitution Reference*], which found those

provisions to be constitutional, was binding in a subsequent challenge to the constitutionality of those same provisions. The impugned *Criminal Code,* R.S.C., 1985, c. C-46, provisions dealt with keeping a common bawdy house and communicating for the purpose of prostitution. The Ontario Court of Appeal found that the trial judge was free to entertain a s. 7 challenge to the bawdy house provisions of the *Criminal Code* because the Supreme Court's jurisprudence on the principles of fundamental justice had evolved since the *Prostitution Reference* was decided. As a result, the legal issues raised in *Bedford* with respect to whether the bawdy house provisions of the *Criminal Code* were an infringement of the accused's rights under s. 7 of the *Charter* had not previously been considered by the Supreme Court.

[42] On the other hand, the Ontario Court of Appeal found that the s. 2 *Charter* challenge to the *Criminal Code*'s provisions on "communicating for the purpose of prostitution" was caught by the Supreme Court's decision. The Ontario Court of Appeal found that the trial judge erred in failing to follow the *Prostitution Reference*, "as there was no suggestion that it [the *Prostitution Reference*] had been expressly or by implication overruled by a subsequent decision of the Supreme Court": see *Bedford*, cited above, at para. 75.

[43] The Ontario Court of Appeal went on to find that the trial judge was wrong in departing from the decision in the *Prostitution Reference* on the basis of a re-characterization of the issue. The Court of Appeal's comments on this issue are apposite to the present case:

> This change in perspective has not altered the *ratio decidendi* of that case, which was that the communicating provision is a reasonable limit on freedom of expression. In coming to

> this conclusion, the majority applied the *Oakes* test based on the best information available to them at the time. There may be good reasons for the Supreme Court to depart from this holding for all the reasons discussed in *Polowin Real Estate*, but that is a matter for the Supreme Court to decide for itself.
>
> In our view, the need for a robust application of *stare decisis* is particularly important in the context of *Charter* litigation. Given the nature of the s. 1 test, especially in controversial matters, the evidence and the legislative facts will continue to evolve, as will attitudes, values and perspectives. But this evolution alone is not sufficient to trigger reconsideration in the lower courts.
>
> If it were otherwise, every time a litigant came upon new evidence or a fresh perspective from which to view the problem, the lower courts would be forced to reconsider the case despite authoritative holdings from the Supreme Court on the very points at issue. This would undermine the legitimacy of *Charter* decisions and the rule of law generally.[…] Such an approach to constitutional interpretation yields not a vibrant living tree but a garden of annuals to be regularly uprooted and replaced.
>
> *Bedford*, cited above, at paras. 82-84.

[44] I adopt these views without reservation. They are dispositive of three of the four grounds given by the Federal Court for not following *McKinney*.

[45] To recapitulate, the Federal Court gave four reasons for not following *McKinney*:

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.

[46] The argument that the Supreme Court itself did not consider *McKinney* as the last word on mandatory retirement does not authorize a lower court to re-litigate the issues decided in *McKinney*. We know from cases such as *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, that

the Supreme Court can, and does, revisit its own decisions when the circumstances call for it to do so. To the extent that, in *McKinney*, the Supreme Court held the door open to revisit the issue of mandatory retirement at a later date, it was holding the door open for itself and not for others.

[47] The fact that there are differences in the evidentiary records in this case and in *McKinney* cannot justify departing from established jurisprudence. If it did, every case would be binding only on the parties to that case since, with rare exceptions, no two cases are decided on the same evidentiary record. Such a result, particularly in *Charter* litigation, is at odds with the values of certainty and finality which underlie the doctrine of *stare decisis*. Similarly, the evolution of social policy over time may justify the Supreme Court revisiting a particular issue but it cannot justify a lower court's failure to follow the Supreme Court's jurisprudence.

[48] This is not to say that lower courts do not have a role to play in the evolution of the jurisprudence once the Supreme Court has spoken. Where a challenge to the existing jurisprudence is raised, the role of the lower court is to allow the parties to gather and present the evidence and to make the necessary findings of fact and of credibility, so as to establish the evidentiary record upon which the Supreme Court can decide whether to reconsider its earlier decision: see *Bedford*, cited above, at para.76. The Federal Court's lucid, well-written decision in this case provides a basis upon which the Supreme Court can revisit *McKinney* if it is disposed to do so.

[49] That leaves for consideration the first argument raised by the Federal Court, that is, whether the difference in the manner of determining the age at which mandatory retirement becomes permissible is a possible point of distinction between this case and *McKinney*.

[50] The specific provisions in issue in *McKinney* were ss. 4(1) and 9(*a*) of the *Code*. Subsection 4(1) prohibits discrimination on the basis of age while paragraph 9(*a*) defines age as one that is 18 years of more, but less than 65. The combined effect of these provisions was to deny the protection of the *Code* to workers over the age of 65 in all aspects of employment, including mandatory retirement.

[51] The provision in issue in this case, paragraph 15(1)(*c*) of the *CHRA*, provides for a limited exception to age-based discrimination for individual who have reached the normal age of retirement for employees working in positions similar to their own.

[52] For our purposes, the distinction between the two provisions is that in one case, the age at which mandatory retirement is permissible is set out in the statute whereas in the other, it is determined by the industry practice with respect to persons working in positions similar to that of the individual in question. The practical consequence of this distinction is that under the *CHRA*, mandatory retirement may be permissible at ages younger than age 65. It is this feature of paragraph 15(1)(*c*) which attracts constitutional scrutiny.

[53] In form, the issue in this appeal is whether the difference in the manner of determining the age at which mandatory retirement may be imposed takes the *CHRA* outside the Supreme Court's reasoning in *McKinney*. In substance, the issue is whether a legislative provision which permits mandatory retirement at an age less than 65 is saved by *McKinney*. In either case, it is important to understand how the Supreme Court's reasoning in *McKinney* could apply to the case at hand.

[54] The Ontario Court of Appeal was confronted with a similar problem in *Bedford* in which the issue was whether the *Prostitution Reference* was binding authority. The Ontario Court of Appeal began by defining *stare decisis* as the requirement that "courts render decisions which are consistent with the previous decisions of higher courts": see *Bedford*, cited above, at para. 56. The Court then quoted the following passage from *Halsbury's Laws of Canada, Civil Procedure I*, 1st Ed. (Markham, LexisNexis Canada, 2008):

> To employ the traditional terminology: only the *ratio decidendi* of the prior court decision is binding on a subsequent court. The term *ratio decidendi* describes the process of judicial reasoning that was necessary in order for the court to reach a result on the issues that were presented to it for a decision. All other comments contained within the reasons of the prior court are termed *obiter dicta*, and in essence such incidental remarks are treated as asides. They may have persuasive value, but they are not binding. [Emphasis added.]
>
> *Bedford*, cited above, at para. 57

[55] The Court went on to note that the distinction between *stare decisis* and *obiter dicta* had evolved in the Canadian context so that there is a spectrum of authoritativeness on which the statements of appellate courts may be placed. The Court then referred to its own decision in *R. v. Prokofiew*, 2010 ONCA 423, (2010), 100 O.R. (3d) 401, at paragraph 19:

> The question then becomes the following: how does one distinguish between binding *obiter* in a Supreme Court of Canada judgment and non-binding *obiter*? In *Henry*,[*R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 309] at para. 53, Binnie J. explains that one must ask, "*What does the case actually decide?*" Some cases decide only a narrow point in a specific factual context. Other cases - including the vast majority of Supreme Court of Canada decisions - decide broader legal propositions and, in the course of doing so, *set out legal analyses that have application beyond the facts of the particular case*. [Emphasis added]
>
> *R. v. Prokofiew*, cited above, as quoted in *Bedford*, cited above, at para. 58.

[56] In this context, the question at hand becomes: what did *McKinney* decide? On what basis did the Supreme Court decide that the *Code* provisions permitting mandatory retirement at age 65 were saved by s.1? Does the Supreme Court's reasoning apply to mandatory retirement at younger age?

[57] Let us therefore examine the reasoning in *McKinney* to see if it is limited to the case of retirement at age 65 or older.

[58] In undertaking this review, one must keep in mind the nature of the question before the Court in *McKinney*. At issue was the constitutionality of a provision that allowed for mandatory retirement beginning at age 65. As a result, it should come as no surprise that the Court's reasons refer specifically to retirement at age 65. The question is whether those reasons apply only to the specific provisions before the Court in that case.

[59] Before beginning his analysis in *McKinney*, La Forest J. reviewed the history of mandatory retirement in Canada so as to place the *Charter* issue in its "proper linguistic, philosophic and historical contexts": see *McKinney*, cited above, at para. 79. La Forest J. noted that mandatory

retirement at age 65 developed as a consequence of the development of public pension plans under which benefits were payable commencing at age 65. Private pension plans were designed so that their benefits dovetailed with those of the public plans. As a result, 65 became the generally accepted "normal" age of retirement. Mandatory retirement arose in the context of this integration of public and private pension plans.

[60] La Forest J. noted that "about one half of the Canadian work force occupy jobs subject to mandatory retirement and about two thirds of collective agreements in Canada contain mandatory retirement provisions at the age of 65, which reflects that it is not a condition imposed on workers but one which they themselves bargain for through their own organizations": see *McKinney*, cited above, at para. 83. In La Forest J.'s view, mandatory retirement had become part of "very fabric of the organization of the labour market" in Canada: see *McKinney*, cited above, at para. 84.

[61] In that regard, at paragraph 83 of his reasons, La Forest J. quoted with approval from the decision of the Ontario Court of Appeal in *McKinney*, reported as (1987), 63 O.R. (2d) 1:

> One of the primary objectives of s. 9(*a*) was to arrive at a legislative compromise between protecting individuals from age-based employment discrimination and giving employers and employees the freedom to agree on a date for termination of the employment relationship. Freedom to agree on a termination date is of considerable benefit to both employers and employees …

[62] This passage highlights two elements that are important to the Supreme Court's analysis. The first is that any law permitting mandatory retirement at any age involves a compromise between competing interests, namely, freedom from age-based discrimination and the freedom of employers

and employees to make mutually beneficial decisions. The second element is the prominent place given by La Forest J. to employer/employee self-determination in the elaboration of work place policies.

[63] After these introductory comments, La Forest J. then turned to the s.1 analysis. He examined the objectives of the legislation. After referring to the legislative debates, he summarized the legislator's preoccupations in the following passage, which I quoted earlier in these reasons:

> The Legislature's concerns were with the ramifications of changing what had long been the rule on such important social issues as its effect on pension plans, youth employment, the desirability of those in the workplace to bargain for and organize their own terms of employment, the advantages flowing from expectations and ongoing arrangements about terms of employment, including not only retirement, but seniority and tenure and, indeed, almost every aspect of the employer-employee relationship. These are surely of "pressing and substantial [concern] in a free and democratic society."
>
> *McKinney*, cited above, at para. 96

[64] This passage reflects the fact that the legislature did not start with a blank slate when it enacted the *Code*. In the period preceding the legislation, employers and employees had entered into a variety of arrangements that reflected their expectations about workplace mobility and stability, based on the existence of mandatory retirement. The legislator was anxious to protect these mutually advantageous arrangements and was wary of interfering with them without understanding the ramifications of such changes.

[65] As La Forest J. noted in his introductory comments (see paragraphs 56 to 58 above), these arrangements usually involved mandatory retirement at age 65. However, there were other

arrangements in place in different sectors of the workplace which reflected a different organization of the workplace. By way of example, the Air Canada pension plan has required mandatory retirement at age 60 since 1957. Air Canada and its employees have been bargaining collectively since 1945. Mandatory retirement at age 60 has been a term of the collective agreement since the early 1980's: see *Vilven*, cited above, at para. 8. Just as the Ontario legislature did not legislate in a vacuum, neither did Parliament.

[66] Moving to the next step in the s.1 analysis, La Forest J. addressed the issue of whether the means chosen by the legislature were rationally connected to its objectives. He was of the view that the legislation achieved its purpose of maintaining stability in pension arrangements and was therefore "rationally connected to that end": *McKinney*, cited above, at para.101. In his view, there was 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": *McKinney*, cited above, at para. 101.

[67] These words accurately describe the thrust of paragraph 15(1)(*c*) of the *CHRA* which leaves the determination of the age at which mandatory retirement is permissible to the prevailing practice in a particular industry. I find in them an indication that the majority of the Supreme Court was addressing its mind to issue of mandatory retirement generally, and not specifically to the question of mandatory retirement at age 65.

[68] The next issue considered in La Forest J.'s analysis was minimal impairment. In analysing this issue, he reviewed some of the social science evidence contained in the record, noting the conflicting predictions as to the effects of abolishing mandatory retirement. In his view, it was not surprising that, in light of this conflicting evidence, the legislature should adopt a cautious approach to the issue.

[69] La Forest J. put his discussion of minimal impairment in context when he wrote the following at paragraph 119 of his reasons:

> It must be remembered that what we are dealing with is not regulation of the government's employees, nor is it government policy favouring mandatory retirement. It simply reflects a permissive policy. It allows those in different parts of the private sector to determine their work conditions for themselves, either personally or through their representative organizations. It was not a condition imposed on employees. Rather it derives in substantial measure from arrangements which the union movement or individual employees have struggled to obtain.

[70] This passage underlines La Forest J.'s sensitivity to the permissive nature of the *Code* and to the choices made by labour market participants in relation to retirement, often through the vehicle of collective bargaining. In my view, La Forest J.'s reasoning is premised on respect for the choices made by labour market participants themselves.

[71] La Forest J. then noted that a court must ultimately consider whether, on the evidence, the legislature had a reasonable basis for concluding that the means it had chosen impaired constitutionally protected rights as little as possible: see *McKinney*, cited above, para. 123. He expressed his conclusion on this point in the following terms:

> I do not intend here to take sides on the economic arguments, and it may well be that acceptable arrangements can be worked out over time to take more sensitive account of the disadvantages resulting to the aged from present arrangements. But I am not prepared to say that the course adopted by the legislature, in the social and historical context through which we are now passing is not one that reasonably balances the competing social demands which our society must address. The fact that other jurisdictions have taken a different view proves only that the Legislatures there adopted a different balance to a complex set of competing values.
>
> *McKinney*, cited above, at para. 123.

[72] Finally, La Forest J. found that the issue of proportionality between the measures adopted and the impairment of the constitutional right must be approached in a manner that respects the fact that certain types of *Charter* problems lend themselves to incremental solutions. In La Forest's view, "it is important to remember that a Legislature should not be obliged to deal with all aspects of a problem at once": see *McKinney*, cited above, at para. 129. This is particularly so in a case like this where protecting the rights of one group of people necessarily affects the rights of others.

[73] Justices Sopinka and Cory each wrote concurring reasons agreeing with La Forest J.'s reasons and conclusion: see *McKinney*, cited above, at paras. 425 and 429-430. Each of them went on to add a further element to the analysis, an element which, in my view, reinforces the thrust of La Forest J.'s analysis.

[74] Sopinka J. summarized his thinking on the issue of mandatory retirement as follows:

> The current state of affairs in the country, absent a ruling from this court that mandatory retirement is constitutionally impermissible, is the following. The federal government and several provinces have legislated against it. Others have declined to do so. These decisions have been made by means of the customary democratic process and no doubt this process

> will continue unless arrested by a decision of this Court. Furthermore, employers and employees through the collective bargaining process can determine for themselves whether there should be a mandatory retirement age and what it should be. They have done so in the past, and the position taken by organized labour on this issue indicates that they wish this process to continue. A ruling that mandatory retirement is constitutionally invalid would impose on the whole country a regime not forged through the democratic process but by the heavy hand of the law. Ironically, the Charter would be used to restrict the freedom of many in order to promote the interests of the few. While some limitation on the rights of others is inherent in recognizing the rights and freedoms of individuals, the nature and extent of the limitation, in this case, would be quite unwarranted. I would therefore dispose of the appeal as proposed by La Forest J.
>
> *McKinney*, cited above, at para. 426

[75] Cory J. was more passionate in his defence of the collective bargaining process:

> Bargains struck whereby higher wages are paid at an earlier age in exchange for mandatory retirement at a fixed and certain age, may well confer a very real benefit upon the worker and not in any way affect his or her dignity or sense of worth. If such contracts should be found to be invalid, it would attack the very foundation of collective bargaining and might well put in jeopardy some of the hard won rights of labour.
>
> The collective agreement reflects the decision of intelligent adults, based upon sound advice, that it is in the best interest of themselves and their families to accept a higher wage settlement for the present and near future in exchange for agreeing to a fixed and certain date for retirement. In those circumstances, it would be unseemly and unfortunate for a court to say to a union worker that, although this carefully made decision is in the best interest of you and your family, you are not going to be permitted to enter into this contract. It is a position that I would find unacceptable.
>
> *McKinney*, cited above, at paras. 432-433

[76] Both of these passages emphasize La Forest J.'s belief in the wisdom of deferring to the legislature's choices with respect to the organization of the workplace by employers and employees.

[77] Given all of this, what does *McKinney* stand for?

[78] It is perhaps easier to state what *McKinney* did not decide. *McKinney* did not decide that the provisions of the *Code* permitting mandatory retirement as of age 65 were saved by s. 1 of the *Charter* because 65 was seen as the normal age of retirement. La Forest J.'s observation that 65 had come to be regarded as the normal age of retirement does not figure at all in his subsequent application of the *Oakes* test. It is simply a demographic observation, the occurrence of which is explainable by reference to certain economic factors.

[79] Age 65, in and of itself, cannot justify a breach of s. 15 of the *Charter*. The factors which justify mandatory retirement must logically apply independent of age since one cannot justify a breach of the right to be free from age-based discrimination by reference to age itself. Such an argument would be tautological.

[80] In my view, what *McKinney did* decide was that mandatory retirement, as an exception to the prohibition against discrimination on the basis of age, could be justified under s. 1 of the *Charter* when it is a mutually advantageous arrangement between employers and employees which permits the workplace to be organized in a manner that accommodates the needs of both parties. While these types of arrangements are not limited to unionized workplaces, La Forest J. was very conscious of the significant role that collective bargaining plays in achieving these types of accommodations: see *McKinney*, cited above, at paras. 120-122.

[81] There is nothing in *McKinney* that would suggest that the analysis which resulted in the conclusion that s. 9(*a*) of the *Code* was saved under s. 1 of the *Charter* does not apply to provisions permitting mandatory retirement prior to age 65.

[82] While retirement at age 65 is the norm in the general workforce, there are instances of particular occupational groups in which there are longstanding mandatory retirement arrangements at an age other than 65. This case is but one example of such an arrangement. There is nothing in *McKinney* which would force the conclusion that such arrangements were not justified under s. 1 of the *Charter* simply because the agreed upon age of mandatory retirement was less that 65.

[83] Moreover, the trigger by which the age of mandatory retirement is fixed does not change the analysis in so far as the constitutional validity of a permissive mandatory retirement provision is concerned. The trigger in the case of paragraph 15(1)(*c*) of the *CHRA*, the normal age of retirement for a given occupation or position, simply allows for the fact that certain occupational groups may have negotiated arrangements based on a fixed and certain retirement date other than age 65.

[84] By way of example only, in the *Vilven* decision, the Federal Court noted the Tribunal's observations with respect to mandatory retirement for pilots at Air Canada:

> In this case, ACPA and Air Canada agreed to retirement at age 60 in exchange for a rich compensation package, including a pension plan that put Air Canada pilots in an elite group of pensioners. Based upon the testimony of an Air Canada witness, the Tribunal observed that employees, including Air Canada pilots, are not faced with the indignity of retiring because they have been found to be incapable of performing the requirements of their

> position or because of failing health. Instead, "retirement at age 60 for pilots is the fully understood and anticipated conclusion of a prestigious and financially rewarding career".
>
> *Vilven*, cited above, at para. 217

[85] While the issue at hand is not the validity of Air Canada's mandatory retirement policy, this passage does make it clear that the same mechanisms which are at play in workplaces where mandatory retirement occurs at age 65 are also at play in workplaces where the parties have agreed upon mandatory retirement at a younger age.

[86] To recapitulate, I am of the view that *McKinney* decided that a provision which permits mandatory retirement is constitutionally permissible because the existence of a fixed and certain retirement date permits the negotiation of mutually beneficial arrangements which might not otherwise be possible. A provision such as para. 15(1)(*c*) of the *CHRA* permits such arrangements and would therefore come within the principles articulated in *McKinney*.

[87] That said, it may be that conditions have changed to the point where the Supreme Court is prepared to revisit this issue. If it is, then, obviously, nothing in this decision would prevent it from doing so.

[88] I therefore find that the Tribunal and the Federal Court were bound by *McKinney* and ought to have followed it.

CONCLUSION

[89] The Federal Court decided in *Vilven* that the Tribunal's conclusion that age 60 was the normal age for pilots was reasonable, see *Vilven*, cited above, at para. 174. Since paragraph 15(1)(*c*) of the *CHRA* is constitutionally valid, and since the Pilot's complaints were caught by paragraph 15(1)(*c*), it follows that their complaints should be dismissed.

[90] I would therefore allow the appeal with costs in this Court and in the Federal Court. I would set aside the decision of the Federal Court, and return the matter to the Tribunal with the direction that the complaints of Mr. Kelly and Mr. Vilven should be dismissed on the ground that paragraph 15(1)(*c*) of the *CHRA* is constitutionally valid, and that 60 is the normal retirement age for persons working in positions similar to theirs.

[91] I would also dismiss the cross-appeal with costs.

"J.D. Denis Pelletier"

J.A.

"I agree
Johanne Gauthier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-107-11
STYLE OF CAUSE:	AIR CANADA PILOTS ASSOCIATION v. ROBERT NEIL KELLY, GEORGE VILVEN, CANADIAN HUMAN RIGHTS COMMISSION, and AIR CANADA, ATTORNEY GENERAL OF CANADA
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CONCURRED IN BY:	GAUTHIER J.A
NOT TAKING PART IN THE JUDGMENT:	LAYDEN-STEVENSON J.A.*
DATED:	July 17, 2012

APPEARANCES:

Mr. Bruce Laughton	FOR THE APPELLANT
	FOR THE RESPONDENTS
Mr. David Baker and Mr. Raymond Hall	Robert Neil Kelly and George Vilven
Mr. Daniel Poulin	Canadian Human Rights Commission
Ms Maryse Tremblay	Air Canada
Ms Anne M. Turley Mr. Craig Collins-William	Attorney General of Canada pursuant to section 57 of The *Federal Courts Act*

SOLICITORS OF RECORD:

Laughton & Co Vancouver, B-C	FOR THE APPELLANT
	FOR THE RESPONDENTS
Bakerlaw Toronto, Ont. Raymond Hall Winnipeg, MB	Robert Neil Kelly and George Vilven
Canadian Human Rights Commision - Ottawa, Ont.	Canadian Human Rights Commission
Heenan Blaikie Montréal, Qc	Air Canada
Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Ont.	Attorney General of Canada pursuant to section 57 of The *Federal Courts Act*