Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2020 CHRT 16
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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 & T802/3212; T1858/812 to T1861/9112

Between:

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Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Air Canada and Air Canada Pilots Association

Respondents

Ruling

Member: David L. Thomas

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I. Consent Request for a Preliminary Decision from Tribunal

[1] This is a decision on a preliminary question put to the Tribunal by consent of the parties to this inquiry. These complaints are a part of a complex matter involving the mandatory retirement of Air Canada pilots at the age of 60. The issue has been before the Tribunal for well over a decade. 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 reached the age of 60 prior to December 31, 2009. (See 2017 CHRT 22.) This matter concerns only the remaining complainants who reached the age of 60 on January 1, 2010 or later, who still have a right to a hearing before this Tribunal.

[2] The remaining parties participated in a case management conference call on November 11, 2017 and asked the Tribunal to consider certain questions relating to this inquiry in a sequential manner. All the parties present agreed to be bound by the Tribunal's decisions in such preliminary questions when making arguments on further preliminary questions or at the hearing to be held at the conclusion of the preliminary decisions being rendered.

[3] The Tribunal has the authority to proceed in this manner and is encouraged by s. 48.9(1) of the *Canadian Human Rights Act* (the "*Act*") to conduct its affairs as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.

The Question

[4] The parties agreed upon the language of this first preliminary question as follows:

> ***What methodology should the tribunal use to determine what is the normal age of retirement for the Air Canada pilots who reached the age of 60 between January 1, 2010 and December 15, 2012?***

II. Background

[5] This matter 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 was pursuant to the collective agreement negotiated between Air Canada and the bargaining agent, ACPA, and the pilots' pension plan. As a result, many human rights complaints have been filed by these retired pilots against both Air Canada and ACPA, and in this instance the forty-six (46) remaining pilots have been combined into a single hearing 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 pilots claim that requiring them to retire at age 60 was in violation of sections 7, 9 and 10 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, as amended (the "*CHRA*").

[6] The first submissions on this preliminary question were submitted by the Coalition Complainants on January 8, 2018. However, the matter was held in abeyance when the Coalition Complainants served a Notice of Constitutional Question on February 26, 2018, and brought a motion on June 5, 2018 questioning the constitutional validity of s.15(1)(c) of the *CHRA* as it existed until its repeal in 2012. The motion gave rise to other questions for which submissions were sought, and the Tribunal's ruling on the constitutional question was rendered on July 29, 2019 (2019 CHRT 32). The outcome of that ruling had no impact on this motion.

[7] In their submissions on the preliminary question, the Coalition Complainants raised a new argument based on the *Canadian Human Rights Benefit Regulations SOR80-86* and their potential applicability to the larger question of what is the "normal age of retirement" for the employment group. While this argument did not go directly to the preliminary question, it raised an overarching question that needed to be resolved before the methodology question could be addressed. The Tribunal subsequently asked the parties for further submissions concerning the applicability of the *Canadian Human Rights Benefits Regulations* and those submissions were finally received November 18, 2019.

[8] Accordingly, this ruling addresses the following three issues:

- Applicability of the *Canadian Human Rights Benefit Regulations*, and more precisely of the definition of "normal age of retirement";
- Obsolescence of Paragraph 15(1)(c) of the *CHRA*;

- Broad General Interpretation versus Strict Statistical Analysis for determination of methodology.

III. Applicability of the Canadian Human Rights Benefit Regulations

[9] In their submissions on the preliminary question, the Coalition Complainants questioned the applicability of the *Canadian Human Rights Benefit Regulations* (referred to hereinafter as the "*Regulations*.") The *Regulations* came into effect in 1980 and have not been updated to reflect a change in paragraph numbering in the *CHRA* or to reflect the repeal of paragraph 15(1)(c) of the *CHRA* that occurred in 2012.

[10] The Coalition Complainants argue that the definition of "normal age of retirement" contained in the *Regulations* should be interpreted as the definitive interpretation of what constitutes the normal age of retirement as it pertains to the complaints of all the Complainants in this inquiry.

[11] The section of interest is paragraph2(1) of the *Regulations*, which is the Interpretation section, which reads in part as follows:

> ***normal age of retirement***, in respect of any employment or position of a person, means the maximum age applicable to that employment or position referred to in paragraph 14(b) of the Act or the age applicable to that employment or position referred to in paragraph 14(c) of the Act, as the case may be;

[12] The above reference to the "Act" means the *CHRA* and sections 14(b) and 14(c) were subsequently re-numbered as sections 15(1)(b) and 15(1)(c) of the *CHRA* respectively, by the time the within complaints were filed.

[13] Before it was repealed in December 2012, paragraph 15(1)(c) of the *CHRA* read:

> 15.(1) It is not a discriminatory practice if
>
> …
>
> (c) an individual's employment is terminated because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual;

[14] The Coalition Complainants conclude that the definition of “normal age of retirement” found in the *Regulations* is equivalent to the age of mandatory retirement for individuals engaged in similar work, found in paragraph15(1)(c) of the *CHRA* before its repeal. In other words, the “maximum age applicable”, the expression used in the definition found in the *Regulations*, is the deemed normal age of retirement. If there is a permissible age of employment beyond what is considered the *de facto* “normal age of retirement”, then the maximum permissible age should, by this definition, deem it to be the “normal age of retirement” for the purpose of the *CHRA*. The logic suggests that, for example, if a single airline permitted its pilots to fly until age 65, it would not matter if a majority of other pilots chose or were forced to retire at age 60. Under this definition in the *Regulations*, the maximum permissible age would be considered the “normal age of retirement” in that occupation, which in this example, would deem it to be 65 instead of 60.

[15] ACPA raises two main objections to this argument. Firstly, it alleges that the Coalition Complainants have misquoted the definition by quoting the portion of the definition that applies only to paragraph 15(1)(b) of the *CHRA*, which is not at issue in this complaint. ACPA argues that the definition in the *Regulations* has a separate phrase applicable to paragraph 15(1)(c), which is consistent with their position.

[16] Secondly, ACPA argues that the Coalition Complainants have ignored the wording of the introductory phrase to the definitions set out in the *Regulations* (s.2(1)), which states that the definitions apply “In these *Regulations*.” They further argue that definition sections of a statute do not contain substantive law and their purpose is limited to indicating the intended legislated meaning of a term in that particular piece of legislation.

[17] Air Canada made submissions that largely echo the same objections made by ACPA. In addition, Air Canada expanded the argument that regulations cannot amend a statute or prevail over it in the event of a conflict. In their view, the *CHRA* and the *Regulations* provide two different and unrelated exceptions to discriminatory practices. The *Regulations* generally apply in the context of an employee’s participation in benefit, pension and insurance plans. The definition of “normal age of retirement” in the *Regulations* refers to the two different exceptions: firstly in paragraph 14(b) (later 15(1)(b)) “the maximum age applicable to that employment or position” or; secondly, in paragraph

14(c) (later 15(1)(c)) “the age applicable to that employment or position.” The two exceptions are separated by the word “or” and the first exception makes reference to the “maximum” age whereas the second exception does not.

[18] Several of the self-represented complainants provided submissions, although not all on point concerning the applicability of the *Regulations*, obsolescence and methodology. Mr. Robert McBride expressed frustration with the fact that his complaint was lodged some 10 years ago and he raised doubts about whether the original intention behind the *CHRA* was to delve into “the legal minutia of legislation and attempting to get into the minds of those who crafted the discrimination laws…” Although Mr. McBride’s submissions do not assist in answering this question, his observations are worthy of our recognition.

Tribunal Ruling Concerning the Applicability of the *Canadian Human Rights Benefit Regulations*

[19] The questions before the Tribunal are not new. Prior to the *Bailie/Nedelec* group of complainants, there were two similar groups of Air Canada retired pilot complainants before the Tribunal, the *Vilven/Kelly* group and the *Thwaites/Adamson* group. Starting in 2005, both sets of complaints were thoroughly litigated and lead to decisions by the federal Court of Appeal in each. Over the course of many years, with same counsel as the Coalition Complainants in this matter, the *Regulations* were never argued as applicable to the determination of the normal age of retirement for the Air Canada pilots in these complaints.

[20] Raising the argument in their original reply argument dated February 27, 2018, the Coalition Complainants describe the “late recognition of the regulatory definition” as “apparent inadvertence” and suggest that the “repeated misconstruction of the term in the preceding jurisprudence” does not justify the continuation of the misconstruction in this proceeding.

[21] Nevertheless, the Tribunal finds that, for the purpose of this matter, the *Regulations* do not determine the “normal age of retirement” to be the equivalent of the maximum age

applicable to that occupation. The definition of the "normal age of retirement" contains two distinct parts, separated by the word "or" which emphasizes the distinction.

[22] The first part referring to "maximum age that applies to that employment" is stated clearly in the *Regulations* with respect to paragraph 14(b) of the Act (later paragraph 15(1)(b)). Then, the definition in the *Regulations* goes on to a new phrase, separated by the conjunctive word "or" to describe the normal age of retirement as that "age applicable to that employment or position referred to in paragraph 14(c)" (later paragraph 15(1)(c)).

[23] Under both the *CHRA* and the *Regulations*, a distinction has been made between "the maximum age that applies to that employment" and the "normal age of retirement for employees working in positions similar to the position of that individual." I agree with Air Canada's conclusion that if Parliament had intended that the "maximum age applicable to that employment" apply to paragraph 15(1)(c), there would have been no need to make such a distinction in both the *CHRA* and the *Regulations*.

[24] Accordingly, the Tribunal finds that, for the purpose of paragraph 15(1)(c), the definition of "normal age of retirement" does not mean the maximum age that applies to that employment.

IV. Obsolescence of Paragraph 15(1)(c) of the *CHRA*

[25] The Coalition Complainants make the argument that paragraph 15(1)(c) of the *CHRA* became obsolescent by the time it was applied to the Complainants in this case and therefore should not be applied. While the statutory provision was arguably applicable to Canadian airline pilots when it was enacted, at a time when substantially all pilots in Canada were required to retire at the age of 60, over time other airlines eventually eliminated mandatory retirement for their pilots. As such, they argue, that the legislative purpose of paragraph 15(1)(c) grew more and more tenuous and inconsistent with industry practice. After all other airlines had eliminated mandatory retirement, there were no comparator pilots left to meet the statute's exemption provision. If no other airline pilots in Canada were subject to a mandatory retirement age applicable to their employment or position, there were no pilots left to use as a comparator group for the Air Canada pilots.

As such, the Coalition Complainants conclude, the statutory exemption is *de facto* rendered meaningless.

[26] The Coalition Complainants cite Professor Ruth Sullivan in her publication, *Sullivan On the Construction of Statutes*, (Sixth Edition, Lexis Nexis Canada inc.2014) (*Sullivan*) suggesting that statutes might become obsolete in different ways. They argue, paragraph 15(1)(c) was obsolete by the time the complainants were required to retire because there were simply no other pilots, other than Air Canada pilots, who faced mandatory retirement at that time. Chapter 6 of *Sullivan* was also relied upon to argue the provision was obsolete for lack of any facts to which it can apply and that its purpose, or the assumptions or the values it reflects, were no longer accurate or appropriate and might lead to undesirable consequences.

[27] ACPA responds to the argument of obsolescence by citing the earlier conclusions of the Tribunal. In particular, it cites 2017 CHRT 22 at paragraph 87, which reads:

> 87 "In the interests of judicial economy, consistency, finality, for the sake of the integrity of this Tribunal and in fairness to the Respondents, I am not going to allow the re-litigation of the comparator group for the older pilots in this group of complaints. I am satisfied that the normal age of retirement for commercial airline pilots in Canada, for the periods considered in the *Vilven/Adamson* and *Thwaites/Adamson* matters, namely up to December 31, 2009, was 60."

[28] ACPA argues that if paragraph 15(1)(c) was not obsolete for the purpose of determining the normal age of retirement up until December 31, 2009, how could it have become obsolete the very next day, as of January 1, 2010?

[29] Air Canada raises three objections to the obsolescence argument. Firstly, the doctrine of obsolescence is rarely used and should be approached carefully. It should not be the role of Tribunals to strike down or set aside rules which Parliament has deemed fit to keep in force. Secondly, Air Canada rejects the argument that there are no longer any facts to which this section can apply. They cite the fact that it was in force at the time the complaints were made and applied to those pilots who turned 60 before 2010. Thirdly, Air Canada also cites *Sullivan* at chapter 6.49, which supports the argument that even if a statute is found to be obsolete, it must still be applied and only its undesirable impact is to

be mitigated. As such, it does not support the Coalition Complainant's assertion that the entire section be set aside.

Tribunal Ruling Concerning the Obsolescence of Paragraph 15(1)(c) of the *CHRA*

[30] The Coalition Complainants, in seeking the Tribunal's agreement with this proposition, are asking the Tribunal to make new findings on matters that have already been the subject of considerable litigation. The main thrust of the argument is that in the absence of a mandatory retirement for pilots other than Air Canada pilots, there could no longer be a comparator group required to bring full meaning to the exemption provided in the Act.

[31] The Tribunal must deal with the law that exists. It is not the role of an administrative tribunal to second-guess Parliament about which provisions of legislation ought not to apply to the facts before it.

[32] The flaw in the Coalition Complainants' argument is the lack of factual record before the Tribunal. In order for the Tribunal to come to any sort of a conclusion about the normal age of retirement for a profession, it needs to have facts before it. This highly contentious matter is not one for which the Tribunal may take "judicial notice" and come to a conclusion in the absence of facts. The parties may be reminded that the only reason the *Nedelec* group of complaints remains active is because the Tribunal concluded it would be unfair to make any conclusions about the normal age of retirement for pilots in Canada between January 1, 2010 and December 15, 2012, in the absence of any evidence before it. (See 2017 CHRT 22 paras. 88-91).

[33] It is true that Parliament made the decision to repeal paragraph 15(1)(c) in late 2012. However, the Respondents were entitled to rely upon it while it was still in force. It cannot be said that there were no longer any facts to which paragraph 15(1)(c) could apply. While there may have been an evolution in the airline industry, this exemption was available to a wide variety of Canadian employers under federal jurisdiction.

V. Broad General Interpretation versus Strict Statistical Analysis for Determination of Methodology

[34] The main issue to be decided in this ruling is the preliminary question submitted by the parties: "*What methodology should the tribunal use to determine what is the normal age of retirement for the Air Canada pilots who reached the age of 60 between January 1, 2010 and December 15, 2012*?"

[35] The Coalition Complainants made submissions to ask the Tribunal to take a more global, "big picture" approach to this question. They suggest that the Tribunal should apply a broad general interpretation of the evidentiary data, as opposed to using a strict statistical analysis based on a calculation using a model of 50% +1 to decide the question. The main argument is that no normal age of retirement can be said to exist if no pilots, other than Air Canada pilots, had any mandatory retirement age during the period in question. In this context, it is impossible to give any meaning to the phrase "for employees working in positions similar to the position of that individual…" found in the exemption.

[36] The Coalition Complainants cites Elmer Driedger in Chapter 2 of *Sullivan* suggesting that the Tribunal approach the *CHRA* exemption in its entire context, in its grammatical and ordinary sense, harmoniously with the scheme of the *CHRA*.

[37] In requesting a "big picture" approach to the question, the Coalition Complainants also ask the Tribunal to look at the legislative history of paragraph 15(1)(c). The Minutes of Proceedings and Evidence on the Standing Committee on Justice and Legal Affairs meeting on March 10, 1977 were cited. This Committee was reviewing the bill which later became enacted as the *CHRA*. At one point, Member of Parliament Gordon Fairweather asked Mr. B.L. Strayer (Assistant Deputy Minister, Policy and Planning, Department of Justice) a question: "I would like to raise the question as to whether the bill condones systematic discrimination in the form of compulsory retirement."

[38] The Coalition Complainant submissions quote Mr. Strayer's reply: "What Clause 14(c) means is that as long as the individual is obliged to retire at the same age as **everyone else in his kind of employment**, then it would not be treated as a discriminatory act to require him to retire…." (emphasis added in submissions.)

[39] The Coalition Complainants point out that Mr. Strayer did not say, "the majority of persons in this kind of employment," or "most others in this type of employment." He said, "***everyone else*** in this type of employment…" (emphasis added in submissions.) They go on to suggest that the scheme was intended only where everyone in a given profession was required to terminate their employment at the same age. It made no mention of a statistical analysis, or of a majority of workers in a given profession. That concept, the Coalition Complainants argue, was merely a concept created by the CHRT, not Parliament, and therefore it is not consistent with the expressed intent of those who enacted the provision.

[40] The Coalition Complainants also argue that the legislative purpose of the exemption should be examined by the Tribunal. Again citing Professor Sullivan, they argue that "legislative purpose must be taken into account… while interpretations that defeat or undermine legislative purpose should be avoided." This argument is tied to the context in 1977, when many occupations were subject to a mandatory retirement age, while twenty-five years later, very few occupations were subject to a mandatory retirement age. Viewed in the historical context, the Coalition Complainants argue that the original purpose of the legislation cannot be fulfilled given that the workplace has evolved so much in the intervening years.

[41] ACPA makes the argument that the methodology to determine the normal age of retirement is settled, and there is no basis upon which to re-litigate the matter. Specifically, ACPA refers to the earlier ruling of the Tribunal in *Vilven and Kelly v. Air Canada* (2007 CHRT 36) in which the Tribunal examined two approaches to determine the "normal" age of retirement: the "normative" approach; and, the "empirical" approach.

[42] The Tribunal adopted a statistical approach, examining data from various airlines and concluding that the normal age of retirement was 60 based on "the majority of positions that were similar…" (see para. 69.)

[43] That decision was judicially reviewed in *Vilven v. Air Canada* (2009 FC 367) and ACPA argues that the statistical analysis was appropriate, quoting paragraph 169:

> 169 Given that paragraph 15(1)(c) refers to the normal age of retirement for "employees working in positions similar" to that occupied by a complainant, I agree with the Tribunal that the determination of the normal age of retirement requires a statistical analysis of the total number count of relevant positions. As the Tribunal observed in *Campbell*, it would be unreasonable for a very small airline to be weighted on an equal footing with a large airline such as Air Canada, in determining the industry norm: see para.5481."

[44] Air Canada makes several arguments to support its position that the question of the "normal age of retirement" must be answered using a statistical analysis. Firstly, they also cite the language of the Federal Court in *Vilven v. Air Canada* (2009 FC 367) which confirms at paragraph 167 that "the approach taken by human rights tribunals has generally been based upon a number count of similar positions…" This supports their argument that the question has already been settled by a court of higher authority which should bind this panel.

[45] The second argument of Air Canada is that the plain and ordinary meaning of the word "normal" should be used in this context. They argue that taking the average age is what a plain and ordinary interpretation requires.

[46] Air Canada also challenges the Coalition Complainants' interpretation of the Parliamentary debates that were cited. Referring to Mr. Strayer's reply, "as long as the individual is obliged to retire at the same age as everyone else in his kind of employment" Air Canada argues that Mr. Strayer did not mean everyone must retire pursuant to a mandatory retirement policy before paragraph 15(1)(c) could apply. All that matters is that those subject to a mandatory retirement rule do retire at a normal age, regardless of whether the comparator group are subject to mandatory retirement or not.

[47] Another argument put forward by Air Canada was that there can always be a "normal age of retirement" even if not all pilots must retire at a certain age. They challenge the Coalition Complainants' assertion that there is no such normal age. Unless it is accepted that pilots never retire, there must be a "normal age". They argue that the statistical analysis of the retirement age of pilots in the comparator group is the proper approach, not the mandatory policies of other airlines. Air Canada also points out that this motion is merely about determining the means by which the facts, which have yet to be presented, will be assessed by the Tribunal.

Tribunal Ruling concerning Determination of Methodology

[48] The motion asks the Tribunal to choose between a broad general interpretation of the exemption found in paragraph 15(1)(c), and a strict statistical analysis, for the methodology it will use when presented with evidence at the hearing. This is what the parties agreed should be decided by the Tribunal as a preliminary question.

[49] The Tribunal is faced with jurisprudence that suggests an obligation to follow the precedent of the statistical analysis. The Coalition Complainants, in essence, seek a departure from that methodology in order to allow for a broader consideration of the meaning of the word “normal”, more specifically in the context of the expression “normal age of retirement.”

[50] The Tribunal is allowing this group of complainants to proceed to hearing because, as cited above in 2017 CHRT 22, there was no factual or evidentiary record before the Tribunal with which to make a determination on the normal age of retirement for the younger pilots of the *Bailie* group. However, in allowing this complaint to survive for this group of pilots, the Tribunal’s intent was to give them the opportunity to bring evidence that uniquely applies to them. However, the Complainants are now seeking to expand that purpose and to exploit the opportunity given by the Tribunal by asking it to change the methodology by which it will determine the normal age of retirement.

[51] I agree with the submissions of the Respondents that this decision has been affirmed by the Federal Court and that the Tribunal should be bound by that decision. Affirming the Tribunal’s earlier decision, the Federal Court agreed “with the Tribunal that the determination of the normal age of retirement requires a statistical analysis of the total number count of relevant positions.” (*Vilven v. Air Canada* 2009 FC 367 at para. 169.)

[52] It is proper for the Tribunal to apply the principles of *stare decisis* and to follow decisions of the Federal Court, and to only deviate in the clearest of cases when there are compelling factors which differentiate the matter before the Tribunal from the jurisprudence of the Federal Court. This is not one of those cases.

[53] In 2019 CHRT 32, the Tribunal considered whether changes to the law of *stare decisis*, because of the Supreme Court of Canada decisions in *Canada (Attorney General) v. Bedford*, 2013 SCC 72; *Carter v. Canada (Attorney General)*, 2015 SCC 5; and, *R. v. Comeau*, 2018 SCC 15, resulted in *Air Canada Pilots Association v. Kelly*, 2012 FCA 209; *Adamson v. Canada* (*Human Rights Commission*, 2015 FCA 153 and *McKinney v. University of Guelph*, 1990 CanLII 60 (SCC), [1990] 3 SCR 229 no longer being binding authorities for the Tribunal on the question of the constitutionality of paragraph 15(1)(c) of the *CHRA*. The Tribunal concluded that the narrow test to depart from *stare decisis* had not been met, and in the interest of consistency and predictability, the Complainants' motion was dismissed.

[54] Similarly, the factors that might suggest a departure from *stare decisis* were not put before the Tribunal by the Coalition Complainants, and indeed, the departure from *stare decisis* was not argued.

[55] Parties before the Tribunal expect us to adhere to the requirements of natural justice (s.48.9(1) of the *CHRA*) and to respect principles of the rule of law. One of those principles is the legitimate goal of legal certainty and the avoidance of arbitrariness.

[56] In the interest of consistency and predictability, the Tribunal will adhere to the strict statistical analysis for the determination of the normal age of retirement for this group of Air Canada pilots.

Signed by

David L. Thomas
Tribunal Member

Ottawa, Ontario
June 5, 2020

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: June 5, 2020

Motion dealt with in writing without appearance of parties

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No submissions filed for the Canadian Human Rights Commission

Fred W. Headon, for Air Canada

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