Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

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File Nos.: T1536/8210 to T1607/5310; T1630/17610 to T1645/17610; T1664/01911 to T1681/03611; T1707/6211 to T1722/7711; T1755/11011 to T1768/12311; T1780/1012 & T1781/1012; T1793/2312 & T1794/2412; T1801/3112 to T1806/3612; T1801/3112 & T1802/3212; T1858/812 to T1861/9112

Between:

Gary Nedelec, Alexander Samanek, Michael S. Sheppard, Douglas Goldie, Gary Bedbrook, Pierre Garneau, Jacques Couture, Larry James Laidman, Robert Bruce Macdonald, Gordon A.F. Lehman, Eric William Rogers, Peter J.G. Stirling, David Malcom Macdonald, Robert William James, Camil Geoffroy, Brian Campbell, Trevor David Allison, Benoit Gauthier, Bruce Lyn Fanning, Marc Carpentier, Mark Irving Davis, Raymond Calvin Scott Jackson, John Bart Anderson, David Alexander Findlay, Warren Stanley Davey, Raymond Robert Cook, Keith Wylie Hannan, Michael Edward Ronan, Gilles Desrochers, William Lance Frank Dann, Robert Francis Walsh, John Andrew Clarke, Bradley James Ellis, Michael Ennis, Stanley Edward Johns, Thomas Frederick Noakes, William Charles Ronan, Barrett Ralph Thornton, Robert James McBride, John Charles Pinheiro, David Allan Ramsay, Harold George Edward Thomas, Murray James Kidd, William Ayre, Stephen Norman Collier, William Ronald Clark

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Air Canada and Air Canada Pilots Association

Respondents

Ruling

Member: David L. Thomas

I. Overview

[1] This is a ruling concerning a motion filed by a group of complainants in this matter, represented by Mr. Raymond Hall (the "Coalition Complainants"), challenging the constitutional validity of a former section of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, as amended (the "*CHRA*"). Mr. Hall served Notice of the Constitutional Question on February 26, 2018. This Motion is dated June 5, 2018 and questions the constitutional validity of Section 15(1)(c) of the *CHRA* as it existed until its repeal on December 15, 2012 (see S.C. 2011, c. 24, s. 166).

[2] This motion relates to a group of complaints that are a part of a complex matter involving the mandatory retirement of Air Canada pilots at the age of 60. In a previous ruling on a motion by the Air Canada Pilots Association ("ACPA") to dismiss all complaints, I partially granted ACPA's request and dismissed the complaints of those complainants who had reached the age of 60 prior to December 31, 2009 (see 2017 CHRT 22). This matter now concerns only the remaining complainants, those who reached the age of 60 on January 1, 2010 or later.

[3] Section 15(1)(c) of the *CHRA* permitted the termination of an individual's employment based on age, if it was the "…normal age of retirement for employees working in positions similar to the position of that individual." The constitutionality of section 15(1)(c) was essentially resolved in the matter of an earlier group of Air Canada pilots with similar complaints, referred to as the *Vilven/Kelly* group. That matter was determined by the Federal Court of Appeal (FCA) which affirmed the constitutional validity of the section, overturning the Federal Court's judicial review of the Tribunal's decision (see 2012 FCA 209). Leave to appeal the FCA decision to the Supreme Court of Canada (SCC) was denied in 2013 (2013 CanLII 15565).

[4] The present motion seeks to re-visit the constitutionality of section 15(1)(c) on the basis that there have been changes since the Supreme Court of Canada decision in *McKinney v. University of Guelph,* [1990] 3 S.C.R. 229 *("McKinney")* in 1990 that are significant enough to warrant a different finding. The motion asks the Tribunal to find that

s.15(1)(c) of the *CHRA* is of no force or effect, and therefore not a defence available to the Respondents for these complaints.

[5] In May of 2019, the Tribunal wrote to the parties and requested submissions on two questions that were not addressed in their earlier submissions. The Tribunal asked the parties to consider whether or not the constitutional challenge is a moot question. Secondly, if the Tribunal concluded that s.15(1)(c) is unconstitutional, could it order any remedies, more specifically the reinstatement of the Complainants in their employment and the payment of damages/remedies by the Respondents.

[6] The Canadian Human Rights Commission did not make submissions on the original constitutional question motion or to the Tribunal's subsequent request on the two questions.

II. Background

[7] This inquiry involves the complaints of retired Air Canada pilots who claim that Air Canada engaged in a discriminatory practice and applied a discriminatory policy by requiring them to retire at the age of 60. The mandatory retirement policy was established pursuant to the collective agreement negotiated between Air Canada and the bargaining agent, ACPA, and was reflected in the pilots' pension plan. As a result, human rights complaints have been filed by many of these retired pilots throughout the years, against both Air Canada and ACPA. In this instance, the complaints of the forty-five (45) remaining pilots have been combined into a single inquiry by the Tribunal, now referred to as the "*Nedelec*" matter. (Prior to the release of 2017 CHRT 22, it was previously referred to as the *"Bailie"* matter.) The Complainants claim that requiring them to retire at age 60 is in violation of sections 7, 9 and 10 of the *CHRA*.

[8] Prior to the *Bailie/Nedelec* group of complainants, there were two other groups of Air Canada retired pilot complainants before the Tribunal who had also alleged age discrimination with respect to the mandatory retirement policy. The Tribunal similarly grouped those complainants together into separate hearings. The first inquiry will be referred to as the *Vilven/Kelly* matter, and the second inquiry will be referred to as the

Thwaites/Adamson matter. Commencing with the *Vilven/Kelly* matter, complaints of this nature by Air Canada pilots have been before the Tribunal since 2005.

III. Judicial history of the similar complaints in *Vilven/Kelly* & *Thwaites/Adamson*

[9] The *Vilven/Kelly* matter was the first proceeding regarding the mandatory retirement rules for pilots who were forced to retire from Air Canada at the age of 60. Two (2) complaints were combined for the proceeding, Mr. Vilven's and Mr. Kelly's, and both were represented by the same counsel, Mr. Hall. The timeframe assessed in the *Vilven/Kelly* proceeding was in respect of pilots who had been forced to retire between 2003 and 2005.

[10] The threshold issue in that case was whether the mandatory retirement defence prescribed in section 15(1)(c) of the *CHRA* was constitutionally valid under s. 15 and s. 1 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). Section 15(1)(c) of the *CHRA* then permitted the termination of employment based on age, if it was the "normal age of retirement for employees working in positions similar to the position of that individual." In that case, if s.15(1)(c) was constitutionally applicable, then the second issue was whether the complainants' employment had been terminated at the normal age of retirement for similarly employed pilots in Canada, and how that should be determined.

[11] On the constitutional issue, the Tribunal initially concluded that the complainants' right to equality under s.15 of the *Charter* had not been violated by s. 15(1)(c) of the *CHRA*, and as such, no determination under s. 1 of the *Charter* was necessary. It also held that s.15(1)(c) provided a defence to Air Canada, as in the Tribunal's view, the complainants' employment had been terminated at the "normal age of retirement" (see 2007 CHRT 36). This decision was judicially reviewed by the Federal Court, and in her ruling, 2009 FC 367, ("*Vilven #1*"), Mactavish J. found that the Tribunal had come to the proper conclusion regarding whether the s.15(1)(c) defence had been made out on the facts, but that the Tribunal had erred in its *Charter* conclusion, and that s.15(1)(c) of the *CHRA* did indeed violate s.15 of the *Charter*. The case was then remitted to the Tribunal for a determination of whether or not the s.15 breach could be saved by s.1 of the *Charter*.

[12] The Tribunal's second decision in *Vilven/Kelly* (2009 CHRT 24) concluded that s.15(1)(c) of the *CHRA* was not a reasonable limit on the complainants' equality rights under s.15 of the *Charter*. The respondents "*bona fide* occupational requirement" (BFOR) defences were not established and, as such, the complaints were substantiated. Air Canada and ACPA applied for a judicial review of this decision. However, on this point of constitutionality, the Federal Court held that the Tribunal was correct in its finding that s.15(1)(c) of the *CHRA* was not saved by s.1 of the *Charter*. (See 2011 FC 120, "*Vilven #2*".) Air Canada and ACPA then filed an appeal to the Federal Court of Appeal.

[13] Meanwhile, the second group of pilots, those involved in the *Thwaites/Adamson* matter, had their complaints heard before the Tribunal. In this hearing, the parties initially decided to defer the question of the constitutional validity of s.15(1)(c), and instead litigated the question of whether the age-based terminations of employment in this case had occurred at the "normal age of retirement" within the meaning of this provision. The Tribunal concluded that the normal age of retirement was 60, and therefore the complaints were dismissed by operation of s.15(1)(c). (See 2011 CHRT 11.) Unfortunately, the Federal Court finding in *Vilven #2,* released a few months earlier, had come to the opposite conclusion on the constitutional validity of s.15(1)(c) and upon motion, the Tribunal then amended its previous decision in the *Thwaites/Admanson* matter, this time substantiating the complaints, as s. 15(1)(c) appeared to be no longer an available defence (see 2012 CHRT 9).

[14] However, the matter was still not settled. Just three months later, the FCA rendered its decision and overturned *Vilven #2* on the question of the constitutionality of s.15(1)(c) in *Air Canada Pilots Association v. Kelly*, 2012 FCA 209 ("*Kelly FCA*"). The FCA held at paras. 86 and 88 that the Tribunal and the Federal Court were bound to follow the Supreme Court of Canada in *McKinney*. The *McKinney* decision had found that mandatory retirement could be justified under s.1 of the *Charter* when it was a mutually advantageous arrangement between employers and employees which permits the workplace to be organized in a manner that accommodated the needs of both parties (see *Kelly FCA,* para. 80).

[15] Given the Federal Court's earlier judgment in *Vilven #1*, upholding the Tribunal's finding that 60 was the normal age of retirement for pilots, and that Mr. Kelly and Mr. Vilven were therefore caught by s.15(1)(c), the decision in *Kelly FCA* upholding the constitutionality of this provision confirmed that their complaints should be dismissed.

[16] Following the decision in *Kelly FCA*, the Tribunal's decisions in the *Thwaites/Adamson* matter were also judicially reviewed by the Federal Court and then appealed to the FCA. There were several matters at issue, and the FCA accepted the Tribunal's finding that "…for each of the years 2005-2009, the majority of pilots working for Canadian airlines, including Air Canada, in similar positions to that of the complainants, retire by the age 60" (see 2011 CHRT 11, para. 181).

[17] Furthermore, and this is relevant to our context, the FCA found that "*McKinney* remains a binding precedent" and noted that in "*Kelly FCA*, this Court held that *McKinney* was still good law as it pertains to the constitutionality of mandatory retirement schemes…" (Para. 97.)

[18] In addition to the foregoing summary of the jurisprudence, it should be noted that following Parliament's repeal of s.15(1)(c) of the *CHRA* effective December 15, 2012, the Respondents ceased requiring Air Canada pilots to retire at age 60.

IV. The Issues

[19] There are the three main issues to be addressed by the Tribunal. This ruling will address the submissions of the parties on each issue separately. The issues are as follows:

Issue #1 – Is the Constitutional Question Moot?

[20] Is the entire issue before the Tribunal in this motion moot because there is no live controversy anymore and because the Tribunal would not be able to award the remedies sought by the Complainants?

Issue #2 – Does the Tribunal have the Ability to Award Damages Retroactively?

[21] If the Tribunal concludes that no alternative defence is available to the Respondents, would it be fair and just to award damages retroactively if it were determined that the Respondents conducted themselves in accordance with the law as it then stood?

Issue #3 - Section 15(1)(c) of the *CHRA*

[22] Should the Tribunal find that s.15(1)(c) of the *CHRA* is of no force or effect, and therefore not a defence available to the Respondents for these complaints, and therefore find liability in favour of the Complainants? To make this finding, the Tribunal must consider the following three questions and answer each successively in the positive:

A. Have changes to the law of *stare decisis*, because of the Supreme Court of Canada decisions in *Canada (Attorney General) v. Bedford,* 2013 SCC 72 *("Bedford SCC"); Carter v. Canada (Attorney General)*, 2015 SCC 5 ("*Carter")*; and, *R. v. Comeau*, 2018 SCC 15 ("*Comeau"),* resulted in *Kelly FCA*, *Adamson FCA* and *McKinney* no longer being binding authorities for the Tribunal on the question of the constitutionality of s.15(1)(c) of the *CHRA,* and as such, should the Tribunal revisit these findings and conclude that s.15(1)(c) infringes s.15 of the *Charter*?

B. If the Tribunal concludes that s.15(1)(c) infringes s.15 of the *Charter*, is that infringement not saved by s.1 of the *Charter*?

C. If the Tribunal concludes that the s.15(1)(c) infringement of s.15 of the *Charter* is not saved by s.1, and the Respondents do not have an alternative defence, such as a BFOR, is liability predetermined in favour of the Complainants?

[23] I have considered all of the parties' arguments, although I am not addressing all of them in these reasons. I am addressing the ones that bear on the important points in issue, and on the main relevant factors I must consider (see *Turner v. Canada (A.G.)* 2012 FCA 159, paras. 40-41).

Issue #1 – Is the Constitutional Question Moot?

[24] In the present motion, the Coalition Complainants are challenging the constitutionality of s.15(1)(c) of the *CHRA* and are looking for a finding that it is of no force or effect. However, it is not possible for the Tribunal to make a proactive declaration of invalidity because the section has already been repealed. Therefore, are there any

remaining issues for the Tribunal to decide? I find there are none and, as such, that the question in this motion is moot.

[25] The Coalition Complainants, in their answer to the Tribunal's letter, sustained that the motion was not moot. In their view, the primary and sole question is whether the termination of employment, as of the respective dates each pilot turned 60 and was terminated, was in accordance with the law at such times. They argue that the Respondents openly contravened the law by continuing to terminate pilots after the decision of the Federal Court in *Vilven #1*.

[26] The Respondents, in their submissions, argue that the mootness question depends on the possibility for the Tribunal to award damages retroactively, which will be addressed in the next section of this ruling.

[27] The Supreme Court decision *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342 established the two-pronged test that must be applied to determine if a case is moot. Firstly, it must be considered whether a live controversy still exists, or if it is merely an academic exercise. If there is no live controversy to be decided, then the court should consider if there are any exceptional reasons to use its discretion to hear the matter anyway. The Supreme Court wrote:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
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> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute

> has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[28] In *Saskatchewan (Human Rights Commission) v. Carlson*, 2008 SKQB 312 ("*Carlson*"), the Borowski test was applied under analogous circumstances. Ms. Carlson was forced to retire in 2003 at the age of 65 from her employment as a librarian. At the time, the *Saskatchewan Human Rights Code*, S.S.1979, c.S-24.1 (the "*Saskatchewan Code*") defined "age" as "any age of eighteen years or more but less than sixty-five years". The Saskatchewan Tribunal concluded that the definition of "age" in the *Saskatchewan Code* constituted an infringement on the complainant's equality rights under s.15 of the *Charter*, but found that it was bound by *McKinney*. It thus concluded that the infringement was justified under s.1 of the *Charter* and accordingly dismissed the complaint in October 2007. The complainant appealed.

[29] Meanwhile, the Saskatchewan legislature had introduced amendments to the definition of "age" found in the *Saskatchewan Code*. In November 2007, the *Saskatchewan Code* was amended to change the definition of "age" by removing the reference to age sixty-five, thus effectively precluding the possibility of mandatory retirement.

[30] In 2008, on appeal before the Court of Queen's Bench for Saskatchewan, the question of whether the appeal was moot was raised. Applying the first step of the analysis from Borowski, the court concluded that the appeal was moot. The court noted that a declaration that "age" (as it was defined in the *Saskatchewan Code* at the time) contravened the *Charter* could not be made retroactively. While a live constitutional controversy may have existed in 2003 when Ms. Carlson filed her human rights complaint, by 2008 the constitutional issues between the parties had become academic, as the impugned provision had been amended. The court further reasoned that it was

not possible for the employer to have contravened a provision of the *Saskatchewan Code* if it was acting in compliance with the existing provisions at the time (paras. 6-11.)

[31] Turning then to apply the second step of the *Borowski* analysis, the court refused to exercise its discretion to hear the case despite the matter being moot. The court rejected the argument that the case ought to be heard as there were other outstanding similar complaints regarding mandatory retirement, concluding that the issues were moot for these complainants in the same way that they were for Ms. Carlson, and that no remedy was available to any of these complainants.

[32] A similar constitutional challenge to legislation permitting mandatory retirement in Nova Scotia was also declared moot once the legislation had been repealed. See *French v. Nova Scotia (Attorney General)*, 2012 NSSC 394.

[33] In the current case, the Tribunal has to determine whether a "live controversy" still exists between the parties. This is the first part of the test developed by the SCC in *Borowski*: "to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic".

[34] The Tribunal thus has to establish what the possible impact of a constitutional challenge to s.15(1)(c) of the *CHRA* would be, since it has been repealed more than six years ago. In addition to a declaration of invalidity of s.15(1)(c), the Complainants seek the following remedies:

A. their reinstatement in employment;

B. damages for lost wages;

C. Non-monetary remedies relating to pension benefits and employment seniority with respect to retirement pass travel; and

D. compensation under s.53(2)(e) and 53(3) of the *CHRA*.

[35] Under s.53(2) of the *CHRA*, the Tribunal may make an order against a person found to be engaging or to have engaged in a discriminatory practice and may include in the Tribunal order a number of possible enumerated remedies, as well as compensation for willful and reckless conduct under s.53(3). However, it should be obvious that to make

such an order, the Tribunal must conclude that a respondent contravened one or more provisions of the *CHRA*. Following the reasoning of the Saskatchewan Queen's Bench in *Carlson*, if the conduct of the Respondents was compliant with the provisions of the *CHRA*, then a finding of liability would not be possible and no order could be made.

[36] The Coalition Complainants submit that the reasoning in *Carlson* is "dubious" because of the manner in which it interpreted the *Saskatchewan Code*. The Saskatchewan Court did appear to be focused on the language in the *Saskatchewan Code* relating to the failure to comply with an order of the Saskatchewan Tribunal. The relevant provision stated that intent of a violation (failure to comply with an order) must be proved. I would not disagree that the language is different between the *Saskatchewan Code* and the *CHRA*, since in the latter, neither intention nor *mens rea* is required to substantiate a complaint. However, it does not alter the reality that the Tribunal must find that a respondent contravened a provision under the *CHRA* before it can order damages. It remains a fact, confirmed twice by the Federal Court of Appeal, that the Respondents did not contravene the *CHRA* with respect to the complainants in the *Vilven/Kelly* Matter or the *Adamson/Thwaites* Matter.

[37] Counsel for the Coalition Complainants makes long argument that the pilots in this matter all filed their complaints after the Federal Court decision in *Vilven #1*. As such, they argue, the Respondents were aware that s.15(1)(c) was constitutionally invalid and despite this, they continued to lay off pilots as they turned 60. In such a way, they sustain that the Respondents willfully and knowingly violated the *Charter* rights of these pilots. I do not find this argument to be an accurate reflection of what transpired.

[38] The decision in *Vilven #1* was released on April 9, 2009. However, the constitutionality of s.15(1)(c) was not finally determined by that Court. The Court did find that s.15(1)(c) of the *CHRA* violated s.15(1) of the *Charter*. However, MacTavish J. referred the matter back to the Tribunal for a determination "on the basis of the existing record whether paragraph 15(1)(c) of the *CHRA* can be demonstrably justified as a reasonable limit in a free and democratic society." (Paras 339-340.)

[39] As described above, the Tribunal's subsequent decision in *Vilven/Kelly* (2009 CHRT 24), released on August 28, 2009, concluded, inter alia, that s.15(1)(c) of the *CHRA* was not a reasonable limit on the complainants' equality rights under s.15 of the *Charter*. However, it is important to note that this finding was only with respect to "the facts of this case" (para. 155) and that the Tribunal did not order the "cease and desist order" requested by the complainants against the respondents. The Tribunal remained seized of the matter pending further submissions on remedy. (See paras. 158-160.)

[40] The Tribunal held a hearing on remedies and then released its decision (2010 CHRT 27) on November 8, 2010, addressing the remedies sought by Mssrs. Vilven and Kelly. The complainants specifically asked for an an order that the respondents cease requiring pilots to retire upon their 60th birthday. The Tribunal clearly rejected this request in para.12:

> Further, and as this Tribunal pointed out in its previous decision, its finding that s. 15(1)(c) offends the *Charter* is not a legal precedent and is applicable only to the facts of this case. In these circumstances, s. 15(1)(c) remains operative and may be relied upon by other respondents as a defence to any other outstanding or future complaints regarding the mandatory policy in question. To grant the order requested would be to deprive them of the defence afforded by this section.

[41] In *Vilven #2*, the Federal Court noted that Mssrs. Vilven and Kelley were seeking "an order directing Air Canada to cease applying the mandatory retirement provisions of the pension plan and collective agreement to *all* Air Canada pilots." (Para. 474.) Although the Federal Court concurred with the Tribunal's finding that s.15(1)(c) was not saved by s.1 of the *Charter*, the court called the request for a cease and desist order "a collateral attack on the Tribunal's remedial decision." (Para. 485.) Furthermore, the Federal Court noted that "Tribunals do not have the power to grant general declarations of invalidity." (Para 479).

[42] *Vilven FCA*, which overturned the *Charter* finding affirmed by *Vilven #2*, also considered Messrs. Vilven and Kelly's cross-appeal from the Federal Court's refusal to grant a general declaration of invalidity. However, the FCA did not have to decide on that matter, as it overturned *Vilven #2* on the basis of *stare decisis* and the *McKinney* decision.

[43] In the absence of a general declaration of the invalidity of s.15(1)(c) of the *CHRA*, it is not accurate to state that the Respondents were not following the law under the *CHRA* as it then existed. The Tribunal and the Federal Court were both clear that the remedies granted were only in favour of Messrs. Vilven and Kelly. While there were some submissions that Air Canada may have treated other categories of employees differently after the release of *Vilven #1*, I do not find that argument, even if true, compelling enough to come to a different conclusion. The decisions from the Tribunal and the Court were very clear that the remedies granted were only applicable to Mssrs. Vilven and Kelly.

[44] For the foregoing reasons, I conclude that the Respondents were following the law, and in compliance with the *CHRA*, as it then stood at all material times. As stated previously, this finding was confirmed by the Federal Court of Appeal twice.

[45] If the Respondents were following the law as it then stood, then it does not follow that any remedies are available to the Complainants under the *CHRA* as the Tribunal could not find them to have engaged in a discriminatory practice, thus giving rise to remedies.

[46] Accordingly, the only possible live issue that could remain is the sought remedy of re-instatement of the Complainants' employment. However, this is a measure that would invoke a valid BFOR defense for Air Canada. The International Civil Aviation Organization (ICAO) Annex 1 on Personnel Licensing states that a "Contracting State, having issued pilot licences, shall not permit the holders thereof to act as pilot of an aircraft engaged in international commercial air transport operations if the licence holders have attained their 60th birthday or, in the case of operations with more than one pilot, their 65th birthday." The Coalition Complainants concede the impracticality of reinstatement because of this BFOR in paragraph 33 of their supplemental Reply submissions.

[47] It should be noted that the Tribunal adjourned these complaints in 2011 pending the outcome of the appeals in the *Vilven/Kelly* matter and the *Thwaites/Adamson* matter. They remained adjourned until March 10, 2016, when the *Thwaites/Adamson* matter was denied leave to appeal to the Supreme Court of Canada. Today, the youngest complainant in this group is 67 years old.

[48] As a result of the foregoing, I find that there are no live issues to be considered by the Tribunal and therefore the question of constitutionality is moot.

[49] The second part of the *Borowski* test, if it is decided that the question is moot, is to decide whether the Tribunal should exercise its discretion to hear the case regardless. As explained in *Powers v. Mitchell, 2019 NLCA 16* at 8:

> **[8]** The discretion to hear a moot appeal is "to be judicially exercised with due regard for established principles" (Borowski, at page 358). As discussed in Borowski, the analysis involves a consideration of three rationales underlying the exercise of the discretion; that is, an adversarial context, consideration of judicial economy, and the adjudicative role of the courts.

[50] I do not find this to be a proper case in which discretion should be exercised. There are no other mandatorily-retired Air Canada pilots before the Tribunal, other than the Complainants in this case. Section 15(1)(c) of the *CHRA* was repealed long ago, and the Respondents no longer engage in the impugned conduct. There is no basis for the Tribunal to exercise discretion in these circumstances.

[51] In conclusion, the Tribunal finds the issue before the Tribunal in the present motion moot. None of the remedies requested by the complainants could be granted by the Tribunal if s.15(1)(c) of the *CHRA* was found to be unconstitutional.

Issue #2 – Does the Tribunal have the Ability to Award Damages Retroactively?

[52] In a letter sent to the parties in May 2019, the Tribunal asked them if they thought it was allowed to award retroactive remedies. In *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, [2002] 1 S.C.R. 405, 2002 SCC 13 ("*Mackin*"), the Supreme Court of Canada reaffirmed the general rule of public law that "courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional", absent conduct that is clearly wrong, in bad faith or an abuse of power (para. 78). The Court noted that public officials and legislative bodies consequently enjoy limited immunity against these types

of actions. In *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, [2004] 1 S.C.R. 789, 2004 SCC 30 ("*Communauté Urbaine*"), the Supreme Court confirmed that "well-established principles of public law rule out the possibility of awarding damages when legislation is declared unconstitutional".

[53] *Mackin* and *Communauté Urbaine* were cases concerning public party liability. Neither case fully turned to the question of private sector liability when legislation is declared invalid. However, other courts have applied the *Mackin* and *Communauté Urbaine* rulings to private parties. For example, in *Mullins v. Levy* (2005 BCSC 1217) ("*Mullins*") the British Columbia Supreme Court concluded that the doctors being sued in that case were entitled to rely on a statutory provision, even though it was later struck down, stating at paras. 191-192:

> **191** In this fashion has a private dispute between the plaintiff and the defendants evolved to include a public law dispute as to the validity of British Columbia's mental health legislative scheme. The plaintiff's challenge is however misguided, as if defendants acted in accordance with the Act, in good faith and for no improper purpose they would not be held liable in damages even if the Act were subsequently held invalid.
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> **192** The constitutional challenge need not therefore be considered when the purpose for it being raised is to obtain damages, as at best it would result in a bare declaration of invalidity.

[54] The decision on this point in *Mullins* was affirmed on appeal to the British Columbia Court of Appeal. (See 2009 BCCA 6 at para.88.)

[55] The Coalition Complainants are of the view that the *Mackin* decision is of no help in the current case since it only applies to public party liability. The Coalition Complainants further cite *Vancouver (City) v. Ward* (2010 SCC 27) ("*Ward*") which emphasizes government conduct and state action taken under a statute that was subsequently declared invalid. These were cases concerning public party liability. None of these cases fully turned to the question of private sector liability when legislation is declared invalid. They argue that these cases deal with public law, not private law, and are therefore inapplicable to the issues before the Tribunal in this motion.

[56] Counsel for the Coalition Complainants further acknowledges at para. 4 of his Reply submissions to the Tribunal's questions that no remedy is sought under s.24(1) of the *Charter*. However, he argues that the *Carlson* decision is inconsistent with the reasoning of the Supreme Court of Canada decision in *Canada (Attorney General) v. Hislop*, 2007 SCC 10 at paras. 81-83:

> 81 The Constitution empowers courts to issue constitutional remedies with both retroactive and prospective effects: see, e.g., Schachter v. Canada, [1992] 2 S.C.R. 679, at p. 719. Section 24(1) of the Charter enables individuals who have had their Charter rights violated to seek redress for those past wrongs and "obtain such remedy as the court considers appropriate and just". Section 24(1) may also, in some situations, enable the claimant to recover damages, which are necessarily retroactive: Schachter, at pp. 725-26
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> 82 Section 52(1) instructs courts to declare unconstitutional legislation of no force or effect. When a court issues a declaration of invalidity, it declares that, henceforth, the unconstitutional law cannot be enforced. The nullification of a law is thus prospective. However, s. 52(1) may also operate retroactively so far as the parties are concerned, reaching into the past to annul the effects of the unconstitutional law: see, e.g., *Miron v. Trudel*, [1995] 2 S.C.R. 418.
>
> 83 This Court has applied in many cases the "declaratory approach" to constitutional remedies, which implies that s. 52(1) remedies are often given retroactive effect. See, for example, *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54, at para. 28, Gonthier J. On this view, s. 52(1) remedies are deemed to be fully retroactive because the legislature never had the authority to enact an unconstitutional law. In the words of Professor Hogg, a declaration of constitutional invalidity "involves the nullification of the law from the outset" (P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 55-2 (emphasis added). If the law was invalid from the outset, then any government action taken pursuant to that law is also invalid, and consequently, those affected by it have a right to redress which reaches back into the past. (Underline added.)

[57] Air Canada also notes that in both *Mackin* and *Communauté Urbaine*, the constitutional challenges and recourses were directed at the legislator (the provincial government of New Brunswick in *Mackin*) or the regulator (the city of Montréal in *Communauté Urbaine*) who had adopted the impugned legislation or regulation that was

found to violate the *Charter*. They point out that in the present case, neither Air Canada nor ACPA enacted s.15(1)(c) of the *CHRA*. The Respondents point out that, therefore, following the Court's reasoning in *Mackin, Communauté Urbaine and Ward*, if the legislative and regulatory bodies that enacted unconstitutional provisions would enjoy immunity from an award of damages, absent conduct that is clearly wrong, in bad faith or an abuse of power, then it follows that Air Canada, which was solely applying the law as it existed at the time, should benefit from the same immunity.

[58] The Tribunal agrees that the issue at hand does not concern "government action" but rather, the acts of a private party which had no hand in drafting the legislation now alleged to be unconstitutional. The Tribunal believes it cannot order the Respondents to pay monetary damages to the Complainants, either lost wages or compensation under s.53(2)(e) and 53(3) of the *CHRA,* since at the time of the facts, they were merely private actors applying s.15(1)(c) in good faith and without improper purpose.

[59] In this context, the Tribunal finds that the motion should fail on the basic principles of fairness and the necessity of confidence in the law. Indeed, the Tribunal is being asked to make a ruling that would only impact past events. Specifically, the period in question is January 1, 2010 to December 15, 2012, which is the date when s.15(1)(c) of the *CHRA* was repealed. The Tribunal is being asked to make a finding that the Respondents were engaging in discriminatory practices during that period.

[60] As concluded in the reasoning above, the Respondents were entitled to rely on s.15(1)(c) of the *CHRA* at all times before it was repealed. It would be patently unfair to the Respondents today to make a finding that their actions were not in compliance with the *Charter* during that period. Indeed, they could not have foreseen future changes in the law. Even though the repeal of s.15(1)(c) of the *CHRA* was announced one year in advance, it was deliberately postponed, giving employers an opportunity to react to the changes. It was not imposed with retroactive application in mind. In fact, it was the opposite, presumably with Parliament's intention to give employers this flexibility to adjust before the repeal took effect.

[61] Similarly the effect of recent jurisprudence in *Bedford SCC*, *Carter* and *Comeau* could not have reasonably been foreseen. It is not reasonable to hold the Respondents to a standard of foreseeability to changes in the law.

[62] If tribunals and courts were to hold parties to such a standard, then how could anyone conduct themselves today with any confidence? In such a world, persons who are conducting themselves lawfully in the present time would have to be continually concerned that one day in the future, such conduct might be against the law.

[63] In matters of criminal law, it is clear in the *Charter* itself (s.11(g)) that persons will not be prosecuted for conduct that was committed when such actions were not contrary to the Criminal Code or other international law. Subsequent changes will only have effect on subsequent behaviour ensuring the law is only enforced pro-actively. This cuts to the heart of our legal system, where persons must be able to conduct themselves and their affairs with some certainty as to their compliance with the law.

[64] There are some notable exceptions to the retroactive applicability of new legislation. In particular, Canada Revenue Agency (CRA) has successfully defended challenges to the retroactive application of new tax laws. The ability of Parliament to enact law to be retroactively applied was affirmed in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, (paras. 69-72) with the Supreme Court expressing the "view that retrospectivity and retroactivity do not generally engage constitutional concerns." The case at issue is differentiated, however, as Parliament did not specify the retroactive application of the repeal of s.15(1)(c).

[65] Without an express intent to apply the change in the law retroactively, the Respondents in this matter should not be held liable for damages arising from their reliance on s.15(1)(c) from January 1, 2010 to December 15, 2012. Private parties should not be held responsible if Parliament passes legislation that is later found to be unconstitutional. To suggest the opposite would require private parties and citizens to individually assess the constitutionality of every law and to decide if it should be followed.

[66] Furthermore, even if the Tribunal declared, retroactively, that a provision in the *CHRA* was unconstitutional, it would not open the door to compensation under ss.52 and

53 of the CHRA, and neither would it allow for remedies to be ordered under s. 24(1) of the *Charter*. It would simply be unfair to parties if it were otherwise, and the public would rightly lose confidence in the law if it were possible for damages to arise in the future as a result of lawful conduct today.

Issue #3 – Was section 15(1)(c) of the CHRA Unconstitutional?

[67] This last question is at the core of the Complainants' motion, which seeks to re-visit the constitutionality of section 15(1)(c) on the basis that there have been changes since then that are significant enough to warrant a different finding. The motion asks the Tribunal to find that s.15(1)(c) of the *CHRA* is of no force or effect, and therefore not a defence available to the Respondents for these complaints. The Complainants argue that the Tribunal is no longer bound by the authority on the subject, *McKinney*, since there was a change in the circumstances that fundamentally shifted the parameters of the debate on mandatory retirement age for pilots.

[68] The principle of vertical *stare decisis* requires administrative tribunals and lower courts to follow the decisions of higher courts. This principle is a fundamental cornerstone of the common law, guaranteeing a degree of certainty of outcome when a question comes before a court or a tribunal.

[69] In suggesting that the Tribunal may now revisit the binding authorities of *Kelly FCA* and *McKinney*, the Complainants have relied upon the recent judgments of the Supreme Court of Canada in *Bedford SCC*, *Carter* and *Comeau* in dealing with the principle of *stare decisis.*

[70] The principle of vertical *stare decisis* was reaffirmed most recently in *Comeau* as follows:

> [26] Common law courts are bound by authoritative precedent. This principle — stare decisis — is fundamental for guaranteeing certainty in the law. Subject to extraordinary exceptions, a lower court must apply the decisions of higher courts to the facts before it. This is called vertical stare decisis. Without this foundation, the law would be ever in flux — subject to shifting

> judicial whims or the introduction of new esoteric evidence by litigants dissatisfied by the status quo.

[71] In *Bedford SCC*, the Supreme Court of Canada held that a legal precedent "may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate." (See para. 42).

[72] That exception to the vertical *stare decisis* is somewhat narrow and was subsequently circumscribed by the Supreme Court in *Comeau,* last year. In that case, the Supreme Court explained the exceptional nature of that new exception:

> [30] The new evidence exception to vertical stare decisis is narrow: Bedford, at para. 44; Carter v. Canada (Attorney General), 2015 SCC 5 (CanLII), [2015] 1 S.C.R. 331, at para. 44. We noted in Bedford, at para. 44, that
>
> > a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach. . . . This balances the need for finality and stability with the recognition that when an appropriate case arises for revisiting precedent, a lower court must be able to perform its full role.
>
> [31] Not only is the exception narrow —the evidence must "fundamentally shif[t] the parameters of the debate" — it is not a general invitation to reconsider binding authority on the basis of any type of evidence. As alluded to in Bedford and Carter, evidence of a significant evolution in the foundational legislative and social facts — "facts about society at large" — is one type of evidence that can fundamentally shift the parameters of the relevant legal debate: Bedford, at paras. 48-49; Carter, at para. 47. That is, the exception has been found to be engaged where the underlying social context that framed the original legal debate is profoundly altered.
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> […]
>
> [34] To reiterate: departing from vertical stare decisis on the basis of new evidence is not a question of disagreement or interpretation. For a binding precedent from a higher court to be cast aside on the basis of new evidence, the new evidence must "fundamentally shif[t]" how jurists understand the legal question at issue. It is not enough to find that an alternate perspective

> on existing evidence might change how jurists would answer the same legal question.

[73] In *Comeau*, which dealt with the constitutionality of a provision restricting access to liquor from other provinces, no such evidence was presented. The trial judge had relied on testimony from an historian who expressed the opinion that the prior Supreme Court of Canada's interpretation of the provision at issue was inconsistent with the motivations of the Constitution's drafters (paras.15-18). The Supreme Court disagreed and ruled that "differing interpretations of history do not fundamentally shift the parameters of the legal debate". The Supreme Court determined that one cannot rely on evidence from an expert with an alternate interpretation as grounds to disturb a legal precedent. It stated:

> [41] … This is precisely why the exceptions provided in Bedford and Carter are narrow. If a constitutional provision could be reinterpreted by a lower court whenever a litigant finds an expert with an alternate interpretation, the common law system would be left in disarray. This is not what Bedford and Carter teach. The approach to stare decisis is strict. Bedford and Carter do not alter that principle.

[74] In *Carter*, the Supreme Court had found that the evidence adduced at trial differed from that before the Court in the leading precedent case, which permitted the application of the narrow exception defined in *Bedford SCC*. *Carter* was challenging the constitutionality of the *Criminal Code's* prohibition of physician-assisted suicide. New evidence about the harms associated with prohibiting assisted death, public attitudes toward assisted death, and measures that can be put in place to limit risk, was found to be unknowable or not pertinent when the Supreme Court had issued its earlier judgment on the question in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R 519. The Supreme Court found that these new legislative and social facts did not simply provide an alternate answer to the question, but fundamentally shifted how the Court could assess the nature of the competing interests at issue (see *Comeau,* at para. 32).

[75] In order to succeed in this motion, the Complainants would like the Tribunal to revisit the conclusions found in *McKinney* on the basis that *Bedford SCC* now allows it. Although it was decided in 1990, it is worth noting that in *McKinney*, the Supreme Court of

Canada discussed the fact that a number of jurisdictions had already removed mandatory retirement, even at that time (para.113). Despite those legislative changes, the Supreme Court still found that mandatory retirement, as a permissive policy, was constitutionally valid under the *Charter*. The Supreme Court held that a legislative provision which permits mandatory retirement derives from arrangements which the union movement or individual employees have obtained, and results from employment contracts that ensure stable, long-term employment, and some security for retirement. In his reasons at paras. 118-119, La Forest J. touched on the constitutionality and the permissive nature of the Ontario provision:

> 118. Indeed, there are not only valid economic reasons, but sound reasons of social policy, for the Legislature's not imposing its will in the area. Mandatory retirement is not government policy in respect of which the Charter may be directly invoked. It is an arrangement negotiated in the private sector, and it can only be brought into the ambit of the Charter tangentially because the Legislature has attempted to protect, not attack, a Charter value. This is not a case like Blainey, supra, where the provision in question could only have a discriminatory purpose.
>
> 119. 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…

[76] Justice La Forest's judgment considered the social and economic values involved. Nevertheless, he considered that the freedom of employers and employees to negotiate and agree upon their workplace conditions through a process of bargaining is a very desirable goal (*McKinney*, para. 121).

[77] The Court of Appeal in *Kelly FCA* noted that the above passages underlined La Forest J.'s sensitivity to the permissive nature of the legislation and to the choices made by labour market participants in relation to retirement, often through collective bargaining (para. 70).

[78] The Court in *Kelly FCA* concluded that the Tribunal was bound to follow McKinney, and that mandatory retirement was justified under s.1 of the *Charter*:

> **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 than 65.

[79] However, the Court in *Kelly FCA* did acknowledge that conditions may have changed to the point where the Supreme Court is prepared to revisit the issue. (*Kelly FCA*, paras. 86-88).

[80] *McKinney* was raised again in *Adamson FCA* in addressing an issue in *obiter* about whether the Judge erred by not concluding that mandatory retirement constitutes *prima facie* discrimination. The court found the Judge did so err because that was the finding in *McKinney*, which remains a binding precedent. Even though in *Kelly FCA* the court held that *McKinney* was still good law as it pertains to the constitutionality of mandatory retirement schemes, and considered primarily whether the SCC's analysis of s.1 of the *Charter* applied to s.15(1)(c) of the *CHRA*, the principle of *stare decisis* equally applies to other aspects of the SCC's analysis in *McKinney*. (Para. 97.)

[81] In coming to this conclusion, the FCA noted the changes in the law of *stare decisis* as a result of *Bedford SCC*, acknowledging a lower court can revisit binding precedent

where there have been significant changes in the evidence or the circumstances that fundamentally alter the parameters of the debate. However, the Federal Court of Appeal in *Adamason FCA* did not find that this threshold had been met. As such, *McKinney* was upheld. (See paras. 99-100.)

[82] The Coalition Complainants argue that the *ratio decidendi* of *Kelly FCA* was erroneous. They argue that *Vilven #2* was overturned solely on the basis of the legal doctrine of *stare decisis*, based on the authority of the Ontario Court of Appeal decision in *R. v. Bedford* (2012 ONCA 186) ("*Bedford ONCA*"). The Supreme Court of Canada decision in *Bedford SCC* "overturned" *Bedford ONCA* by citing two instances wherein its own decisions might be re-visited by the lower courts, notwithstanding the legal doctrine of *stare decisis*.

[83] Citing the principles re-stated in *Carter*, the Coalition Complainants argue that the Tribunal can reconsider settled rulings of higher courts where: a) a new legal issue is raised; or, b) there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.

[84] The Coalition Complainants take the position that there have been significant developments in the law since *McKinney* which would meet the test for allowing the Tribunal to revisit the *Charter* issues that were decided in *Kelly FCA*.

[85] The Coalition Complainant's argue that, given the erroneous conclusion in *Kelly FCA*, section 1 of the *Charter* should not save s.15(1)(c) of the *CHRA*. In that event, the *Charter* rights of the Complainants should prevail. As such, the *Charter* claim should prevail over the doctrine of *stare decisis*, and consequently, free the Tribunal to make an obvious finding of liability in the Complainants' favour.

[86] Hence, the Coalition Complainants argue that the only question to be determined is whether s.15(1)(c) of the *CHRA* is saved by s.1 of the *Charter*, and that the onus of providing evidence that a provision is saved by s.1 lies upon those seeking to uphold the constitutionality of the provision, not those who challenge it.

[87] The Coalition Complainants argue that the factors discussed in *Vilven #1* may be "subsumed under the rubric of the analysis required for a 'change in circumstances or evidence'…" and reiterate the Federal Court's reasons in that decision. Specifically, they point to the different nature of the Ontario and federal legislation, and the argument that unions should not be allowed to negotiate away the human rights of its older members.

[88] Finally, the Coalition Complainants state there are issues that were not before the court in *McKinney*, or before the Tribunal in the *Vilven* matter, including issues mentioned in *Bedford SCC* and *Carter*, namely arbitrariness, overbreadth and gross disproportionality.

[89] ACPA and Air Canada argue that the Tribunal is bound by the Court's findings under *Kelly FCA*, and that section 15(1)(c) of the *CHRA* is constitutionally valid by virtue of the principle of *stare decisis*. In accordance with the jurisprudence, a binding vertical precedent remains binding unless it has been overtaken by profound social or legal change that fundamentally shifts the parameters of the debate, which must be proven by evidence.

[90] It is the position of the Respondents that the Complainants have not introduced any evidence to support a profound social or legal change that would fundamentally shift the parameters of the debate. Therefore, in the absence of evidence of "new legislative and social facts" that correspond to profound alteration of social context, the judgments in *Bedford SCC, Carter* and *Comeau* teach that legal precedents cannot be revisited by lower courts (see *Comeau*, paras. 31-32).

[91] Furthermore, the Respondents challenge the Complainants' assertion that *Kelly FCA* is no longer valid because of the subsequent decision by the Supreme Court of Canada in *Bedford SCC*. While it is true that *Kelly FCA* predates *Bedford SCC*, the Respondents point out that *Adamson FCA* was decided in 2015, subsequent to *Bedford SCC* and subsequent to the repeal of s.15(1)(c). They observe that the findings in *Adamson FCA* are ignored in the Complainants' submissions.

[92] *Adamson FCA* reiterated and endorsed the prior determination in *Kelly FCA* that *McKinney* remains binding on the Tribunal, even after the Supreme Court of Canada's

judgment in *Bedford SCC*. Although the Supreme Court of Canada developed a new narrow exception to vertical *stare decisis* in *Bedford SCC*, this did not change the Federal Court of Appeal's analysis in respect to the binding nature of *McKinney*. Following the issuance of *Bedford SCC*, *Adamson FCA* clearly stated, in 2015, that "*McKinney* remains a binding precedent", that "*McKinney was still good law as it pertains to the constitutionality of mandatory retirement schemes*" and that "*any part of the reasoning that was necessary for the Court [in McKinney] to reach its result has the force of binding authority*." (*Adamson FCA,* para. 97).

[93] In light of the parties' arguments, the Tribunal considers that it is still bound by the Supreme Court decision *McKinney*. In the absence of factors that would otherwise allow it to depart from binding precedents, *McKinney* and the subsequent *Kelly FCA* and *Adamson FCA* decisions must be followed and leads the Tribunal to the conclusion that s.15(1)c) of the *CHRA* was not unconstitutional.

[94] Even if the Tribunal accepts that *Kelly FCA* no longer accurately states the law of *stare decisis*, and that the current state of the law is as reflected in *obiter* by the Federal Court of Appeal in *Adamson FCA* (para. 99), I do not find that the Complainants have demonstrated that either of the exceptions set out in *Bedford SCC* and *Carter* are applicable in the current case.

[95] The argument is made that there have been new legal issues and/or changes in the circumstances or evidence that have fundamentally shifted the parameters of the debate. However, I find that the submissions of the Complainants are insufficient to support that conclusion.

[96] Counsel for the Coalition Complainants argues that the predominant legal issue is the wholly different nature of the legislation considered in *McKinney* and the corresponding legislative objectives of the two different provisions. Whereas the Ontario legislation in *McKinney* provided for a fixed, certain mandatory age of retirement that would necessarily impact all persons more or less equally, s.15(1)(c) of the *CHRA* permitted a variable age of mandatory retirement determined by private parties. Following the line of reasoning in *Vilven #1*, the argument is made that:

a) Individuals are unable to determine whether their rights are infringed because appropriate comparator groups are uncertain, and the information required to make a determination under s.15(1)(c) may not be readily available;

b) The dominant air carrier in Canada is Air Canada and as such, they may have the ability to “set” the normal age of retirement in the industry; and

c) Unions should not be able to negotiate away the human rights of its older members, posing as an unresolved conflict between the Carter rights of persons to enjoy the fruits of collective bargaining versus the rights of individuals to be free from discrimination based upon an enumerated prohibited ground of discrimination.

[97] It cannot be said that any of these arguments are new. They were fully argued before the Federal Court in *Vilven #1* and rejected in *Kelly FCA*. Even if the Tribunal were to consider these arguments freshly today, they are not compelling enough to meet the first part of the test in *Bedford SCC,* which is to determine if new legal issues were raised as a consequence of significant developments in the law. In regard to argument a), I agree with the Federal Court of Appeal that employees do not have to engage in the legal analysis which a tribunal will employ in determining whether they have been victims of discrimination (see *Kelly FCA* paras 30-31.) Employees are knowledgeable themselves about the industry in which they are employed, especially after engaging in their profession for many years towards the end of their careers. They should not be at a loss as to the general knowledge about normal age of retirement.

[98] As for arguments b) and c) above, the legislation is permissive in nature. Employees are not forced to enter into any employment arrangement. Employees do so on their own free will, including choosing if they want to enter a unionized work force or not. Similarly, if one engages in employment with a dominant player in a certain industry, it is with knowledge and consent. There are obvious benefits to unionized employment. There are undoubtedly other benefits associated with employment with an industry-dominant employer. However, one must accept the good with the bad in one’s decisions, and to the extent that employees are not forced into any particular employment situation, they should be responsible and accepting of the employment decisions they have made for themselves, with corresponding advantages and disadvantages. This is consistent with the permissive nature of s.15(1)(c) of the *CHRA*.

[99] The Coalition Complainants argue that the only substantive change in the law since *Vilven #1* is the fact that s.15(1)(c) of the *CHRA* was repealed. They suggest that this factor reinforces the social underpinnings in that decision and should oblige the Tribunal to revisit the constitutionality of the provision in light of *Bedford SCC*. I am not satisfied that this legal development should justify my re-examination of *McKinney*. The Supreme Court, in *McKinney*, was aware that other jurisdictions had already repealed mandatory retirement schemes, but it did not alter its view that *Charter* rights were not unduly infringed (*McKinney* at para. 113).

[100] Mr. Stephen Collier is a self-represented Complainant. He argues that the Tribunal ought to be bound by the finding in FC *Vilven #2*. Mr. Collier cites the recent interim decision of the Human Rights Tribunal of Ontario in *Talos v. Grand Erie District School Board* (2018 HRTO 680) ("*Talos*"). In this case, Mr. Talos challenged a provision in the Ontario *Human Rights Code* which permitted, in certain circumstances, unequal compensation for workers age 65 and older. The HRTO held that the impugned provision violates s. 15 of the *Charter* and that it is not saved under s. 1 of the *Charter*.

[101] Mr. Collier's submission argues that the *Talos* decision should be considered in the context of a change in the law that might merit a review of *stare decisis* under the first exceptions set out in *Bedford SCC*. Unfortunately, the *Talos* decision is not particularly helpful to the issues before the Tribunal. While it concerns a provision in the Ontario's *Human Rights Code* which permits discrimination on the basis of age, the permissible age differentiation is limited to workplace group benefits payable to employees age 65 and over; it does not extend to mandatory retirement. The differences between the statutory regimes under consideration in *Talos* and *McKinney* had an impact on the applicability of the latter to the former (see *Talos,* para. 18). Moreover, the tribunal in *Talos*, while suggesting at some point that circumstances had changed since *McKinney* was decided (see paras. 18, footnote 1, para. 243), did not conduct a formal *stare decisis* analysis along the lines of *Bedford SCC*, *Carter* or *Comeau*.

[102] Furthermore, a finding by an administrative tribunal such as the HRTO on the constitutional validity of certain legislation does not have the same binding effect as such a finding made by a court (*Nova Scotia (W.C.B.) v. Martin et al.* 2003 SCC 54, para. 31). In

the absence of any other relevant jurisprudence, it is sometimes helpful for this Tribunal to consider the decisions of provincial human rights tribunals. However, in this inquiry, I find the judgments in *Kelly FCA* and *Adamson FCA* to have greater relevance, given that they deal with s. 15(1)(c) of the *CHRA*. In addition, as judgments from one of the CHRT's supervisory courts, these are decisions which by necessity must be considered by the Tribunal, and must be followed to the extent they provide binding answers to the questions before me. To the extent that their conclusions may differ with a finding in an HRTO decision, the Tribunal is bound to follow the binding jurisprudence of the courts above it.

[103] In addition to its other arguments about *stare decisis*, Counsel for the Coalition Complainants argues that new issues mentioned in *Bedford SCC* and *Carter* may now be addressed by the Tribunal: arbitrariness; overbreadth; and, gross disproportionality.

[104] Arbitrariness suggests that there is no rational connection between the object of the impugned law and the limit it imposes on one's human rights. Overbreadth suggests that the law takes away rights that bear no relation to the object. Gross disproportionality suggests the impact is grossly disproportionate to the object of the law.

[105] I am not persuaded that any of these considerations have validity in the current context. Firstly, the position of airline pilot is a safety sensitive position. Age restrictions that currently remain in the industry, and not contested by the Complainants, relate to BFOR considerations and to the safety of airline passengers. Therefore, the connection is not arbitrary. For similar reasons, I do not find there is overbreadth. The right to continue employment as a commercial airline pilot is impacted because legitimate safety concerns exist. Other rights are not impacted. The impact is not grossly disproportionate either. There is no middle ground. At a certain point, age is a legitimate BFOR consideration for a safety sensitive position like a commercial airline pilot. The parties are not in disagreement with this fact. Therefore, I do not find the issues of arbitrariness, overbreadth or gross disproportionality to be applicable in this case.

[106] The second part of the test in *Bedford SCC* is whether there has been a change in circumstances or evidence that fundamentally shifts the parameters of the debate. In this regard, the Coalition Complainants did not lead new evidence, but asked the Tribunal to

rely on submissions they made to the Federal Court in *Vilven #1*. Air Canada objected to this approach in their submissions, and argued that the evidence presented before the court in another matter cannot simply be referenced. In any event, Air Canada argues that any new facts to support a deviation from *McKinney* ought to be, by definition, more recent than 2009.

[107] I believe the Tribunal should consider any new facts going back to the date when *McKinney* was decided. However, in reviewing the bullet points provided by the Coalition Complainants in their submissions, I do not find any of the listed factors compelling. Many of them overlap with the points made with respect to arguments about new legal issues having arisen. However the remainder are non-referenced claims of shifting attitudes and assumptions about aging and retirement. There is no specific reference for each claim, and indeed nothing to suggest that any of these shifting attitudes and assumptions were not already recognized at the time *McKinney* was decided in 1990.

[108] In *McKinney*, the Supreme Court of Canada received submissions of competing social science about the impact of mandatory retirement schemes. In the view of the Court, "the Legislature is entitled to choose between them and surely proceed cautiously in effecting change on such important issues of social and economic concern." (See para. 112.) The Court acknowledged that social and historical context was complex and required balancing competing social demands (para. 123.) However, in the end, the Court concluded that the permissive scheme of mandatory retirement could reasonably balance those competing demands:

> 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. The latter choice may impinge on important rights of others, especially those near retirement. The observations I made in R. v. Edwards Books and Art Ltd., supra, at p. 795, have application here:

> By the foregoing, I do not mean to suggest that this Court should, as a general rule, defer to legislative judgments when those judgments trench upon rights considered fundamental in a free and democratic society. [page315] Quite the contrary, I would have thought the Charter established the opposite regime. On the other hand, having accepted the importance of the legislative objective, one must in the present context recognize that if the legislative goal is to be achieved, it will inevitably be achieved to the detriment of some. Moreover, attempts to protect the rights of one group will also inevitably impose burdens on the rights of other groups. There is no perfect scenario in which the rights of all can be equally protected.
>
> In such circumstances, as I there stated, "a legislature must be given reasonable room to manoeuvre to meet these conflicting pressures". What a court needs to consider is whether, on the available evidence, the Legislature may reasonably conclude that the protection it accords one group does not unreasonably interfere with a guaranteed right. (Para.123.)

[109] When Parliament decided in 2011 to repeal s.15(1)(c), it was presumably reacting to the competing social interests and trying to strike the appropriate balance, just as the Supreme Court had suggested.

[110] The other change in circumstances that merits consideration under the second test in *Bedford SCC* was raised by Mr. Collier in the context of his complaint about his union. As mentioned above, in 2006, ICAO changed its rules to permit pilots over 60 but under the age of 65 to fly internationally if their co-pilot was under the age of 60. Although not specifically argued as such, this constituted a change in circumstance or evidence that could possibly fundamentally shift the parameters of the debate, thereby justifying a re-examination of *McKinney*.

[111] I am not convinced it meets the threshold required under *Bedford SCC*, *Carter* and *Comeau*. The opportunity for some pilots to fly beyond the age of 60 is a factor that might affect a BFOR defence of the Respondents. However, that matter is not at issue in this motion.

[112] *McKinney* found that mandatory retirement age did violate s.15 of the *Charter*, but that it was saved by s.1 of the *Charter*. If the Tribunal decided that *Kelly FCA* and *Adamson FCA* are no longer impediments to re-examining the decision in *McKinney*, the

only remaining question (as counsel for the Coalition Complainants submits and to which I agree) is whether or not s.15(1)(c) of the *CHRA* is saved by s. 1 of the *Charter*. I do not find that the ICAO rule changes impact the conclusion reached by the Supreme Court of Canada. The ICAO rule changes may impact the BFOR defence, although this was previously considered by the Tribunal in the other matters. However, the more important consideration is whether or not parties themselves ought to be free to enter into arrangements which might include mandatory retirement. In this regard, I agree with the *McKinney* reasoning at para 426:

> 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.

[113] The Supreme Court considered the objectives of mandatory retirement to determine whether they were sufficiently important to warrant the limitation of a constitutional right under s.15 of the *Charter.* They subjected it to the proportionality test, balancing it against the nature of the right of equality, and the degree to which the limitation furthers other rights or policies of importance in a free and democratic society. In the end the Supreme Court favoured the permissive nature of the policy and it was perhaps best underscored at para. 122 of *McKinney*:

> Though an individual may, quite understandably, object to being mandatorily retired when he or she becomes 65, it does not alter the fact that this was the arrangement that underlay the expectations of both parties at the beginning and throughout the employee's working life and for which they contracted.

[114] On the conclusion that s.15(1)(c) of the *CHRA* was valid at all relevant times, the only remaining challenge open to the Complainants is to contest, during the period in question, whether or not 60 was the “normal age of retirement” for persons in a similar occupation. It was concluded earlier that the Tribunal was not presented with evidence on this point in prior hearings, and therefore, under s.50(1) of the *CHRA*, the Tribunal remains bound to offer the Complainants a full and ample opportunity to make such a case before it (see *Bailie et al. v. Air Canada and Air Canada Pilots Association*, 2017 CHRT 22, paras. 88-91.)

V. Conclusion

[115] This motion is dismissed on the ground that the matters at issue are now moot. The remedies sought by the Complainants would not be available even if s.15(1)(c) were found to be unconstitutional at the relevant times.

[116] In addition, and in the alternative, the motion is dismissed on the ground that it would be unfair and unjust for the Tribunal to make a retroactive declaration of invalidity and award damages against respondents who were following the law at all relevant times.

[117] Furthermore, the Complainants have not supported their assertion that there are new legal issues raised as a consequence of significant developments in the law, or changes in the circumstances or evidence that fundamentally shift the parameters of the debate, that meet the threshold established in *Bedford SCC*, *Carter* and *Comeau,* at which point the Tribunal might reconsider the *stare decisis* decisions in *Kelly FCA* and *Adamson FCA*. Accordingly, the Tribunal remains bound by those decisions which held that *McKinney* decided the question.

[118] Finally, even if the Tribunal did not feel bound to follow *Kelly FCA* and *Adamson FCA*, I do not find sufficient reason to depart from the Supreme Court's finding that mandatory retirement, as a permissive policy, is a reasonable limit in a free and democratic society.

[119] For the foregoing reasons, this motion is dismissed.

Signed by

David L. Thomas
Tribunal Member

Ottawa, Ontario
July 26, 2019

Canadian Human Rights Tribunal

Parties of Record

Tribunal Files: T1536/8210 to T1607/5310; T1630/17610 to T1645/17610; T1664/01911 to T1681/03611; T1707/6211 to T1722/7711; T1755/11011 to T1768/12311; T1780/1012 & T1781/1012; T1793/2312 & T1794/2412; T1801/3112 to T1806/3612; T1801/3112 & T1802/3212; T1858/812 to T1861/9112

Style of Cause: Nedelec et al. v. Air Canada and Air Canada Pilots Association

Ruling of the Tribunal Dated: July 26, 2019

Motion dealt with in writing without appearance of parties

Written representations by:

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