

DECISION RENDERED ON MARCH 18, 1982

T. D. 5/ 82 IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT, S. C. 1976- 77, C. 33, as amended;

AND IN THE MATTER of a Hearing before a Human Rights Tribunal Appointed Under Section 39 of The Canadian Human Rights Act.

BETWEEN:

PAUL S. CARSON, RAMON SANZ, WILLIAM NASH, BARRY JAMES, ARIE TALL,
COMPLAINANTS,

- and

AIR CANADA, RESPONDENT.

TRIBUNAL: SIDNEY N. LEDERMAN, Q. C.

DECISION OF TRIBUNAL

APPEARANCES: GEORGE D. HUNTER, DAVID A. AYLEN Counsel for The Canadian Human Rights Commission and The Complainants
COLIN A. MORLEY, GUY DELISLE Counsel for the Respondent

DATES OF HEARING: February 18, 19, 20, 21, 22, 1980; April 23, 24, 1980; August 22, 1980; February 17, 19, 1981; April 21, 22, 23, 24, 1981; June 23, 24, 25, 26, 1981; October 5, 1981.

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1. - INTRODUCTION

In recent times, there has been increasing concern about age discrimination in the work force and the economic, social and psychological consequences for those victimized by such discrimination. Of countervailing importance to the employer is the maintenance of legitimate employment standards and requirements: *Foreman et al v VIA Rail Canada Inc.* (1980), 1 C. H. R. R. 111 at 112. Where the employment involves the safety of others, the interests of the public, in addition to those of the older individual and the employer, must also be considered. In those circumstances, one must carefully balance the interest of the older worker in acquiring and continuing employment against the interest in public safety. The problem usually manifests itself in the issue over mandatory retirement at a particular age: see, for example *Lamont v Air Canada* (1982), 34 O. R. (2d) 195. In this inquiry, however, the question of age has been raised in the context of entry into, rather than retirement from employment. This inquiry arises, in part, out of a legal challenge by The Canadian Human Rights Commission to the alleged hiring - age ceiling policy of the Respondent, Air Canada, and its application to the Complainants.

The five Complainants (a sixth Complainant, Arthur Lashbrook withdrew his complaint in the course of the hearing), allege that Air Canada committed a discriminatory practice contrary to Section 7 of The Canadian Human Rights Act in that it directly or indirectly refused to employ them as pilots- in- training because of their age, which by Section 3 of the Act is a prohibited ground of discrimination. The Commission also alleges that Air Canada contravened Section 10 of the Act in that it maintained a discriminatory practice by establishing or pursuing a policy or practice that deprives or tends to deprive an individual or class of individuals of employment opportunities on a prohibited ground of discrimination.

Air Canada takes the position that in each of the cases of the Complainants, there were individualistic reasons, unrelated to the Complainants' age, for denying employment; and, accordingly asserts that it did not conduct any discriminatory practice. Alternatively, Air Canada argues that if its practice took into account the Complainants' age in refusing them employment, such practice is defensible by reason of Section 14(a) of the Canadian Human Rights Act which reads as follows:

"It is not a discriminatory practice if any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement."

2. - THE COMPLAINANTS AND THE RESPONSE OF AIR CANADA TO THEIR APPLICATIONS FOR EMPLOYMENT

I first turn to the claims of each of the Complainants that they were discriminated against by Air Canada by reason of their age.

There are some characteristics common to all of the Complainants but at the risk of some repetition, each of the Complainants will be considered separately.

(a) William Nash:

For a period of 10 years from 1968 to 1978, Mr. Nash sought employment as a pilot with Air Canada. When he first applied in 1968, he was informed that there were no positions available and that no openings were expected until 1969. Accordingly, Air Canada was not interviewing prospective pilots at that time. Nash periodically updated his application and was told that his file was being held open and would be considered in competition with other candidates as positions for new pilots became available. On November 7th, 1973, Air Canada wrote to Nash as follows:

"This will acknowledge receipt of your recent application concerning employment as a pilot with Air Canada.

We have been hiring pilots steadily for the past two years and we expect that recruiting in 1974 will be on a reduced scale.

You will, therefore, be considered along with others depending on our future requirements. We should point out that competition among candidates will be very keen, since we have numerous qualified applicants awaiting future consideration, many in a lower age bracket."

Nash took this letter to mean that he was too old for consideration, as far as Air Canada was concerned and he therefore did not continue to update his file. However, in 1978, when he learned that Air Canada was in the midst of a large hiring campaign, Nash applied for a position once again. By letter dated September 27th, 1978, Mr. Nash was informed that there was no possibility of employment with the Respondent. The letter reads as follows:

"Thank you for your application for pilot employment. The competition between candidates is extremely keen as the incoming flow of well qualified applicants continues. Many are now in the low to mid twenty age group and are therefore more suited to Second Officer roles which they will hold for an extended period of time.

Under these circumstances we are not able to offer you very much in the way of encouragement. Nevertheless, your interest in Air Canada and the offer of your services are appreciated."

This rejection letter should be seen in the context of Mr. Nash's background. He was born on April 28th, 1937 and was therefore 41 years old when he received his last rejection letter from Air Canada. He obtained Grade 12 level of education in or around 1955 and then embarked upon a career with the Royal Canadian Navy. He went to Naval College and obtained the equivalent of Grade 13 in 1958 which would have been the last year that he was involved in formal school training. He left the Navy in 1969 having accumulated 3100 flying hours in various fixed wing aircraft, 2600 of which were as pilot-in-command. He became employed thereafter as a helicopter pilot and flew some 1700 hours in helicopters during a period of 2 years. He then returned to flying fixed wing aircraft as an executive pilot with the Ontario Government and for Kenting Aviation for 2 years.

From December 1973 until the Spring of 1976, Nash flew Dehavilland Twin Otters with Air Transit out of Montreal. Air Transit was a subsidiary of Air Canada which was established to operate the STOL (short take off and landing) project between Ottawa and Montreal. Nash flew approximately 1100 hours, all as pilot-in-command, with Air Transit. After he departed Air

Transit, he returned to flying helicopters in Labrador for a period of six months. In December 1976, he became a Civil Aviation Inspector with the Ministry of Transport where he is employed today. His current responsibilities are flight inspection for the Region of Ontario and he is responsible for calibrating navigational aids, instrument landing systems and very high frequency omni ranges on directional beacons to ensure that they are safe for the flying public.

He obtained his Commercial Licence in 1967 and his Air Transport Licence in 1973.

Air Canada called Captain Keith Sanderson as its witness to testify as to the reasons for declining to hire the Complainants including Mr. Nash. Captain Sanderson was the individual at Air Canada who played the largest role in establishing and applying Air Canada's current employment criteria for pilots. He has been with Air Canada for some 28 years and his present position is Senior Director of Flying Operations. Among his duties with Air Canada, he has served as a supervisory or check pilot on various aircraft and is currently a Captain on a Lockheed 1011. Although Captain Sanderson did not personally deal with Mr. Nash or his application at the material time, he did offer three reasons from his perspective at the time that he gave testimony before this Tribunal as to why Mr. Nash would not rank as a competitive candidate for employment as a new pilot:

1. Captain Sanderson expressed concern about the length of time that Mr. Nash had been away from formal schooling prior to his application. It had been some 22- 23 years after he had finished his formal education which in any event was only to Grade 13. (Nash's application incorrectly stated that he had obtained Grade 13 at Burlington High School in 1956.)

2. Another concern of Captain Sanderson was the high flying time that Mr. Nash had accumulated. The negative aspect of high flying time was expressed by Captain Sanderson to be that it encouraged the perpetuation of bad habits and made it difficult for a pilot to re- learn fundamental techniques which would be required as a pilot with Air Canada. As well, Captain Sanderson would not have considered Mr. Nash's helicopter time of importance, as Air Canada, along with most other airlines, does not consider this type of flying to be of benefit because it is in a different discipline altogether.

3. The third concern expressed by Captain Sanderson was the problem that Nash's age could contribute to adverse crew personality relationships. An older pilot could be a junior officer on the flight deck and would be obliged to accept orders and instructions from a younger and perhaps a more inexperienced Captain. There is a danger, Captain Sanderson testified, of disharmony and perhaps some reluctance to readily accept the orders of a younger Captain.

It is interesting to note that none of these reasons are exhibited in documents in Mr. Nash's personal file. They were all expressed as reasons by Captain Sanderson from the perspective of February 1980 when he gave his evidence. None of these reasons were expressed directly to Mr. Nash as a basis for his rejection. They are naked, speculative generalizations which have no apparent foundation either in Mr. Nash's record or in Air Canada's file of Mr. Nash or upon any examination of Mr. Nash's personality. As to the first reason advanced by Captain Sanderson, there was no written requirement in Air Canada's qualifications at the material time imposing a limitation or restriction relating to an applicant's length of absence from formal schooling. Given

the fact that there was neither a formal requirement nor an in-house guideline in these terms, it is difficult to give credence to Captain Sanderson's belief that this may have been one of the reasons for Mr. Nash's rejection by Air Canada.

Captain Sanderson's criticism of Mr. Nash's high flying time as a possible basis for his unsuccessful application is similarly suspect. No formal or in-house guideline existed to this effect at the material time. Moreover, the ability to re-learn techniques is a very individualistic trait and no tests were ever conducted upon Mr. Nash to determine his ability in this regard. Indeed, at one point in his testimony, Captain Sanderson stated that Mr. Nash's high flying time was rather impressive; but, nevertheless, held fast to his assumption that this kind of experience could be detrimental. Although, expert medical testimony was adduced during the course of this hearing in support of the proposition that increasing age may impair the ability to learn new techniques and to abandon old habits, no evidence was led to confirm that there is a similar correlation between experience and learning ability. In the absence of any particular knowledge of Mr. Nash, this generalization by Captain Sanderson cannot be accepted.

In the same vein, no psychological test was ever conducted on Mr. Nash and therefore Captain Sanderson's conclusion that the presence of Nash on a flight deck with a chronologically younger crew could lead to problems is totally unsubstantiated. Moreover, there was evidence adduced to show that in the military in which Mr. Nash had an extensive career, the pilot-in-command is often chronologically younger or even junior in rank to other members on the flight deck. There is no indication that Mr. Nash ever encountered the type of problem articulated by Captain Sanderson. Furthermore, Mr. Nash received high praise and an unqualified recommendation from his former employer, Air Transit, a subsidiary of Air Canada, by reason of his service to that corporation.

It should also be noted that when Mr. Nash wrote to Air Canada in September of 1978 reaffirming his interest in seeking employment as a pilot, he did indicate that he was content to accept the fact that he might be a relatively junior officer for some period of time.

Given all of these factors, it would appear that Captain Sanderson's surmise about Nash encountering a personality conflict was without a rational basis.

It was acknowledged that Mr. Nash met the hiring profile qualifications at the time. His only negative characteristic was his age and that would appear to be the basis for his rejection by Air Canada. As early as the Fall of 1973, Mr. Nash's fate was sealed for there appeared a handwritten notation of an Air Canada executive in Mr. Nash's file which read in part:

"I don't think we can do much. Age 36." This reason became manifest and known to Mr. Nash when Air Canada indicated in its letter of September 27th, 1978, that he was in a disadvantaged position because of his age in relation to other younger applicants. There can be little question that Mr. Nash was expressly turned down by reason of his age. At the very least, age was a primary factor affecting Air Canada's decision.

(b) Paul Carson:

Mr. Paul Carson was born on January 30th, 1946 and first applied to Air Canada for a position as a pilot in November 1972. From time to time thereafter, Mr. Carson updated his application with Air Canada as his qualifications improved.

For example, he informed Air Canada in 1973 that he had obtained his Commercial Licence and in 1974 that he had obtained his Multi-engine and Instrument Rating, Class 1. Mr. Carson was informed by Air Canada that the airline had sufficient numbers to meet its confirmed courses and that recruiting activities had been curtailed.

In June 1974, Mr. Carson obtained his Senior Commercial Pilot's Licence and in 1975 he received his Airline Transport Pilot's Licence and informed Air Canada of those newly attained qualifications.

In terms of education, Mr. Carson obtained an Honours Bachelor of Science Degree from the University of Windsor in 1969 and a Masters Degree in applied mathematics in 1970 from the same university. In 1977 he graduated from Carlton University with a Masters Degree in aeronautical engineering. From the date of his application for employment with Air Canada up to the present time, he has been employed by the Federal Government, Ministry of Transport. He is presently a Civil Aviation Inspector, Grade Level 3 with the Ministry. In that capacity, he is responsible for all aeronautical information and charts used in flights by pilots in Canada. In this context, his work is not primarily of a flying nature although he does maintain proficiency on one of three different aircraft and experiences the simulator once or twice a week. In or about 1975, Carson did work as a full time pilot for a six month period running a private flying school. All of his flying has been as a part-time flying instructor or a charter pilot.

By letter dated January 6th, 1975, Mr. Carson was informed by Air Canada that "your age and flying experience do not place you advantageously in competition for pilot employment". At the time of this letter, Mr. Carson's age was approaching 27. Feeling that his prospects for employment as a pilot were becoming dimmer, Mr. Carson suggested to Air Canada that perhaps they could use his services either in their flight technical area or other areas such as route planning. Air Canada responded by stating that it would circulate his resume through their flight operations, technical services and engineering departments.

Mr. Carson continued to communicate with Air Canada seeking employment primarily as a pilot, but also, secondarily, seeking other opportunities and positions within the airline. By letter dated January 14th, 1976, Mr. Carson was informed by Air Canada that it had found his resume "interesting in terms of experience and qualifications but that at the present time there were no openings". Finally, by letter dated September 18th, 1978, Mr. Carson was informed by Air Canada in terms identical to those contained in the letter forwarded to Mr. Nash on September 27th, 1978, that there were many well qualified applicants "in the low to mid twenty age group ... more suited to second officer roles".

Mr. Carson wrote a letter of protest to Mr. Claude Taylor, President of Air Canada on September 21st, 1978, in which he expressed his view that Air Canada's hiring practice was discriminatory.

At the time of his last employment application with Air Canada in July of 1978, he had in excess of 2500 hours flying time, 252 of which was on instrument.

As with Mr. Nash, Captain Sanderson who had no relevant involvement in Mr. Carson's application or Air Canada's decision to deny him a position, again expressed his views for the rejection. He feels they may be summed up in a document which appears in the Air Canada file and sets out on the right-hand side Mr. Carson's qualifications, "A. T. R. (Airline Transport Rating), Class 1, Age 32, 11 months, approx. 2600 hours, M. Sc. Engineering" and on the left-hand side there appears the rating "BLUE" which is Air Canada's nomenclature for inactive. There also appear notations which state "non-competitive, late applicant, only 150 hours on multi-engine". Air Canada submits that those are the real reasons for denial of employment. An additional reason expressed by Captain Sanderson was perhaps the fact that he was over-qualified from an education point of view. He also stated that Mr. Carson had very limited multi I. F. R. (instrument flight rules) experience and that he had never held a full-time flying position. He also expressed concern that "his age to flying time ratio was not high."

Air Canada had little experience in dealing with pilots who had the educational qualifications of Mr. Carson. Captain Sanderson admitted, in fact, that he personally, was aware of only two cases where pilots with post graduate degrees had not done well in Air Canada. He knew of no other circumstances where a pilot suffered from job dissatisfaction because of having a post-graduate degree. This reason, in any event, did not find its way into Mr. Carson's file nor was he ever informed that this was a consideration which Air Canada took into account. In the absence of any psychological or similar test performed on Mr. Carson, it cannot be said that the mere fact that Mr. Carson has post-graduate degrees would create a danger of job dissatisfaction for him in a pilot's career. Indeed, the contrary would appear to be the case since Mr. Carson in his evidence indicated a love of flying and stated, "I had been wanting to work for Air Canada for a long time; as the national airline, I think it's one of the best airlines in the world. It was a goal and a dream, I guess". Mr. Carson did not strike me as a man who would become easily dissatisfied as a pilot with Air Canada merely because he had a number of university degrees.

As to the number of hours of flying multi-engine aircraft, it would appear that Mr. Carson's resume, which was on file with Air Canada prior to September of 1978 indicated flying experience of 215.9 hours rather than 150 as previously noted. Captain Sanderson was unable to state how those number of hours compared with other candidates who were being considered for employment by Air Canada at the relevant time. A perusal of Air Canada's files of pilots currently flying with the airline and hired in September, November and December of 1978 makes it clear that there were many pilots who had similar and in some cases even less multi-engine time than Mr. Carson. It is inconceivable therefore that this factor entered into the decision-making process of Air Canada in any significant way as far as Mr. Carson is concerned.

There was no formal or in-house requirement with respect to the quantity of instrument time that a candidate for employment as a pilot had to have in September 1978. Nevertheless, Captain Sanderson commented negatively upon Mr. Carson's low ratio of instrument time to total flying time. Mr. Carson's resume in the Air Canada file sets out that the total instrument time that he had amassed as of September 1978 inclusive of simulator time was 252.4 hours. Simulator time

was indicated at 37.3 hours leaving actual instrument time experience during flight of 215.1 hours. The ratio of instrument time in Mr. Carson's case (215.1 hours) to total flying time (2,612.5 hours) is 8 percent. An examination of the files of Air Canada pilots indicates that this ratio was not out of line in comparison to those successful applicants who competed with Mr. Carson. For example, 50 percent of the class of candidates hired in September of 1978 had a ratio of instrument time to total flying time equivalent to or less than Mr. Carson. The percentage is 37% with respect to those pilots hired in October of 1978, 45% for those pilots hired in November 1978 and 59% for those pilots hired in December of 1978. Accordingly, given the fact that Mr. Carson held his own in respect of this factor with his competing candidates who were eventually hired by Air Canada at or about this time, it is difficult to accept Captain Sanderson's view that this factor played any meaningful role in his rejection.

Captain Sanderson alluded to the motivational problem which he felt could arise because Mr. Carson was not flying on a full-time basis in 1978. At that time he was employed as a Civil Aviation Inspector with Transport Canada. As such, he was required to pilot Ministry aircraft as one of his responsibilities and to maintain proficiency on a number of aircraft. It cannot be said that the fact that his employment did not require his flying aircraft each and every day reflects a lack of motivation. At all times he was desirous of obtaining employment with Air Canada even if it meant in a capacity other than a pilot. Moreover, there is nothing in the Air Canada file nor any evidence relating directly to Mr. Carson's alleged lack of motivation at the relevant time.

Captain Sanderson's view that Mr. Carson may have been turned down because of his low flying time to age ratio is pure supposition and again as with so many of the reasons advanced, finds no foundation in either Mr. Carson's file or in the formal requirements of Air Canada at the time. It was the relationship between Mr. Carson's age and the age of the competing candidates not the relationship between his age and his low flying time which appeared to affect Air Canada's decision. Even Captain Sanderson on cross-examination acknowledged that although he considered Mr. Carson to have a low ratio in this respect this mere fact would not exclude Mr. Carson from consideration from employment.

The most telling notations in Air Canada's file pertaining to Mr. Carson are "late applicant" and "age 32, 11 months". Although, Mr. Carson had commenced his application for employment as a pilot with Air Canada in the early 1970's and continued throughout until his rejection in 1978, it became abundantly clear that it was his age which was the significant impediment to his finding a position with the airline.

(c) Barry Ashley James:

Mr. James was born on July 28th, 1939. He graduated from the University of Otago, New Zealand, with a Bachelor of Science degree in 1961.

His aviation experience is as follows. He attained his Air Transport Licence in 1974. He was experienced on many different types of aircraft and had considerable instrument flying time. He had extensive experience flying in the Northwest Territories and flew approximately 3000 hours, 2000 of which was as pilot-in-command. He then flew as a Captain for a private charter carrier and accumulated 500 hours. In March 1976 he commenced employment with the Ministry of

Transport as a Civil Aviation Inspector in the Airways Division. As such, he is a calibrations flight check pilot which involves flight checking navigational facilities in Ontario as well as the instrument landings systems. His position also involves drawing up airways, air routes, instrument approach procedures and the implementation of those procedures. In the course of his duties he is required to fly aircraft such as the Beech King Air which is a twin engine 10,500 pound plane. He flies it as pilot-in-command and accumulates approximately 300 hours a year on the aircraft. In addition he does some private flying and some instrument instructing on Cessna 310's, Piper Aztecs and light multi-engine aircraft.

Mr. James first made application for employment as a pilot with Air Canada in 1973. Prior to making such application he had an interview with Captain Chowan of Air Canada who was involved in the hiring process at that time. The purpose of the interview was to learn the requirements of Air Canada to qualify for employment as a pilot. He informed James that he required a Commercial Licence, Instrument Rating, Multi-Engine Rating and around 200-300 hours flying time. At the time that he made his application for a position as a pilot, Mr. James had his Senior Commercial Licence, Class 1 Instrument Rating, his Multi-Engine Endorsement and flying experience of 1000 hours, 800 hours of which was as pilot-in-command and 200 hours of which was night experience. Air Canada, by letter dated July 5th, 1973, acknowledged receipt of his application for pilot employment. It went on to say:

"Your file has been reviewed and our major concern is your present age of 34 years (July 28, 1973) with less than 1000 hours flying time, mainly on light equipment. This combination does not place you in a favourable competitive position with other candidates. As you are probably aware the competition for pilot employment is extremely keen.

Nevertheless, we will hold your application and you may wish to advise us of your progress from time to time."

Mr. James felt the negative impact of his age coming through in the letter but believed that if he could amass more flying hours, his application would be looked upon more favourably by Air Canada. Accordingly, James would periodically update his aviation achievements with Air Canada's employment department.

The next communication that he received from Air Canada was a letter dated December 12th, 1973 quoting an earlier letter of November 9th as follows:

"This will acknowledge receipt of your recent application concerning employment as a pilot with Air Canada.

We have been hiring pilots steadily for the past two years and we expect that recruiting in 1974 will be on a reduced scale.

You will, therefore, be considered along with others depending on our future requirements. We should point out the competition among candidates will be very keen since we have numerous qualified applicants awaiting future consideration, many in a lower age bracket. Would you also

be good enough to complete and return the attached supplementary application form to complete your file."

In 1974, James obtained his Airline Transport Licence and informed Air Canada of this fact. On May 31st, 1974, Air Canada wrote to Mr. James as follows:

"This letter refers to your application for pilot employment. A number of factors have arisen which will restrict our 1974 Operating Plan. As a result our original pilot requirement forecast has been modified. At present we have sufficient numbers of approved candidates to meet our confirmed courses. As future courses are indefinite we have had to curtail our recruiting activities.

The competition between candidates will be extremely keen as the incoming flow of well qualified applicants continues. Many are in the low to mid twenty age group and are therefore more suited to second officer roles which they will hold for an extended period of time.

Under these circumstances, we are not able to offer you very much in the way of encouragement. Nevertheless, your interest in Air Canada and the offer of your services are appreciated."

From that point on until mid- 1978, James communicated with Air Canada through a personal friend of his, Captain Bill Martyn who was a pilot with Air Canada. Captain Martyn told him on the basis of information received from Captain Sanderson and others in Air Canada, that they were not hiring new pilots and the situation was dormant.

However, in August of 1978, James learned that Air Canada's hiring program had increased dramatically and that they were hiring many pilots. Accordingly, he wrote to the employment department on August 8th, 1978, renewing his application. He stated therein his concern that Air Canada was hiring candidates who only applied recently and who had less flying experience than himself. On August 22nd, 1978 he was the recipient of the same form letter that the other Complainants received. It contained the following familiar phrases: "Thank you for your application for pilot employment. The competition between candidates is extremely keen as the incoming flow of well qualified applicants continues. Many are now in the low to mid twenty age group and are therefore more suited for Second Officer roles which they will hold for an extended period of time.

Under these circumstances we are not able to offer you very much in the way of encouragement. Nevertheless, your interest in Air Canada and the offer of your services are appreciated."

Subsequently Mr. James called Captain Sanderson to discuss the matter. Mr. James testified that Captain Sanderson "told me frankly, 'you are too old'; that was pretty well the end of the matter". Following this telephone conversation, Mr. James wrote a letter to Captain Sanderson on September 14th, 1978 seeking Air Canada's further consideration of his application and setting out the reasons why he felt that he was a competitive candidate. Towards the end of the letter he summed up his feelings as follows:

"I have tried to convey to you that I have made many sacrifices both in effort and time, in order that I could more than meet your requirements for Air Crew applicants.

I have never before tried so hard for something. It is very discouraging to think that for 6 years I have been working towards a goal that is to be denied me because at 39 I am too old."

Captain Sanderson in his evidence asserted two main criticisms -- one technical and one personal -- of Mr. James which, he believed, could have caused sufficient concern for Air Canada to have turned down his application. With respect to the technical matter, Mr. James wrote a letter to Air Canada on October 31, 1973 to update his file by informing Air Canada that he was employed by Bradley Air Services flying a Twin Otter out of Resolute Bay, Northwest Territories. In the letter, amongst other things, Mr. James commented on his recent high Arctic flying experience:

"Because this type of operation involves long hours of flying, often in adverse weather, necessitating I. F. R., it has been suggested to me that I write, updating my experience and flying time, which is attached.

I'm now quite familiar with the operation of turbine engines, weather radar, radar altimeter, astro compass and an Omega type navigation system called G. N. S. 200 which is becoming more and more popular up in the Arctic.

The majority of the flying is I. F. R., due mainly to the remote location of the station visited, and the everpresent fog and low lying stratus cloud cover.

Many times landings were attempted and made, in white out conditions, high gusting winds, and visibilities of 100' with ceilings no better."

Captain Sanderson found this latter comment to be an unacceptable boast about breaking operational limits while flying in the high Arctic. This was not considered by Captain Sanderson to be a desirable characteristic for a pilot employee. He said this in his evidence:

"I am afraid I just find that professional conduct totally unsuited to an airline career. I can understand where a pilot might get caught once or twice in bad weather, but I know his obligations under the law, and I know his obligations to his paying passengers to plan that flight with alternates to check the weather, whatever it may be, in terms of availability, and to use his knowledge of that route, if the weather reports are deficient or forecasts were deficient, to exercise judgment; perhaps to provide another alternate or not go at all." (Transcript, p. 600)

And he further added: "I think those qualities, particularly as professional operating ethics, are sufficient for my purposes, of not putting him into the selection stream." (Transcript, p. 603)

On the personal side, Captain Sanderson criticized the unprofessional manner of Mr. James' approach to Air Canada personnel on a first- name basis. In this regard, Captain Sanderson testified:

"His approach to people, and his first- name basis with people, he might have interpreted as being influential in the hiring process, was rather unprofessional in our opinion, and certainly, not something we encounter very often; he also seems to infer a familiarity that those people do not support." (Transcript, pp. 599- 600)

Captain Sanderson also pointed out that Mr. James' time away from formal schooling was considerable at 17 years.

The first observation that can be made with respect to these criticisms is that they were never raised with Mr. James at the material time; nor do they appear in Mr. James' file as sources of concern about his candidacy.

Turning to the merits of each of the criticisms, the fact that Mr. James referred to Air Canada personnel on a first name basis has nothing to do whatsoever with his ability to pilot an aircraft in a professional and competent manner. As Captain Sanderson conceded in his cross-examination, when someone uses first names with persons from whom he is seeking employment, it may demonstrate no more than that he is "a friendly individual". At another point in his testimony, Captain Sanderson stated that the issue in isolation was rather "minor". Captain Sanderson also went on to say that it was his "personal predilection" that he regards this kind of informality as unprofessional. It may well be that this concern is more personal to Captain Sanderson than it is to Air Canada because there is nothing in the record of Mr. James' interview by Air Canada that demonstrated that he had an unprofessional manner in any way. Accordingly, there is no substance to this criticism.

Captain Sanderson evidently did not like the comment by Mr. James in his letter concerning his flying experience in the high Arctic. Captain Sanderson read into it the fact that James was deliberately flying into conditions which he knew or ought to have known were unsafe or dangerous, such that he couldn't land the aircraft with safety, - and that this was unacceptable bravado. No one, however, was critical of this fact at the material time when James was interviewed and when he was dealing with other personnel of Air Canada in terms of his application.

When Mr. James' letter of October 31st, 1973 is read in its entirety, it is clear that he was merely trying to describe to Air Canada in the form of an update the recent experience that he had with equipment and with flying under extreme weather conditions in the Arctic. It cannot be said that this comment in Mr. James' letter represents a tendency on his part to take unnecessary risks or depart from operational standards. Mr. James was merely describing the conditions under which he had flown in the Arctic as a facet of his experience. Moreover, there is no evidence that any other Air Canada personnel interpreted the letter the way Captain Sanderson did at the relevant time.

Furthermore, in subsequent testimony before the Commission of Inquiry on Aviation Safety, Captain Sanderson alluded to circumstances where there would be no alternate airport planned if certain conditions were satisfied. Given the distances and the variable weather conditions in the Arctic, it is quite possible for a pilot to be forced to land his aircraft if unforeseen difficult conditions arose at his destination and he had no alternate airport to which to resort.

As to the hiatus between Mr. James' last formal education and his application to Air Canada for a position, again, it is worth repeating that, at that time, no such restriction was one of the articulated basic requirements of Air Canada insofar as the entertainment of pilot applications was concerned. Given the fact that nothing appears in Mr. James' file to suggest that this was an adverse factor of any kind leads one to the conclusion that this criticism of Captain Sanderson is devoid of merit as well.

From the time that he first submitted his application to Air Canada until his ultimate rejection on August 22nd, 1978, the issue of Mr. James' age surfaced from time to time as a negative trait militating against his acceptance. As early as December 16th, 1974, when an internal Air Canada memorandum commented adversely upon Mr. James' age ("I am not sure whether his age is an adverse factor" and the response "yes, 35 years") until Air Canada's final letter of 1978, it is clear that Mr. James' age precluded his entry into the Air Canada organization.

(d) Arie Tall:

Mr. Tall was born on November 11th, 1944, in Bucharest, Rumania and completed European High School. He also graduated from the Israeli Airforce Flight Academy in 1967. In 1973 he obtained his Airline Transport Rating, equivalent to A. T. R. in Canada, and he also obtained his Class 1 Israeli Instrument Rating which is equivalent to the Class 1 rating in Canada.

After leaving the Israeli Airforce he was unable to secure employment with the national airline of Israel because he was too young and required further experience. Interestingly, the minimum age for pilots in Israel was 30 and the country required pilots with more experience. Tall was 25 years old at the time and felt that there was little chance of securing employment with El Al Airlines.

From 1970 to 1974 he flew for a small Israeli domestic airline known as United Airline, piloting small Cessna 337's and Islanders. The weights of these aircraft were approximately 6300 to 6500 pounds and they were multi-engine planes.

By the time that Tall emigrated to Canada he had flown about 4000- 4500 hours.

On a visit to Canada in 1971 Tall made application to Air Canada for pilot employment but was told that he would have to achieve landed immigrant status before he could be considered. He returned to Canada as a landed immigrant in February of 1974 and reapplied to Air Canada. Subsequently he became a Canadian citizen. In or about March of 1974 he completed all the requirements and obtained his Canadian A. T. R., and Canadian Radio Telephone Restricted Licence.

Pending his application to Air Canada, Tall became Chief Pilot for Atlantic Central Airways; then in July 1975 he served as a co-pilot on DC-3's with Eastern Provincial Airways; then pilot-in-command with Interflight Florida; then in 1976 he flew a single engine plane for Forest Protection Limited in its spruce bud-worm spraying program in New Brunswick; and then became Chief Pilot for Air Bathurst in New Brunswick. He eventually started his own company,

Tall Air Limited of Moncton, New Brunswick, when he realized his chances for employment with Air Canada were diminishing.

In 1974 when he reapplied for pilot employment with Air Canada, he had obtained his Air Transport Licence and had 4000 hours flying time, 3000 hours of which would have been as pilot-in-command. He spoke with Captain Bill Irvine of Air Canada who said he was rather old since he was 29 at the time, although Irvine liked his qualifications. Captain Irvine then offered Mr. Tall employment on a DC-9 course.

Tall was requested to take a medical which he did. It revealed a sinus problem pertaining to a medical operation that he had in 1963. Subsequently, it was demonstrated that this was not a problem of any significance and had no effect on his flying ability. He was considered medically fit as far as Air Canada was concerned. In addition, Mr. Tall was given an I. Q. test known as the Otis test. Although, he believes that he did not do well on that test (he was never informed of the results), he was told by Captain Irvine that in fact the Otis test was not to be relied upon. Tall's optimism increased.

He received a favourable report from the Air Canada officer who interviewed him on July 12th, 1974. The interviewer remarked as follows:

"This is a unique applicant, has excellent flying background. I was impressed with his quiet determination. Has gone through six wars since infancy and is now determined to get established in flying in Canada. His English is good but with an accent. I am interested in seeing how he will make out on his I. Q., with a possible language comprehension problem. Barring this possibility I would highly consider this man as a prospect."

His recommendation was that Mr. Tall be hired as a first officer or a second officer.

He was further advised by Captain Irvine that he would be going on the DC-9 course by the end of 1974. But as subsequent events demonstrated, that was not to be.

In October of 1974, Mr. Tall was informed that the DC-9 course was being cancelled due to the economic circumstances of the airline. Later, he was told by Captain Irvine that Air Canada was going to take navigators from the DC-6's and attempt to have them qualify as pilots. Accordingly, because of this program to hire navigators, the airline would have a surfeit of applicants. Captain Irvine indicated to Tall that he had openings in another course for "second officer" but that Tall was too old.

By letter dated October 21st, 1974, Captain Irvine confirmed to Mr. Tall that he was considered fit as far as Air Canada's medical department was concerned and then went on to state:

"As far as the Otis test is concerned, as you are below the minimum acceptable standard, it would require the writing of a practical test that we are in the process of putting together now. However, the overriding factor in your case is the fact that our DC-9 direct entry courses have been cancelled and as we normally staff the S/O positions on the various equipment types with

younger applicants, I regret to state that I cannot offer you any encouragement as far as employment is considered."

Mr. Tall nevertheless persisted and continued to apply for a position at Air Canada. By letter dated July 20th, 1976, he received the form letter which the other Complainants received, indicating that other well qualified applicants were in the low to mid twenty age group and were therefore more suited than Mr. Tall to second officer roles which they will hold for an extended period of time. At this juncture, Mr. Tall was 31 years old.

Mr. Tall made another application only to be discouraged by Air Canada's letter of January 9th, 1979 stating that competition would be very keen and implicitly indicating that he would not be successful. It is interesting to note that although this letter is similar to the format used in previous letters, it does not contain the phrase, "many are now in the low to mid twenty age group and are therefore more suited to second officer roles which they will hold for an extended period of time". It may be that at this point in time the subject matter had been raised by way of complaint before The Canadian Human Rights Commission and Air Canada was more sensitive to the wording of its form letter.

Mr. Tall's frustration can be seen in a letter that he wrote to Captain Bob Coneen, Air Canada Flight Operations on January 9th, 1979:

"I believe that since 1974, Air Canada has hired hundred of new pilots, most of which have much less experience than I and younger than myself. I am sure that the age of the candidate is very important, considering the investment needed to upgrade the pilots through the system. However, discrimination based on age is against basic human rights in this Country. Going through my files can easily prove that my hiring was held back, when others younger and with much less training and experience were hired.

I would not write or apply at this stage, if it were my first try. In my case, you can see how keen I am to get this position with Air Canada, and how circumstances at first, and discrimination after have prevented my being hired.

I believe that basic fairness exists in the system, and in people to see that I was unfairly handled, as far as being hired as a Pilot.

Correcting this situation, by giving me a chance to go through and complete this hiring procedure, will fully reward me for all these years having tried to get on, and also prove that no discrimination for age is practiced by Air Canada, the National Airline of Canada."

He received no response to this letter. He was 34 years old at that time.

As with the others, Captain Sanderson who had no personal involvement in this matter speculated as to why Mr. Tall's application was rejected. They all relate to factors other than age. He advanced the following reasons, as summarized by counsel:

1. Mr. Tall had the equivalent of Grade 11 education in the Province of Quebec, the bare minimum accepted by Air Canada;
2. Mr. Tall had been away from formal education for 17 years prior to submission of his application;
3. His high flying time was of concern because of the difficulty in unlearning and relearning techniques;
4. Mr. Tall had attended an employment interview in casual dress and this demonstrated an unprofessional attitude.

It should be noted that even Captain Sanderson conceded that the education possessed by Mr. Tall was acceptable to Air Canada although it was the bare minimum. Mr. Tall, in addition to his high school education, as previously mentioned, attended the Israeli Airforce Flight Academy in 1967 and thereafter the University of Tel Aviv in July of 1973 where he received his Israeli A. L. T. P. certificate. Having met Air Canada's educational standards at the time, it is difficult to place any weight upon a comment to the effect that it was just the bare minimum.

I have already considered the length of time away from formal schooling in the context of the other Complainants and the same holds true in Mr. Tall's case. Moreover, the hiatus of 17 years postulated by Captain Sanderson contracts dramatically when one has regard to the fact that Mr. Tall had been in university as recently as July of 1973. In addition, Mr. Tall had attended a course on small business management at Moncton College in New Brunswick from 1977 to 1978. More significantly, the evidence shows that there are numerous pilots currently flying with Air Canada who at the time of their employment had been away from a formal educational setting for a period much longer than Mr. Tall had been. Furthermore, this alleged deficiency has no foundation in the basic in-house guidelines at the time; nor was it ever mentioned to Mr. Tall directly; nor, is there a hint of it constituting a problem in Mr. Tall's file. Accordingly, there is no basis for Captain Sanderson's view that this may have been a factor in Mr. Tall's inability to obtain employment with Air Canada.

When Mr. Tall came to Canada as a landed immigrant in the Spring of 1974 and applied to Air Canada he had approximately 4000 flying hours. This had increased to 6200 hours of which 5000 had been pilot in command as of May 1979. Captain Sanderson viewed this experience as essentially negative when he testified:

"Well, the flying hours are very high. I don't mean to imply a 'Catch 22'..., but again, from our own internal studies, we feel there is an indication of high experience flying time influencing or appearing to influence the performance. Again, whether that's an unlearning or relearning process, or whether it is age related, I cannot speak to. but it has been our experience that people with higher flying time entering our process seem to have more trouble."

The "internal studies" as set out in the above passage were not available until December of 1979 and it is clear that Mr. Tall was rejected without any reference to high hours and at a time when Air Canada had no statistical information indicating that high flying time could create problems.

Indeed, Air Canada, in its in-house guidelines which came into effect in the Summer of 1978 and are presently extant, require additional qualifications for applicants over age 26 including "high time". It is clear therefore that Mr. Tall was not rejected because of his number of flying hours.

Lastly, Captain Sanderson speculated from his reading of the interview summaries of Mr. Tall made in July of 1974 that his casual dress may have led Air Canada to the conclusion that he was unprofessional and that may have worked to his disadvantage. One interviewer in his summary sheet on July 12th, 1974 under the heading "Appearance" gave the following description:

"casual dress, open neck shirt and slacks; neat; good physique; military bearing; 6'1"; 170 lbs. It was a muggy day."

The other interviewer in his summary sheet of August 5th, 1974, under the same heading, commented:

"neatly dressed in shirt, open collar, no coat or tie. When questioned re informal attire, he explained that he was unaware of the Canadian custom since he had been in Canada only 6 months. Well-groomed, well-trimmed moustache. Presents good figure of a man".

When one reads the interview summaries in their entirety, one is left with the feeling that both interviewers were favourably impressed by Mr. Tall. Even Captain Sanderson concedes that. Although the interviewers commented on the casual dress, it was explained to their satisfaction on the basis, in one case, that Mr. Tall having recently arrived in the country, was unfamiliar with the Canadian custom of wearing a shirt and tie and in the other case, that the weather was sultry. Captain Sanderson's interpretation that informal dress demonstrates an unprofessional attitude was certainly never advanced as a reason to Mr. Tall for his rejection and the mere musing of Captain Sanderson in this respect cannot be taken very seriously.

A close examination of the Air Canada documentation shows that Mr. Tall's age was the reason for his downfall. That notion clearly comes through in Air Canada's letter of October 21st, 1974, the comments of Captain Irvine, the letter of July 20th, 1976, the fact that Mr. Tall alleged in his letter of January 9th, 1979 that he had suffered discrimination on the basis of age to which there was no reply and Air Canada's letter of the same date which merely echos the fact of keen competition and deliberately omits the reference to the age factor. There must be a finding accordingly that subsequent to March 1st, 1978, Mr. Tall was denied employment as pilot with Air Canada either directly or indirectly on the basis of age.

(e) Ramon Sanz: Mr. Sanz was born on August 29th, 1942 in the Philippines. He graduated from high school and completed two years of a four year Bachelor of Science course at the University of The Philippines. He left the program during his third year. He then entered the pilots' training course with Philippines Airlines in 1965. He received the award for the highest proficiency in his class. He obtained his Philippines Commercial Licence, his Philippines Instrument Rating, which Mr. Sanz equated to a Class 1 rating in Canada, his Philippines Flight Engineer's Licence, and his Philippines Radio Licence. Subsequent to his training, Mr. Sanz flew as a pilot with Philippines Airlines until 1974. During this time he took the advanced commercial licence

course, an instrument rating course and the airline transport pilot course at the Philippines Airlines Aviation School and he attended the DC- 8 Flight Engineer's Course conducted by K. L. M. Royal Dutch Airlines in the Netherlands. When he left the employment of Philippines Airlines, he had accumulated over 3600 hours of multi- engine time as a pilot with that airline on equipment weighing over 12,500 pounds, flown well over 1000 hours as a flight engineer on the DC- 8 and had amassed well over 1200 hours of simulator time.

Mr. Sanz emigrated to Canada in 1974 and became a Canadian citizen in 1977.

He obtained his Canadian Commercial Licence and Canadian Radio Licence in 1975. However, he did not obtain a Canadian Instrument Rating, for as he explained, he felt that he had the qualification and the ability to obtain one should he find employment with a Canadian airline, but at the time he did not have the financial wherewithal to obtain and maintain it in the absence of employment prospects.

Mr. Sanz first applied to Air Canada in the Spring of 1974. Air Canada responded by letter dated April 16th, 1974 indicating that a number of factors had arisen which would restrict the 1974 pilot recruitment and advising that Mr. Sanz' application would remain on file and that he would be given further consideration when additional pilot training courses were approved. This letter makes no mention of Mr. Sanz' qualifications or lack thereof. Indeed, this letter encouraged Mr. Sanz to continue to update his file with Air Canada. He did just that on September 30th, 1975.

Unknown to Mr. Sanz, an internal "memogram" was prepared apparently with respect to Mr. Sanz' recent application. The memogram was from the Flight Operations Director in Vancouver to a Mr. Mortimer who was then Employment Supervisor for Air Canada. Mr. Sanz' application would have been considered in the first instance by the Flight Operations Director in Vancouver, who would have been a pilot in a supervisory capacity. The memogram reads as follows:

"To: Mr. G. V. Mortimer, Employment Supervisor From: Flight Operations Director, Vancouver
Date: October 6, 1975

Message: Re: Pilot Applicant Ramon Katindoy Sanz In view of this applicant's age, would you please arrange a reply. Thank you."

In his testimony, Captain Sanderson agreed that it was "a reasonable assumption" that the Flight Operations Director, having reviewed Mr. Sanz' application, found that he was not acceptable on the basis of his age.

Following this memogram, Mr. Sanz received the form letter dated October 16th, 1975 from Air Canada referring to the fact that many of the candidates were well qualified and were in the low to mid twenty age group and were therefore more suited than Mr. Sanz to second officer roles which they would hold for an extended period of time. Again, no reference was made therein to any deficiency in Mr. Sanz' qualifications other than the reference to age.

Mr. Sanz nevertheless continued to update his application and by letter dated May 10th, 1978, he received the following discouraging news from Air Canada:

"Our pilot training program is at a standstill at the moment, although a few candidates were hired earlier this year. All of them possessed above average flying qualifications and were in a lower age bracket. Therefore, there is little we can add to our letter of October 16th, 1975 at which time we mentioned that unfortunately we would be unable to be encouraging toward your candidacy."

The letter made it clear that Air Canada had a preference for applicants younger than Mr. Sanz. There was no indication in this correspondence that Mr. Sanz' aviation qualifications were inadequate in any way.

Still undeterred, Mr. Sanz reapplied on April 27th, 1978, and again on September 25th, 1978. Air Canada's reply was by letter dated October 16th, 1978 which was identical in wording to the letter that it forwarded to Mr. Sanz exactly three years earlier on October 16th, 1975. Even with the passage of three years, it was clear that Air Canada still preferred to hire competitive candidates younger than Mr. Sanz. As before, the only negative aspect of Mr. Sanz' qualifications appears to have been his age, which at time of his last rejection was 36.

In early 1979, Mr. Sanz wrote his Member of Parliament asking for assistance in this matter, feeling that he had been discriminated against because of his age. Apparently, after an inquiry was made, Air Canada in February 1979 indicated to the Member of Parliament that Mr. Sanz did not meet Air Canada's standards in that he did not satisfy the minimum licensing requirements.

In his testimony, Captain Sanderson who was not personally involved in Mr. Sanz' file at the time explained the failing this way:

"Mr. Sanz never did meet our minimum requirement of an instrument rating, let alone a Class 1. I think his record will indicate that he hasn't had any instrument rating since arriving in Canada."

From the foregoing, it is quite clear that Mr. Sanz was never specifically rejected because of any deficiency in his instrument rating. It is true that Mr. Sanz never did obtain the Canadian Class 1 Instrument Rating but he stated that the only reason that he did not bother to obtain it was because that he could not at the time afford to make the financial commitment necessary to obtain and to maintain it. Furthermore, if he were offered employment, he felt that he would have had no difficulty in becoming certified on the aircraft at the position he would be authorized to fly, given his very extensive instrument experience as a pilot with Philippines Airlines.

Most telling, of course, is the fact that not one word or suggestion of this inadequacy was ever expressed to Mr. Sanz over the years that he applied to Air Canada. It surfaced for the first time only after a Member of Parliament made inquiries of Air Canada. It therefore cannot be said to be the reason why Mr. Sanz was turned away. The primary reason was his age. In any event, even if the lack of the Canadian Class 1 Instrument Rating played any part in Mr. Sanz' rejection, it pales in significance to the age requirement that Mr. Sanz failed to satisfy.

Air Canada, in its argument, also submitted that Mr. Sanz was a classic illustration of a pilot applicant who failed to upgrade his qualifications and that was illustrative of a lack of sustained motivation. It is difficult to understand how his failure to obtain a Canadian Class 1 Instrument

Rating shows any such thing when at all material times Air Canada never mentioned that this could be a potential problem. In any event, Mr. Sanz' persistence over the years to become a pilot with Air Canada would easily rebut any such inference.

Captain Sanderson's second criticism of Mr. Sanz was the considerable period of time that Mr. Sanz had been away from formal education. He stated it to be 14 years. This period of time appears to be somewhat exaggerated when one considers the fact that subsequent to his University of Philippines experience, Mr. Sanz took a number of courses while working for Philippines Airlines, many of which were similar to those he would have taken had he been employed with Air Canada. For example, Mr. Sanz completed his commercial pilot's course and first officer qualification course with Philippines Airlines as of February 14th, 1967 and he was the recipient during his pilot flight training course of the award for the highest proficiency in flying. Notwithstanding that he was only a first officer, he was checked out satisfactorily in the left seat or as a captain in March of 1970 with Philippines Airlines. As of April 1971 he had successfully passed his Air Transport Pilot Licence written examination. He successfully completed the DC- 8 recurrent training program given by K. L. M. Airlines. Accordingly, over these years he had been subjected to various forms of relevant schooling up until the time he came to Canada in 1974. For these reasons and the reasons discussed in the context of the other Complainants, this criticism of Captain Sanderson must too fall by the wayside as a reason for refusing Mr. Sanz employment.

One must therefore conclude that the primary reason for the rejection of Mr. Sanz' application by Air Canada was his age.

3. BASIC QUALIFICATIONS OF AIR CANADA PILOTS

The standards against which all of the Complainants appear to have been assessed are Air Canada's criteria for selection of pilots for interviews which have changed somewhat over the years. But, the criteria which were effective from August 1978 to the present time are set out in Exhibit R- 3, Appendix 3 as follows:

"TO QUALIFY FOR A BOARD INTERVIEW *Recommendation from Base interview.

*Preferences: 1. Aviation Graduate or Military

Training. 2. University Degree. 3. Other (Minimum University Entrance). TO QUALIFY FOR A BASE INTERVIEW *Update since last review of files. *Currently employed as a pilot. *20/ 20 vision. Note: Applicants may be considered with less than 20/ 20 vision, if it is correctable to 20/ 20 with glasses and medically approved by the Senior Medical Officer - Air, prior to Base interview.

*Canadian Citizen or Landed Immigrant. EXPERIENCE

Age: Over 27 - ATR, plus special qualifications, such as Military or Airline experience, Aviation Graduate and University Degree, etc.

25- 27 - ATR or Senior Commercial, Class 1 Multi- Instrument Rating.

Preferences: 1. Aviation Graduate or Military Training. 2. University Degree. 3. Other (Minimum University Entrance).

20- 25 - Commercial or higher licence, Class 1 Multi- Instrument Rating, over 700 hours flying time.

Preferences: 1. Aviation Graduate or Military Training. 2. University Degree. 3. Other (Minimum University Entrance).

TO QUALIFY FOR ACTIVE FILE *Not over 27, unless ATR qualified, and *Not over 29, unless ATR and special qualifications, e. g. high time, University Degree, Aviation Graduate, Military Training, etc.

*20/ 20 vision Note: Applicants may be considered with less than 20/ 20 vision, if it is correctable to 20/ 20 with glasses and medically approved by the Senior Medical Officer - Air, prior to a Base interview. Maximum of 20/ 50 allowed.

*Canadian Citizen or Landed Immigrant. *Update within two years. *Actively flying.
*University Entrance. *Not over 31 years old, unless special qualifications present.

OTHERWISE - INACTIVE"

It is clear from the foregoing, that there has been (at least as early as July 1977, as evidenced by Exhibit R- 3, Appendix 1), and there continues to be an age qualification which is considered in respect of all candidates for pilot employment with Air Canada. In order for an applicant to keep his file active, he cannot be over 27 years of age unless he has qualifications over and above those required of younger candidates (for example, he must have an Air Transport Licence). A candidate over 29 would have to meet even higher qualifications. He would have to have in addition to an Air Transport Licence, other special qualifications, such as high flying time, university degree, or be an aviation college graduate or had military training. A candidate over 31 years of age would not be considered unless "special qualifications" were present. Accordingly, Air Canada imposes higher qualification requirements upon applicants in direct proportion to their age.

Air Canada has obviously concluded that it is necessary that the older candidate be required to possess additional qualifications in order to enter its pilot selection process.

When an applicant's file has been identified by the Selection Committee as one that is entitled to be given a preliminary interview, the file is sent out to the Flight Operations Base near his location. A senior supervisory pilot, trained in interview techniques conducts the interview of the applicant on a one- to- one basis. The interview takes approximately 1 hour, following which the interviewer prepares a written appraisal of the applicant's qualifications. If favourable, his file is then forwarded to Flight Operations Headquarters with a positive recommendation that the candidate be granted a further interview. At this time, the candidate is given a rating or priority which basically states whether the applicant is considered as an outstanding or average candidate.

If the base interviewer considers the applicant unsatisfactory, his file is returned to the employment office. The applicant could also be considered as not being competitive at this time but as worthwhile keeping on file as an active applicant to be reassessed at a later date by the selection committee. If the applicant was considered unsatisfactory or not in the highest category, he would be so advised by the base interviewer.

The second interview, known as the board interview, is set up for those applicants who have successfully passed the primary or base interview. The selection board at this level is made up of 4 or 5 senior flight operations management personnel and if possible a member of the medical department. This interview takes from 45 minutes to 1 hour and follows much the same format as the initial interview. A matrix is used and each candidate is given a priority rating by the board. Those that are considered employable then are subjected to a medical test and if they are assessed medically "fit" by the medical department are hired in the priority of the rating given by the selection board.

Applicants who are considered unsatisfactory or not competitive at this time are so advised and their files are returned to the employment office.

4. AGE POLICY OF AIR CANADA

The evidence is clear, and Air Canada concedes, that it has maintained consistently over the years a pilot hiring practice which has demonstrated a preference for younger qualified pilots over older candidates with the identical qualifications. That is illustrated in the fact that a chronologically older pilot applicant is required by virtue of Air Canada's in-house standards as set out in Exhibit R- 3, Appendix 3 to meet requirements higher than those of a chronologically younger applicant. This policy was expressed by Captain Sanderson and is set out in Exhibit R- 3, Page 40 as follows:

"Due largely to the much higher standard -- both initial and ongoing -- demanded by a major scheduled airline, in concert with the age/ seniority system ladder, Air Canada and its peers have historically preferred to hire pilots in the 21 to 27 year age bracket. As any employer, Air Canada will seek the best available prospect from a variable supply of applicants. In this regard, maximum age has not been a reason not to hire, but rather one of many preferential elements in the package which establishes priority of consideration.

... In summary, Air Canada has not denied employment to older pilots, but has shown preference to qualified younger pilots -- when available. Through experience with all age levels, there has been clear evidence that this philosophy most enhances the safety of our operations."

Section 10 of The Canadian Human Rights Act reads as follows: "It is a discriminatory practice for an employer or an employee Organization,

(a) to establish or pursue a policy or practice, or (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an

individual or class of individuals of any employment opportunities on a prohibited ground of discrimination."

Taking Air Canada's policy as it has existed and presently exists, and its admitted application to all pilot applicants, it is without question that this policy deprives or tends to deprive an individual or class of individuals, in this case, those over 27 years of age, of employment opportunities as pilots by placing them in a relatively disadvantaged position in comparison to younger candidates for employment opportunities with the airline. Accordingly, it is a policy which by the terms of section 10 of the Act constitutes "a discriminatory practice".

5. BONA FIDE OCCUPATIONAL REQUIREMENT

(a) Interpretation

It is Section 14 of The Canadian Human Rights Act which Air Canada relies upon so as to excuse its hiring policy from the general prohibition against discriminatory practices. Section 14(a) reads as follows:

"It is not a discriminatory practice if any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement."

Having found that there has been a prima facie case made out against Air Canada of discrimination in the contravention of Sections 7 and 10 of The Canadian Human Rights Act, the focus of this inquiry now centres upon the interpretation of Section 14(a) and its application to Air Canada's policy.

The Supreme Court of Canada in *The Ontario Human Rights Commission et al v The Borough of Etobicoke* (February 9th, 1982, unreported) had occasion to consider the bona fide occupational qualification and requirement defence as set out in section 4(6) of The Ontario Human Rights Code which is akin to the defence asserted by Air Canada under the federal legislation. The Court was interpreting the section in the context of the mandatory retirement of an Etobicoke fireman at age 60 as provided for in a collective agreement between the municipality and the firefighter's union. Mr. Justice McIntyre speaking for the Court stated at pages 6-7 as follows:

"To be a bona fide occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the code. In addition, it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

The answer to the second question will depend in this, as in all cases, upon a consideration of the evidence and of the nature of the employment concerned."

The Supreme Court of Canada has thereby confirmed that the defence imports both a subjective and objective test.

As to the former, the employer must demonstrate that it maintains an age discriminatory policy honestly and sincerely, believing that such limitation is in aid of carrying on its business in an expeditious, safe and economical fashion and not with a view to evading the purposes of the Canadian Human Rights Act.

As to the objective element of the defence, the Supreme Court of Canada by using the phrase "reasonably necessary" requires the application of a "business necessity" test and not a business convenience test. Thus, the employer has the onus of demonstrating that the essence of its business would be undermined (as opposed to merely being inconvenienced) if it was not permitted to apply its discriminatory policy.

(b) Burden of Proof: Another Canadian Human Rights Tribunal has recently commented upon Section 14(a) of the federal Act and the burden upon the employer to establish that it comes within this saving provision:

"Acts which would normally have been found to be discriminatory practices will not be objectionable if the basis for the act is a bona fide occupational requirement ... The burden of proof now shifts to the Respondent to show that the dismissal of [the employee] was justified in the circumstances. The language of paragraph 14(a) ('... is established by an employer... ') is clear in placing the onus of proof upon the employer to bring itself within the exception.

The employer in such cases properly bears the burden of showing that the discriminatory act was carried out in good faith according to the necessity of its business. The employer is aware of the demands to be placed on employees and the realities of its business.

If the employee were required to show that the employer's requirement was not a bona fide occupational requirement, the difficulties of proving that negative proposition would ensure that few complaints would be brought by employees and even fewer would be successful.

It is generally recognized that human rights legislation is remedial and intended to be liberally interpreted to achieve the intended policy of the legislator. The converse is also true. That is, that exceptions under such statutes are to be narrowly construed. The policy of the Act is not to be compromised or abridged unless by express language of the legislation. Thus, not only does a respondent bear the burden of showing that an employment condition qualifies as a bona fide occupational requirement, as an exception to the general prohibition against discriminatory practices, the definition of that exception will be narrowly interpreted.

A good deal of jurisprudence now surrounds the concept of a bona fide occupational requirement. There have been cases in almost every province dealing with the issue. Most of these cases involve discrimination on the basis of age or sex...

Each particular type of employment, of course, has its own requirement. Thus, what is a bona fide occupational requirement has to be determined on a case-by-case basis."

(K. S. Bhinder v Canadian National Railways, September 22nd, 1981 at pp. 67- 68)

In The Ontario Human Rights Commission et al v The Borough of Etobicoke, supra, Mr. Justice McIntyre confirmed that the burden of establishing this defence rests upon the employer under the Ontario Human Rights Code even though it does not contain express wording imposing such onus upon him as it does under the federal equivalent. He also went on to state the standard of proof upon the employer. These were his words at page 6 of the Judgment:

"Once a complainant has established before a board of inquiry a prima facie case of discrimination, in this case proof of a mandatory retirement at age sixty as a condition of employment, he is entitled to relief in the absence of justification by the employer. The only justification which can avail the employer in the case at bar, is the proof, the burden of which lies upon him, that such compulsory retirement is a bona fide occupational qualification and requirement for the employment concerned. The proof, in my view, must be made according to the ordinary civil standard of proof, that is upon a balance of probabilities."

Although there is no indication by the Supreme Court of Canada that the standard of burden of establishing the bona fide occupational qualification defence is lessened when public safety is involved, it did state at p. 8 that in such circumstances "the board of inquiry and the court must consider whether the evidence adduced justifies the conclusion that there is sufficient risk of employee failure in those over the mandatory retirement age to warrant the early retirement in the interests of safety of the employee, his fellow employees and the public at large". Canadian Tribunals have felt that the burden to be discharged by the employer is lighter in such circumstances. For example, in K. S. Bhinder v Canadian National Railways, supra, the Tribunal stated at page 82 as follows:

"A great deal of jurisprudence on the matter of bona fide occupational requirements has arisen out of cases where the employer's concern is for the safety of fellow employees or the public as a whole. Where it can be shown that there are safety implications for persons other than the employee himself, the burden of proof on the employer to justify an employment requirement will be considerably less. Boards of Inquiry have been willing to defer to the judgment of employers when there seems to be a necessity to do the utmost to maintain safe employment practices for the benefit of fellow employees or the public as a whole."

In The Canadian Human Rights Commission v Voyageur Colonial Limited (December 10th, 1980), R. D. Abbott sitting as a Human Rights Tribunal found at p. 31 that the Respondent's policy of an age 40 hiring ceiling was one which was honestly directed at achieving public safety and "the burden of proof of the bona fides of its occupational requirement is correspondingly lighter". To the same effect is Little v St. John Building & Dry Dock Company Limited (1980), 1 C. H. R. R. 1 at p. 8.

This reduced burden was first enunciated in Courts in the United States. One such early case was Spurlock v United Airlines Incorporated 475 F. 2d 216, 5 F. E. P. Cases 17, (U. S. Court of

Appeals, 10th Circuit, 1973). Although dealing with the question of race and not age discrimination, the Court discussed the burden upon the airline to justify its hiring policy of pilots at *F. E. P. Cases*, p. 19 as follows:

"When a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant, the courts should examine closely any pre-employment standard of criteria which discriminate against minorities. In such a case, the employer should have a heavy burden to demonstrate to the court's satisfaction that his employment criteria are job-related. On the other hand, when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related. The job of airline flight officer is clearly such a job. United's flight officers pilot aircraft worth as much as \$20 million and transport as many as 300 passengers per flight.

The risks involved in hiring an unqualified applicant are staggering. The public interest clearly lies in having the most highly qualified persons available to pilot airliners. The Courts, therefore, should proceed with great caution before requiring an employer to lower his pre-employment standards for such a job."

There is no question that Air Canada has a public duty to carry on its operations with the highest degree of safety. It is accordingly in the business of assessing risk factors and implementing methods which eliminate or reduce such hazards. The consequences of error on the flight deck are apparent to all.

(c) Application of Bona Fide Occupational Requirement Defence to Bus Drivers & Pilots

The first important decision to consider age discrimination and the bona fide occupational qualification defence was *Hodgson v Greyhound Lines Inc.* 499 F. 2d 859 (U. S. Court of Appeals, 7th Circuit, (1974), Cert. denied, 95, S. Ct., 805 (1975)). At issue was Greyhound's policy of not hiring anyone above the age of 35 for the position of bus driver. At trial, evidence was adduced showing that there were two types of bus runs, normal scheduled runs and extra-board runs. The bus drivers on the extra-board runs were on an unpredictable 24 hour call and often endured more rigorous schedules. The evidence showed that more accidents occurred on these trips than on the regular routes. Older drivers, due to their seniority, could avoid the more strenuous extra-board runs by selecting a scheduled route. Also, those older drivers still on the extra-board routes could cope with its strenuous physical demands due to their experience. However, Greyhound argued, if new drivers were hired who were over the age of 35, they would not have this compensatory experience and there would be a greater chance of an accident and injury to passengers.

The Appellate Court made public safety the focus of its decision. It determined that the essence of Greyhound's business was the safe transportation of passengers and that Greyhound only need demonstrate that the essence of its business would be undermined by hiring drivers over 40. Because of the "compelling concerns for safety", the Court held that Greyhound had only to show a "rational basis in fact" for believing that elimination of its maximum hiring age would increase the risk of harm to its passengers. Moreover, the Court held that Greyhound could meet

its burden of proof if it demonstrated only a minimal increase in risk of harm; hence, it would be sufficient for Greyhound to show that eliminating its hiring policy could jeopardize the life of even one more person than might otherwise occur. The Court felt that it had been demonstrated that aging had a detrimental effect on driving skills and that these changes are not detectable by physical examination, and furthermore, that such testing would be impractical on a regular basis. On this basis, the Court decided that Greyhound's age hiring limitation was a bona fide occupational qualification for the job of bus driver.

The Court in *Hodgson* was dealing with The Age Discrimination in Employment Act of 1967 which required that a bona fide occupational requirement be "reasonably necessary to the normal operation of that particular business." Although no such phrase appears in Section 14(a) of The Canadian Human Rights Act, the objective element in the test laid down by the Supreme Court of Canada in *The Ontario Human Rights Commission v The Borough of Etobicoke*, supra, makes this wording of the American Age Discrimination in Employment Act and the *Hodgson* interpretation relevant to the Canadian context. Moreover, a recent Canadian Human Rights Tribunal has adopted the principle in *Hodgson* as applicable to section 14(a) of the Canadian Act: see *The Canadian Human Rights Commission v Voyageur Colonial Limited*, supra, at pp. 31-32.

Again, in *Usery v Tamiami Trail Tours Incorporated*, 531 F. 2d 224 (U. S. Court of Appeals, 5th Circuit, 1976), the United States Court of Appeals held that a bus company's policy of refusing to consider applicants for initial employment as inter-city bus drivers between the ages of 40 and 65 was a bona fide occupational qualification reasonably necessary to the normal operation of its business. The Court acknowledged that federal legislation promoted employment of older persons based upon ability rather than age and stated that such was a laudable purpose, but chose to balance this interest against the claims of a nationwide busing industry that the safety of the travelling public utilizing bus service between cities militated against hiring bus drivers over the age of 40. The Court regarded job discrimination based upon age as a necessary means of maintaining the established safety record.

This case is of interest, as well, because of its further interpretation of the "business necessity" test articulated in the *Hodgson* case. According to the Court, an employer must demonstrate in the first instance that the job qualification that it has chosen is "reasonably necessary" to the essence of its business. Once business essence has been demonstrated, the "reasonably necessary" language permits the employer, the essence of whose business is safety, to set very stringent job qualifications so long as these qualifications are designed to promote public safety. Once this is shown, the employer, however, has the additional burden of demonstrating either a factual basis for believing that all or substantially all job applicants over a certain age are incapable of safe and efficient job performance or that it is impossible or impractical to test job applicants over a certain age on an individualized basis to determine whether they meet the stringent job qualifications required by safety concerns.

The United States Court of Appeals, 5th Circuit, did find that the employer had satisfied both of the aforesaid tests in that the safe transportation of its passengers was the very essence of its business and that there was no effective individualized testing procedure that could meet with

sufficient reliability the bus company's special safety obligations. The Court accordingly held that its maximum age restriction must stand.

A similar decision was handed down by the Canadian Human Rights Tribunal in the *Voyageur Colonial Limited* case, *supra*, in holding that the Respondent's exclusion of over 40 year old candidates for employment as bus drivers was a bona fide occupational requirement and not a proscribed discriminatory practice within the meaning of The Canadian Human Rights Act.

All of those cases were based upon the rigours of the spare or extra-board system which confronted newly hired bus drivers. The evidence turned upon the ability of older individuals to cope with the additional stresses that they would face as beginning drivers with low seniority under the spare-board system -- stress which they would have to endure for approximately 10 years. Since spare board bus drivers are on call and must be prepared to drive any route at any time on short notice, the work is unpredictable and physically exhausting. It was this additional stress that the Courts and the Tribunal were concerned about in terms of older candidates. In those cases, there did not exist any way of predicting an older person's capacity to adjust to that stress. Accordingly, they held that the one reasonably reliable barometer of such matters was age; and, if this requirement was eliminated, the risk of harm to the travelling public would increase.

These cases, are of limited relevance to the issues before this Tribunal since there are no additional stresses for an older individual embarking upon his pilot's career with Air Canada than for a younger applicant. There is nothing in the airline business akin to the extra-board or spare-board system which is prevelant in the busing industry. The progression to larger aircraft and more senior positions with Air Canada is gradual and involves extensive training. Moreover, unlike the bus driver cases, it is practical, indeed obligatory, for Air Canada to maintain a regular periodic medical surveillance upon its pilots. They are subjected to a medical every 6 months and they take an additional test that is of a preventative nature every two years. After reaching 40, the Air Canada pilot is subjected to more frequent electro-cardiograms to satisfy more stringent government standards.

In *Houghton v McDonnell Douglas Corp.* 553 F. 2d 561 (U. S. Court of Appeals, 8th Circuit, (1977), Cert. denied, 98, S. Ct. 506 (1977)), a 51 year old test pilot, being the oldest pilot employed by the company, was transferred from flight status to ground duties. The company argued, unsuccessfully, that age was a bona fide occupational qualification under the section of The Age Discrimination in Employment Act which provided that an employer may take action based upon age when such age discrimination is "reasonably necessary to the normal operation of the particular business".

The U. S. Court of Appeals for the 8th Circuit differed from the interpretation by the Courts in *Hodgson* and *Tamiami*, *supra*, of evidence presented on the aging process. While the other Courts viewed the aging process of the bus driver within the context of the aging of the general public, the Court in *Houghton* held that professional pilots are a particular species and deterioration as a function of aging occurs much more slowly in the test pilot than it does in the rest of the population. The Court also placed much more faith in medical technology to determine functional age the age at which a person has the mental capacity and physical ability

to do the job. It felt that medical science could "predict a disabling physical condition in a test pilot with virtually full proof accuracy" (p. 564). Therefore, the Court found no bona fide occupational qualification justification for the imposition of a chronological age cut-off for the test pilots.

The Court later amended its judgment to delete the last quoted sentence and remanded the matter back to the District Court to determine whether the Complainant was still physically capable of safely and effectively performing his duties of test pilot in which case he was to be reinstated. The District Court held that they could not so find in favour of the Complainant mainly because there were no reliable testing methods to determine psychophysiological or functional age and that it was best to err on the side of safety given the degenerative changes which take place because of aging: (1979) 29 F. E. P. Cases 915. The District Court, in so finding, seems to contradict the very principles upon which the Court of Appeals based its decision.

Criswell et al v Western Airlines Inc. (United States District Court, Central District of California, May 12th, 1981, unreported) is a recent case of interest. It was an action under The Age Discrimination in Employment Act brought by inter alia two former captains against Western Airlines Inc. Having reached the age of 60, they were required by Federal Aviation Administration regulations to retire as captains from the airline. However, they wished to downbid and continue flying as second officers as there was no equivalent mandatory F. A. A. age 60 retirement for second officers. The Respondent refused, alleging the bona fide occupational qualification defence on the basis that the onset of disease and other debilitating conditions were age related and there was no practical way of predicting in pilots over age 60 on an individual basis whether such disease or condition, which would pose a flight or safety risk, would occur. Substantial medical evidence was adduced by both the Complainants and the airline on this issue. In fact, the two leading experts who testified in that case also gave evidence in the instant case, i. e. Dr. Busby for Air Canada and Dr. Mohler for the Complainants. The Court concurred in the finding of the jury that the application of the age 60 rule to second officers in addition to pilots in a hands-on position was not reasonably necessary to the essence of its business and that Western did not have a sufficient factual basis for believing that second officers past age 60 would be unable to perform their duties safely and efficiently and that it was not highly impractical to deal with second officers past age 60 on an individual basis. In holding that Western did not satisfy the burden upon it in establishing the bona fide occupational qualification defence, it is important to note that the Court made a distinction between the duties of a flight engineer or second officer on the one hand and the duties of a captain and a first officer on the other, in the sense that the normal duties of the former are less critical to the safety of flight than those of a hands-on pilot. Moreover, the age 60 rule as required by the F. A. A. with respect to pilots had never been applied by the F. A. A. to flight engineers or second officers and accordingly the Court was of the view that retirement at age 60 for second officers was not a bona fide occupational qualification reasonably necessary to the normal and safe operation of Western's business.

A second recent decision which is germane is *Smallwood v United Airlines* (United States Court of Appeals, 4th Circuit, September 17th, 1981, unreported) as it considered the very issue before this Tribunal. That case dealt with the refusal by United Airlines to hire a 48 year old applicant who had ten years of previous flight experience. The airline had a policy of not hiring applicants

over age 35 and relied upon this policy as a bona fide occupational qualification. The main evidentiary thrust was that airline safety would be adversely affected if the Respondent was forced to hire pilots over the age of 35. Its contentions were two-fold: that hiring older pilots would impede its "crew concept" - the safe and effective operation of its three-man crews in a coordinated manner -- and that hiring pilots over the age of 35, significantly raising the average age of pilot personnel, would disproportionately increase the chance of medical emergencies during flight. The Court of Appeals rejected both submissions. It found first, that there was no reliable evidence that the airline's crew concept would be impaired by hiring second officers over age 35. The Court felt that the alleged harm to the crew concept was found to be a function of prior experience, not age at hire. The Court of Appeals also rejected the medical arguments of the airline and found that its medical examination programme was effective in detecting potentially disabling medical conditions and thus the airline had failed to show the impossibility or impracticality of dealing with the older applicants on an individual basis.

The last of the trilogy of recent U. S. cases is *Murnane v American Airlines Inc.* (United States Court of Appeals for the District of Columbia, October 1st, 1981, unreported). It came to the opposite conclusion of the Court in *Smallwood* but based its decision upon a factor not previously considered by other Courts. In that case, a 43 year old former naval pilot brought suit against American Airlines for its enforcement of an "age 30" rule under which American Airlines would not consider hiring any person for the position of flight officer, even though otherwise qualified, if he was over 30 years of age. American Airlines hired their flight officers on the basis that they would eventually proceed to co-pilot and then captain of their own planes. The process usually took 14 to 20 years, the average being about 16 years. Pursuant to F. A. A. regulations, Captains had to retire at age 60.

The Court was limited to examining the discriminatory effects of the "age 30" rule as it applied to persons over 40, due to the scope of The Age Discrimination in Employment Act as it only applied to employees between 40 and 65 years of age. Thus, the comparison was between a potential candidate for flight officer who was 30 years of age or younger and a potential candidate who was 40 years of age or over. The 30 year old flight officer, on average, could become a captain by the time he was 46 years of age and could continue in that position for another 14 years until he was forced to retire. However, a 40 year old commencing his position as flight officer, on average, would only be able to acquire 4 years experience as a captain before having to retire under F. A. A. regulations at age 60. The Court found that on these facts that by reason of the "age 30" rule, American Airlines had captains with more years of experience piloting their planes than otherwise would result if no such rule existed. The Court held that safety was the essence of the airline industry and the airlines were duty bound to reduce any risk to its passengers. The Court went on to hold that American Airlines' age restriction was reasonably necessary to maintain that safety as the "age 30" rule resulted in captains acquiring greater flying experience, which presumably led to increased passenger safety.

More shall be said of these three cases in the context of the evidence adduced both in favour and against the bona fide occupational requirement defence in the instant proceeding.

Air Canada in Exhibit R- 3 sets out some general observations as to why it regards age as an important factor in pilot selection. In support of its contention that age is a legitimate and

required consideration in the employment of pilots, Air Canada adduced evidence which can be conveniently dealt with hereinafter under the following headings:

Studies Conducted by Air Canada; Crew Personality Dynamics and the Dead End Phenomenon; The Seniority System; Motivation; Return on Investment; Medical Considerations; Experience Factor.

(d) Studies Conducted By Air Canada: Air Canada's position is that it has been its experience that hiring a qualified younger pilot provides the best opportunity for a successful piloting career, minimizing competency problems and thereby achieving the airline's prime objective of providing the public with safe air transportation. A series of studies were undertaken by Air Canada to examine the role of age in this context.

(i) The 400 Pilot Study:

As early as 1976, Captain Sanderson proposed that a review of pilot performance be conducted for the purpose of evaluating the merits of certain pilot employment criteria that had been applied in the past. The main purpose in conducting such a review was to assess pilot performance particularly because of the company's concern for establishing the highest possible level of flight safety. The study became known as the 400 Pilot Study (Exhibit C-89). The objective of Part 1 of the 400 Pilot Study was to "assess and validate selection criteria used to employ approximately 500 pilots in order to identify and modify systems strengths and weaknesses as seen necessary". Part 1 of the Study was to deal with rated performance observed during initial ground training, miles training, simulator and flight training, plus a limited period of line service and it was to cover those pilots employed by Air Canada between February 1978 and June 1979. Part 2 of the Study was to be initiated only after the control group of approximately 400 pilots had completed a minimum of 2 years line service or in the Summer of 1981 and was to attempt to measure line performance and demonstrate employee characteristics.

The objective was to emphasize identification of candidates who not only should be successful in their initial ground training but who could be assessed as possessing those characteristics that are felt to be necessary in the flight deck environment and in the long term as motivated, loyal and committed employees of Air Canada (See Exhibit C-89, p. 2).

The Study was conducted to establish common denominators in the success and failure group and comparisons were made between the top two performers in each class during this period of time and the failures in those classes. Captain Sanderson justified selection of the top two performers only within the success group as being consistent with Air Canada's desire to hire only the best candidates and therefore its efforts were directed to identifying the common characteristics that would point to those who best fitted that objective and, conversely, to isolate those that fell within the failure group.

Air Canada submitted that the study demonstrated the following:

1. The most successful group during initial training phase were aviation college graduates and those with two years post secondary education whereas the poorest performance recorded was by those who had completed a basic high school education;
2. As the number of years away from formal schooling increased, it negatively affected the applicants' performance;
3. The pilot with the greatest opportunity to succeed was one whose hours of flying time was within the 2000 to 2499 hours range. Conversely, those pilots with the least chance of success were those with less than 1500 hours and those with more than 5000 hours;
4. Those pilots who came from the military or executive charter background performed better than those who came from a flying school instructor background;
5. The majority of successful pilots are in the 20 to 26 age range whereas success rates reduce as enrollment age increases and finally reaches the point where no pilot 30 years of age or older was able to achieve either first or second place standing in the ground school group;
6. The failure rate of total pilots in a given age group escalates with age.

By analyzing the Phase 1 Study, Air Canada submits that certain common attributes emerge with respect to each of the top performer and the failure groups. Accordingly, these characteristics were compiled into an "ideal profile" to assist the Airline Pilot's Selection Committee in determining which of the applicants had the greatest potential for success. It is Air Canada's position that this ideal profile supports the original in-house guidelines which it followed during the years 1977 to 1980. The ideal profile arose in 1980 and is contained in Exhibit R- 7. It is set out as follows:

"The 1980 Profiles" (Ideal Profile) PLUS NEUTRAL MINUS LICENCE ATR/ SR. COM COM.

(Airline (Commercial) Transport Rating/ Senior Commercial)

EDUCATION 2 YRS p/ s (AC) UNIV. DEG HIGH SCHOOL (2 Years' Post Secondary or Aviation College)

AGE 20- 26 - 27+ EXPERIENCE MIL/ EXEC BUSH F/ S INST

(Military (Flying or School Executive Instructor) Charter)

HOURS 2000- 2500 1500/ 3000 less than 1500, greater than 5000 YRS. FROM NOT greater - greater than SCHOOL than 5 YRS 7 years

Phase 2 of the 400 Pilot Study was undertaken not after the second year of line performance as originally contemplated; but, rather its objective was changed to measure pilot performance during the first year of pilots' line flying employment and to relate that information to future hiring criteria. The entire remaining pilot population included within Phase 1 of the 400 Pilot

Study provided the control group to be reviewed in Phase 2. In fact, all but three of the original 400 Pilot group remain employed. The three persons who did not continue in employment were of age 28 or older. Two of these individuals were terminated due to their performance and one resigned.

Air Canada submits that Phase 2 of the 400 Pilot Study revealed that:

1. A greater percentage of younger pilots continue to perform to a satisfactory or better rating;
2. Of the younger pilots in the less challenging positions, (for example second officer on DC- 8 and second officer on B- 727), a greater percentage performed to a satisfactory or higher standard than the overall group. Of the older pilots, in the same positions, however, a much smaller percentage performed to a satisfactory or higher level when compared to the overall group;
3. There was an indication that the younger pilots' motivation remained at a much higher level when assigned to a less challenging position. There was also an indication that the older, more experienced pilot, who was assigned to a more challenging position requiring greater motivation, continued to perform at a higher level. The significance of this observation is that the combined effects of the seniority system and fluctuating company pilot requirements made it impossible for Air Canada to predict or control the assignment of newly hired pilots to any specific equipment. Accordingly, because Air Canada feels that there is a connection between motivation and performance and therefore safety, it was concerned about motivation problems that could arise when an experienced pilot was assigned to a less challenging position.

Accordingly, Air Canada has submitted that the Phase 2 Study further supports the validity of the 1980 ideal profile as established in the Phase 1 part and which originated in the earlier hiring guidelines as contained in Exhibit R- 3. Moreover, Air Canada submitted in argument that an analysis of its files shows that when its ideal profile is applied retroactively to those pilots who failed in training during the period, 1965- 1976, 91% of those who so failed were outside the profile appropriate to their age group. Thus, it is urged that the ideal profile can be beneficially used to screen out prospective failures.

Commission counsel urges that both Phases 1 and 2 of this study, be kept in their proper perspective. The study had its genesis in a document entitled "A Proposed Air Canada Hiring Policy" (Exhibit C- 91) which was prepared by Captain Sanderson in February of 1977 and who at the time had company- wide responsibility for pilot hiring. The purpose of the paper was stated to be as follows:

"Much of the content of this submission merely attempts to formalize practices which have been developed by previous individuals and committees charged with pilot selection. Great credit is due to these men whose hiring responsibilities have been carried out so skillfully without the aid of formal guidelines."

Counsel argues that this is illustrative of the fact that Captain Sanderson's proposal which was eventually carried forth into the 400 Pilot Study was not to do an entirely objective examination but simply to formalize existing practices.

Moreover, when the proposal was prepared, lurking in the background was the thought of increasing societal pressure to eliminate discrimination in employment practices. There appears in the proposal under the heading "Purpose" the following:

"Added to this mathematical aspect, are the social, cultural and political complications that arise as individuals, in their contemporary sense of social awareness attempt through various means, to pressure for their "right" to be hired."

That passage is followed immediately by a statement that "Flight Operations" objective should continue to be to preserve its autonomy in its responsibility to select pilots that it deems to be the best possible pilot/ employee available at any given period of hiring. And, under the heading "Qualifications" in the same document in a discussion of whether the medical visual standard of 20/ 20 should be reduced, it is stated:

"This approach might be considered if exceptional candidates are otherwise excluded or, it is felt that 'Equal Opportunity' type social pressures require it..."

Even at this embryonic stage, Captain Sanderson included in his list of qualifications in this proposal the following age limitation:

"Age - minimum 20 years, maximum 29 years. Exceptions outside of this range can be made if the P. S. B. Pilot Selection Board collectively agrees there are compensating qualifications present."

As to the substantive aspects of the 400 Pilot Study, it should first be noted that Captain Sanderson designed the study without the assistance of Air Canada's professional statistician. She was consulted as to how the information might be used only after it was accumulated. Her only specific involvement was the making of suggestions for the chart which appears at page 5 of Appendix 7 to Exhibit R- 3. The statistician did not participate in the design stage of the Phase 2 Study.

The total number of pilots hired during the period covered by the Phase 1 Study was 388. However, only 70 of this number were included in the Study, inasmuch as only the top two pilots in each class (designated as the success group and totalling 36) were compared with the entire number of failures during the period (totalling 34). Accordingly, 318 members of the classes in the same period who were successful (i. e. 80%) were not covered in the Study in any way.

Phase 1 was prepared and then presented in December of 1979 to the Pilot Selection Seminar which was held over a year after the complaints in this matter had been filed. Commission counsel argues that the real initiative for the Phase 1 Study was the existence of these complaints. This is evidenced by the fact that the item in the agenda under which this Phase 1 Study was presented to the meeting of the 1979 Pilot Selection Committee Seminar was stated to

be "Age Discrimination Status Report" which, as Captain Sanderson testified, related to the subject matter of this hearing.

Commission counsel also points out certain factors pertaining to the Phase 2 Study which he submits affects its credibility. Originally, as mentioned, Phase 2 was designed to review the group of 388 pilots after 2 years of on line service. Subsequently, this was changed to study their performance on the completion of probation, although, the new objective of Phase 2 was to assess pilot performance during the first year of line flying. Commission counsel points out that there was no probationary exam until the Spring of 1980 and the age factor was the only item taken from the ideal profile described in the Phase 1 Study which was reviewed in detail in the Phase 2 study. Accordingly, Commission counsel submits that both Phases 1 and 2 of the Study were merely colourable attempts to provide specific defence evidence for this hearing rather than a truly objective analysis of the pilot hiring selection process.

Commission counsel called as a witness a statistician with a view to undermining the nature of the 400 Pilot Study and the alleged conclusions that could be derived therefrom. The expert, Terry James Cheney, lodged a number of criticisms, the most significant of which relate to the failure to adequately design the study and the fact that the data base that was being considered was too small to reap significant conclusions.

Mr. Cheney was critical of the fact that there was no formal design stage to the study. Nor was there any standard of quality control in terms of what was to be done with problems created by the raw data. Moreover, the data base was so small in many cases that one person more or less would make a great difference in the results that were achieved.

He testified that in order to do a meaningful study to determine whether any specific conclusions could be drawn from the fact of a candidate's age, it would be important to obtain a representation in the study group which eliminated a number of factors which otherwise would influence the success or failure rates. He suggested that the study might have to take as long as a 20 year period because it is possible that an individual aged 25 or aged 45 in the year 1950 might have performed in a way different than someone of comparable age hired today. There would also have to be a way to ensure adequate representation for unique groups. He stated:

"... If you are trying to make an inference to people over 30 you would have to have enough people over 30 who were hired in peak hiring periods and hired in low hiring periods who had certain types of marital situations, certain types of ethnic backgrounds, a whole variety of things to be able -- what you are trying to do is find a way to isolate age as a factor so you can say 'if we are finding an effect we've controlled for everything else, the only thing which could be going wrong here is age. Therefore, age must be the factor which is effective. '" (Transcript, p. 2031)

As to the graphs appended to Exhibit R- 3 he stated: "I think when we go to various of the graphs and tables, the constantly recurring characteristic here is that there is a very limited data base and quite clearly, it becomes especially limited for certain of the factors and with increasing age the number of representatives we have in the study becomes very few. It fact, with people over 30 it probably becomes almost non- sensically small." (Transcript, p. 2033)

With respect to the Phase 1 aspect of the 400 Pilot Study, Mr. Cheney testified that since it was a study of only 66 pilots, as it turned out, all that one could reasonably do with Phase 1 is to describe the characteristics of 66 pilots. He stated that one could not draw any conclusions about a candidate's likelihood of succeeding through the training program from the results of the Phase 1 Study.

Mr. Cheney took issue with the charts and their presentation in Appendix 7 of Exhibit R- 3. One criticism was that it was misleading to describe the data in terms of percentages. The survey was insufficient in size to justify computing percentages. Only 66 pilots in total were included in both the success and failure groups in the Phase 1 Study and the use of percentages for such a small data base may lead to a visual distortion of the actual situation.

With respect to the first chart which apparently measures the hours of flying time accumulated at time of employment in terms of the success group and failure group, Mr. Cheney testified that one's immediate visual response to the first category i. e. those with 1000 to 1499 hours, is that there are 2 1/2 times as much chance of failing as succeeding if a candidate has accumulated that number of hours. In fact, what is being portrayed is not the relative percentage of succeeding or failing of the candidates but in fact the percentage of the failure group who had these number of hours.

Moreover, on the horizontal axis the breakdown is in roughly 500 hour allotments. Given that there are only 33 people in each of the success and failure groups, Air Canada has chosen to break these 33 down into 8 distinct categories of hours of flying time accumulated at time of employment. In the opinion of Mr. Cheney, there is not enough data to break it into 8 distinct categories and have enough cases in any category to say anything statistically meaningful. In his view, with only 33 candidates in each group, it would have been preferable to have chosen perhaps only 3 or 4 categories.

Looking at the chart, Mr. Cheney was of the view that one might obtain an impression that people with fewer hours tend to fail but with respect to groups with more than 2500 hours, there is not much difference between success and failure in terms of the number of hours. In fact, Mr. Cheney indicated that what the graph does truly represent is that of the failure group, 20% had 1000 to 1499 hours, 35% had 1500 to 1999 hours and so forth. In its current presentation the graph says nothing of the probability of success or failure for the average candidate. Given these limitations, Mr. Cheney said that all an interpreter of this data could conclude is that flying time has little effect on the likelihood of someone being in the failure group or in the success group.

Chart 2 in Appendix 7 of Exhibit R- 3 purports to depict the previous flying experience of the success and failure groups. Mr. Cheney testified that the immediate visual impact of this chart is to suggest that those who previously were flying instructors are twice as likely to fail as to succeed and that those who had flown as bush pilots perhaps have an equal chance of failing or succeeding, that those with military experience have a perfect chance of succeeding and those who had flown as executive or charter pilots have approximately 6 times as much chance of succeeding as failing and that schedule pilots have a 50/ 50 chance but the odds are in favour of succeeding. In fact, according to Mr. Cheney, the chart actually shows that of the failure group, 54% were instructors, 30% were bush pilots, none had military experience, 3% flew executive

charters and 12% were schedule pilots. But, the graph says nothing of the odds of an individual with particular flying experience succeeding.

Mr. Cheney again pointed out the difficulty of using a very small data base in the context of the military category. He indicated that the military grouping in this instance represented only two people. With such a small data base, normally proper statistical procedures would require building in a confidence interval i. e. a margin for error. If this confidence interval was reflected in these circumstances as being one person more or less, the military category could change, such that the visual representation as to likelihood of success would be precisely equal assuming one person moved from the success group to the failure group, thus indicating that one person more or less makes a radical difference in how things are interpreted.

Similarly, Mr. Cheney criticized the third chart which showed levels of education achieved and depicting age breakdowns. He said that this chart would not allow one to interpret the chance of a typical candidate succeeding on the basis of knowing his education.

The witness observed in respect of this chart: "... what you are finding here is that there are too few cases to comprehensively cover off all situations. The reason there are no people 27 plus in one or two years post- secondary and college diploma isn't because people 27 plus in the Canadian population don't have those characteristics. It's because the data base area isn't big enough to have representation from those kinds of people, and you certainly couldn't make any absolute conclusion where they are not represented. It emphasizes further the limitations of the data you have got here..." (Transcript, p. 2057)

With respect to Chart 4 in Appendix 7 which is entitled "Age at Time of Enrollment", the immediate visual impression of the graph is that candidates in the 20 to 23 age category seem to have about twice the chance of succeeding as failing, people in the 24 to 26 age category have approximately equal chances of succeeding or failing, and people in the 27 to 29 age category probably have more chance of failing than succeeding and people who are 30 and over have virtually no chance of passing. In fact, what is actually being given here is a description of the composition of the failure group and the top two in the success group.

It shows that 21% of the failure group were aged 20 to 23, 36% of the failure group were 24 to 26 years old, 30% of them were age 27 to 29 and 12% of them were between the ages of 30 to 32. The graph says nothing about the probability of failing for the typical candidate.

Mr. Cheney reviewed the conclusions in Phase 1 of the 400 Pilot Study pertaining to the most successful candidate and the failure characteristics. With respect to the age factor, he stated that it is probably not very strongly related to failure from the analysis of the raw data. If anything, the charts to Appendix R- 3 demonstrate that it is in the 24 to 26 year old range where there tend to be failures.

Mr. Cheney commented on the 1980 ideal profile and stated that with respect to the factor of age, he felt that on the basis of the data, those 20 to 23 years of age deserved a positive rating on the evidence coming from the Study. Those 27 years and over were neutral and those 24 to 26 should be placed in a negative category.

With respect to the heading "Experience" in the ideal profile, he stated that there should be no credit given for prior military experience on the basis of the Study because no confidence could be placed in the small data base that was available.

With respect to the number of flying hours in the ideal profile, no data was taken which is applicable to the average candidate. Rather, there is a comparison of the traits of the very ideal candidate and the failure candidate which gives you no better insight into the average candidate. And accordingly this characteristic has not been proven to be significant.

He indicated that each factor in the ideal profile has been given equal weight and the form of analysis has been to consider one off or two off the ideal profile. It was Mr. Cheney's view that in terms of the observations he had made about the inadequacy of the data that all these factors should not be given equal weight.

As to Phase 2 of the 400 Pilot Study, Mr. Cheney testified that only the age factor in the 1980 ideal profile was continued to be studied in any depth through Phase 2. He indicated that to consider age by itself without putting it into context is likely to result in misleading conclusions. In Phase 2 there were no systematic or comprehensive review of all the other factors which might affect someone's performance. Again, with Phase 2, there is an attempt to make comparisons on the basis of percentages which because of the small numbers involved could fluctuate rapidly on the basis of one person more or less being considered a success or failure. Given the limitation of this data base, Mr. Cheney did not feel that the conclusions were statistically valid. Moreover, it is to be noted that the probation exams were introduced in the Spring of 1980 and therefore the requirement to write these examinations for probation release was not applicable to all pilots. Mr. Cheney therefore observed that obviously not every pilot in the Study had the same applicable characteristics or experienced exactly the same factors since not all of them were subjected to the probation exams.

Mr. Cheney raised other criticisms with respect to the Phase 2 Study and felt that the figures did not allow one to conclude that a greater percentage of younger pilots performed better. With respect to both Phases 1 and 2 of the 400 Pilot Study, Mr. Cheney gave the following opinion as to the statistical adequacy of the methodology employed:

"As I have suggested almost from the beginning of our conversations, in kind of laying out the type of research project this is, this isn't one involved with statistical rigour or making statistical inferences; it is one of describing a very fixed data base. So from that point of view, it is rather severely limited in the kind of inference you can make from it. I think that would have to be considered a rather major limitation of the study. Above and beyond that, because of a variety of things we have gone over here in terms of the quality control for the data, how the data was treated, the kind of analysis that was brought forward, you would have a lot of reservations about making any conclusions from the study and perhaps even making any decisions or recommendations utilizing the data.

... If we want to try to use the data, and I think this is the real world situation, we don't have the ideal research environment, you have the pragmatic environment, and it may not be worth saying, but I think clearly in the real world of business in making management decisions, this is a

typical management research report. There is no reason to believe this is especially bad or contrived or anything else.

I think this is the kind of material a manager has to work with. And the problem is, given this data, what is the best informed decision he could make.

... I think in terms of your management decision to act on this, you clearly have to recognize that there are other data quality control efficiencies. The way the data is represented might be misleading you and you should want to talk with the researchers about it to find out what it really meant or how you should safely use it, and then you have to recognize that because of the design context, it is really not telling you anything at all about all the 400 candidates. It is not telling you anything at all about next year's recruitment batch. It is not telling you anything at all about people over 30." (Transcript, pp. 2094- 2096)

By reason of these deficiencies, the Commission argues that no effective conclusions can be drawn regarding the probability of success of younger as opposed to older candidates. It is further argued that the Study could have been done much more accurately and in a manner which would have been more substantively useful in view of the fact that Air Canada has a significant data bank and professional statistical capabilities. Furthermore, as mentioned earlier, there are serious questions about the objectivity of the Study since it was conducted in the context of the complaints before this Tribunal.

Respondent's counsel responded that Mr. Cheney lacked the first- hand experience to properly analyze and evaluate the research material in question. Mr. Cheney acknowledged that he has had very little experience with respect to personnel activities, has had no involvement in recruiting, has played no role in the assessment of employee performance, has not been involved in any aspect of airline operation and has had no involvement in the analysis of pilot performance. Mr. Cheney conceded that he is unaware of any more reliable study than the 400 Pilot Study dealing with pilot recruitment and to the best of his knowledge there are in fact no other reports on the subject at all. Respondent's counsel also argued that there were occasions in his testimony where Mr. Cheney demonstrated a lack of comprehension of the basis upon which these studies were conducted. Furthermore, and more significantly, Respondent's counsel submits that Mr. Cheney did acknowledge that Air Canada's approach to the 400 Pilot Study was "quite a normal approach for management to take".

I do not find that the alleged deficiencies in Mr. Cheney's testimony weaken his fundamental conclusion that the inference that Air Canada draws from the data pertaining to the age of a pilot candidate is suspect. Mr. Cheney's conclusion which I accept, is, that the 400 Pilot Study in both Phases 1 and 2 is neither statistically valid nor significantly useful to the extent that it could be relied upon as a basis for the conclusions advanced by Captain Sanderson. Furthermore, when Mr. Cheney testified that the 400 Pilot Study was a normal approach for management to take, he was not saying that it was an acceptable study but only "normal" in the sense that such an inadequate study frequently occurs among corporate management and results in incorrect interpretations. This is what Mr. Cheney said in his evidence:

"... that this probably is a kind of management support document done with the best evidence available statistically speaking and in a relatively short period of time to pursue a very narrow end. And if I could characterize it -- and this is in no way to be precise -- I would say someone has said, 'Get me some information on certain factors'. Someone in C-90 generated a lot of information on certain factors and someone said, 'Right -- I'm interested in that one; I'm interested in that one; I'm interested in that one; and they put it together'. And that's what you have is a very specialized document, a kind of management support or resource study and what you are seeing is the kind of inaccuracies and inconsistencies, potentially misleading information, which you run the risk of doing in that kind of thing. And the research situation would be, if someone is making a decision where he wants some background information and they are going to take into account say 5 percent in making their decision, this is as useful as anything else. If this is something which is seriously going to affect the decision, then you probably would want to spend more time on the research. If this is one of 27 studies sitting on somebody's desk, that is perhaps the role it fulfills." (Transcript, pp. 2181-2182)

While statistical evidence has not been adduced with any great regularity in discrimination cases in Canada, it is now well established in employment discrimination cases in the United States, "Statistics often tell much and Courts listen". (See *State of Alabama v U. S.* 304, F. 2d 583 at 586 (5th Circuit, 1962), affirmed per curiam, 371 U. S. 37 (1962)). The United States Supreme Court has recently emphasized that, "statistic analyzes have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue." (See *Teamsters v U. S.*, 431 U. S. 324 (1977)). However, while acknowledging the importance of statistics, the U. S. Supreme Court in the *Teamsters* case also warned that "statistics are not irrefutable; they come in infinite variety and, like any other evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances". (see p. 418). Captain Sanderson himself recognized this concern when he said:

"There is an old saying that Lake Erie averages four and half feet deep, but I wouldn't walk across it because there are some holes deeper than that. And I would like to say, in agreeing with you, that we would never disagree and I hope I have made clear throughout all my testimony that we don't hold what we said to be inflexibly true. We are only looking at the greatest number, the greatest number of traits for the purpose of identifying common denominators that would help us build a profile." (Transcript, p. 1174)

It is readily acknowledged that it is of great importance to determine which characteristics go into making the best and safest pilots, and that compilation of data is useful for this purpose. The unacceptability of the 400 Pilot Study lies not in the fact of the data which it contains. Rather, its frailty is in the representation of the data and the conclusions that Air Canada attempts to draw therefrom. (ii) The Navigators' Study:

The second study conducted by Air Canada relates to the performance of 51 navigators afforded the opportunity of qualifying as pilots. Air Canada in 1972 felt some obligation and responsibility to its navigator employees when the position of navigator became redundant with the introduction of new equipment. As a result, an agreement was entered into between Air Canada, the Canadian Airline Pilots Association and the Canadian Airline Navigators Association whereby it was agreed that seniority numbers would be reserved for all navigators

who could qualify as pilots i. e. commercial licenced and class 1, I. F. R. pilots prior to January 1st, 1972.

To assist these employees who were faced with mid- career unemployment or premature retirement, Air Canada made bans available to the navigators of up to \$1,000.00 in order that they could acquire their instrument endorsement (I. F. R. Class 1).

As a group, they afforded, in Air Canada's mind, a unique opportunity within the air transport industry to examine a control group of older pilots undergoing initial training.

Although, all the former navigators continue to be employed with Air Canada, Air Canada's submission is that they have not been on the whole "successful". Air Canada argues that success in terms of a pilot employed with it is measured by his ability to demonstrate proficiency as a hands- on pilot in either the captain's seat or the first officer's seat. Air Canada's data reveals that one navigator did not attempt second officer conversion and of the remaining 51 who did, 19 (or 37%) have achieved and are maintaining first officer status. Thus, 32 (63%) are considered "failures" by Air Canada in the context of piloting "success" since they are capable of maintaining only a second officer hands- off status. By contrast, Air Canada argues, that it has hired in previous years many younger pilots with qualifications similar to those of the navigators but who have maintained a significantly higher success rate.

Because the navigator group had experienced prior flight deck exposure with Air Canada and were to be trained on the very same aircraft, Air Canada assumed that this prior experience would satisfy their want of additional qualifications. The conclusion, however, reached by Air Canada was that their previous flight deck experience failed to compensate for the fact that they were an older age group since they did achieve a rather low success rate in Air Canada's terms. Air Canada argues that this study demonstrates the need for additional qualifications in older pilots to ensure their "success". Air Canada, thus points to this study as further support for its hiring policies as outlined in Exhibit R- 3.

Commission counsel has argued that it is misleading to hold out the navigator group as an example of the performance of an older age group of pilots. The vast majority of navigators had no pilot qualifications whatsoever until this opportunity for conversion was afforded to them and at which time they were required to obtain their licences.

The navigators, as a group, although exposed to flight deck operations, were used only on trans-oceanic flights and they performed their responsibilities and duties while the aircraft was in flight over the water and only from landfall to landfall. They had no responsibilities or duties during take- offs or landings. Therefore they were not pilots in the true sense of the word and indeed most of them had no motivation prior to this opportunity for conversion to be pilots in hands- on positions. Accordingly, they commenced their pilot employment with Air Canada with prior experience which was relegated to the observer role rather than as actual pilots. Many of them would not have obtained their licence qualifications if the opportunity to convert to pilot status did not arise, and perhaps, if they were not afforded financial assistance from Air Canada. They acted out of necessity in that their positions as navigators were being phased out. Of the 52 navigators whose files were reviewed, 37, or 71% had no previous experience as pilots prior to

the conversion opportunity. Therefore, the navigator class represents an aberration in several respects and as such is not a legitimate study from which Air Canada can draw any general conclusions about older aged pilots.

Moreover, a review of the "N" file of navigators shows that 19 of them have either not had an opportunity to convert to a hands-on position or have not tried to convert. Several former navigators with no previous flying experience ranging in ages from 37 to 46, notwithstanding their inadequate background, have been able to successfully achieve hands-on positions with Air Canada and are currently flying with the airline. Accordingly, some of these navigators nevertheless have demonstrated a certain degree of success even though they converted to pilot status when they were relatively older.

The hiring of these navigators also demonstrates that Air Canada was prepared to hire older individuals who had no former piloting experience and reserve for them positions on the seniority list. Air Canada obviously felt that the employment of these individuals as pilots would not detract from safety. Since the element of safety is foremost among Air Canada's considerations in the hiring of pilots, surely, it felt at that time that the conversion of this older aged navigator group to pilot status would not create any risk to public safety.

(iii) The Flight Engineers' Study A third study, similar to the one conducted in respect of navigators, was also conducted by Air Canada on its flight engineers.

They, as well, were allowed the opportunity for seniority privileges when their position was made redundant. If they earned a commercial pilot's licence from the Ministry of Transport and could successfully qualify with Air Canada as pilots, they were to be given seniority privileges. All the flight engineers who attempted conversion were licensed by the Ministry of Transport prior to commencing ground school and flight training.

Twenty-four such flight engineers were examined in the study and it showed that three are presently successful as pilots in a hands-on position. Three flight engineers are restricted to permanent second officer status and Air Canada regards them as "unsuccessful" in its terms; five were furloughed immediately after completing their training and opted not to return as pilots when recalled. Of the three that may be assessed as successful, Air Canada argues that one continues to maintain only a minimum to satisfactory standard. As with the navigators, it was originally believed that the flight engineers' prior flight deck experience should have compensated for deficiencies in other qualities. Air Canada takes the position that the very low success ratio of three out of twenty-four among this group further supports the necessity for compensatory additional qualifications in older pilot applicants.

As with the navigator group, Commission counsel argues that the former flight engineers as a class of pilots represent an aberration and it would be inaccurate to draw any generalizations from Air Canada's experience with this group as to the performance of older pilots. They, too, negotiated with Air Canada an agreement whereby as a class they would have an opportunity to convert to pilot status provided they met the requisite standards. It is clear as well that most of these flight engineers were not actual pilots. They were neither licenced as pilots nor had any

qualifications as pilots prior to this opportunity to convert. They may well have availed themselves of this opportunity only to avoid the prospect of unemployment.

A review of the 24 former flight engineers is set out in Exhibit C- 87 which describes the age at time of conversion, flying experience prior to conversion and achievement thereafter. This record shows a class of people who were doomed to failure from the outset because they never were pilots in the true sense of the word, and were never interested in piloting.

And, while Air Canada takes the position that since these flight engineers had some exposure to the operational aspects of the flight deck and this should be beneficial, in fact, their sole responsibility as engineers was in the mechanical area. They were essentially mechanics or machinists on the floor and were not pilots at all. Nor did they have much pilot related experience. Accordingly, it must be concluded that the flight engineers do not represent a legitimate experience upon which Air Canada can rely in support of a bona fide occupational requirement pertaining to age.

(iv) Performance Problems of Certain Established Pilots:

A fourth study conducted by Air Canada constitutes the case histories of performance problems of established pilots that Air Canada alleges to be age related. Within this study, Captain Sanderson referred to the "R" group which illustrated pilots whose competency deteriorated to an unacceptable level and who were consequently retired prior to the age of 60; and to a second group called the "C" group which illustrated pilots who had consistently failed to exceed minimum standards of performance. Captain Sanderson referred to specific cases in these two group studies to support the conclusion that many pilots with Air Canada did encounter competency problems with advancing age and that in extreme cases, those problems led to early retirement. Air Canada also concludes from these studies that pilots do experience increasing difficulty in learning new aircraft procedures with advancing age.

A review of the actual files of the "R" and "C" groups of pilots which was conducted during the course of the hearing shows that factors other than age resulted in the pilots' failure on transitional or conversion training. It would appear that Captain Sanderson in setting out the summary in Ex. R- 3, App. 9, of the "R" and "C" series neglected to mention other factors which would be of importance in a consideration of the reasons for the pilots' failures. Many of these pilots apparently had alcohol, medical and attitudinal problems or competency difficulties throughout their career, all of which were not age related, and which appear to have played an important role in their demise. Accordingly, a study of the "R" group and "C" group and a review of the individual pilots' files as contained in Exhibit C- 87 do not support the theory advanced by Air Canada that age was a limiting factor in the learning process and resulted in a higher incidence of failures.

By way of explanation as to the reason for the omission of the other problems that seemed to beset the pilots as found in Exhibit C- 87, Respondent's counsel attributes this to Captain Sanderson's difficulty in summarizing what might well be bulky files. It is only a thorough analysis of the files which highlights the fact that Captain Sanderson's summaries selectively leave out relevant facts and accordingly are deserving of little weight.

(e) Excursus into Psychology (i) Crew Personality Dynamics

Captain Sanderson dealt at some length with this subject and pointed out that without some deference to age priority in initial hiring practices, individuals who were older and more experienced but junior in rank, would be required to serve as members of a crew under a chronologically younger captain. Captain Sanderson testified that this type of age reversal in the cockpit has the potential for, and in his experience, has caused disagreements and challenges to authority which could negatively affect the safety of the operation of the aircraft. Within the close confines of the flight deck for periods of up to 12 to 14 hours, it is important that the captain be able to relate closely to his crew members in socially acceptable terms but at the same time to maintain their respect and support for his position as the leader of the crew. In addition, this relationship becomes of extreme importance if a critical split-second decision such as the rejection of a take-off or landing must be made. Air Canada submits that any factor which interferes with the equilibrium of that crew relationship would be a matter of great concern. Captain Sanderson related a personal experience in which there was such an inverse relationship between age and position and in which his authority as captain was challenged. Similarly, Doctor Antoine St. Pierre, the Senior Medical Officer (Air) for Air Canada, whose evidence shall be considered in greater detail later in these Reasons, recounted a personal experience during his time with the military when a captain's authority was challenged by an older pilot during an emergency situation.

Dr. Douglas E. Busby, a medical expert who was called by Air Canada also provided general support for Air Canada's position in this respect. He explained, that particularly in aircraft management situations, there is a potential for problems where the "age ladder" has not been followed. He specifically stated "that this type of conflict has to be prevented totally on the flight deck".

Aside from the isolated incidents referred to by Captain Sanderson and Dr. St- Pierre, no written record of this problem in Air Canada's files was alluded to. Indeed, there is evidence to the contrary, that one cannot generalize about this inverse relationship; rather, the whole question of crew inter- action depends upon the individual personalities of the members of the flight deck and is not age related at all.

Captain Roderick R. Stevenson was called as a reply witness by the Commission. Captain Stevenson is a pilot of considerable and senior experience with Air Canada. It is said that he has his own axe to grind with Air Canada because he himself has taken litigious and political steps to attack the mandatory age 60 retirement rule which has obliged him to relinquish his captaincy. Accordingly, Air Canada's counsel submits that one should be circumspect in accepting his evidence. In any event, Captain Stevenson did describe the normal environment in the cockpit as "calm, deliberate and unhurried ... where if there are emergencies, time is taken to properly assess and follow the correct sequence". (Transcript, p. 2394)

His view of the dynamic on the flight deck is one of co- operation and not one in which a captain dictates and is reluctant to accept assistance from his colleagues. He testified that "in fact the second officer and the first officer are encouraged to participate and draw to the attention of either of the other members of the crew any deviations from standard operating procedure". In

this way the captain obtains the benefit of the observations and experience of his fellow officers. Indeed, a good captain performing his role would "request the assistance and accept all suggestions that are made to him, and that functions well at this point in time in the airline". Captain Stevenson noted that in his 36 years of flying with the airline he has divided his flying time 50% with the first officer, in usual normal conditions, thus allowing the first officer to develop his skills. Even in emergency situations where the first officer was designated the "pilot flying" he would continue to have control of the aircraft with the captain being the "pilot not flying" and subject to the direction of the former. This type of environment in Captain Stevenson's experience did not lead to any disagreements or challenges to authority.

Moreover, it is a fairly common practice in the military to have a person who is chronologically younger serving as pilot-in-command on the flight deck with older first officers. Apart from the one experience referred to by Dr. St. Pierre, this practice in the military appears to be well established and does not appear to cause any known adverse personality reactions. There is no question that personality characteristics are important and should be investigated in the course of the pilot selection process. However, one would have to conclude that such disposition for disagreement depends upon the individual and the mere fact of an age reversal situation on the flight deck is not of itself the catalyst of this problem.

The United States Court of Appeals, 4th Circuit, in *Smallwood v United Airlines Inc.*, supra, at p. 10 said:

"In short, there is no reliable evidence that United's 'crew concept' would be impaired by the sole factor of hiring Flight Officers, starting as Second Officers, over the age of 35. This alleged harm to the 'crew concept' is a function of prior experience, not age at hire."

This kind of personality defect can be ascertained either by a proper assessment by the interviewer during the pilot selection process or alternatively through psychological testing of candidates.

The possibility of personality differences which could give rise to confrontations on the flight deck is in fact contemplated by Air Canada since it does consider and assess personality characteristics of the pilot applicant during the initial interview process. Furthermore, it is also considered the basis of the "Twitchell Bid" process whereby Air Canada first officers do not select their assignments until after the captains have chosen their assignments and they have been made known to the lower rank officers. By this process, personality conflicts can be avoided by a first officer steering clear of a captain with whom he may have some problems of compatibility.

I must conclude that there is no probative evidence to suggest that the removal of Air Canada's age hiring policy could be a potential source of poor crew inter-action.

(ii) Dead- End Phenomenon: Within Air Canada's system, a new pilot can continue in the second officer hands-off role for a period up to 13 years and this, according to Captain Sanderson, could result in lack of motivation, frustration and other stresses on an older individual. The older pilot serving in the junior role can be expected to suffer some form of adverse reaction, Captain Sanderson reasons, because he is not realizing his expectations commensurate with his age. The

extreme example posited was the older pilot serving an extended period in a second officer's role on the B- 727 or DC- 8 aircraft. Dr. Busby described the problem as the "dead- end phenomenon". This could result in stresses for the older pilot which in turn could give rise to health problems of a physical and emotional nature such as ulcers, hypertension, lethargy and depression and to corresponding decreased performance. Captain Sanderson elaborated on this phenomenon as follows in Exhibit R- 3, p. 3:

"The role of the Second Officer in Air Canada as the junior member of the crew, is more of monitoring, systems management and apprenticeship, than that of a pilot. He is not permitted to manipulate the flight controls, but instead monitors the aircraft systems and the operation of two pilots up front. This role can be a frustrating one for the experienced pilot as it is the desire of all pilots to actually fly the aircraft. Hence, it has proven difficult for many Second Officers to maintain their motivation towards their more routine duties when contractually restricted to this Second Officer position for a prolonged period. As a general rule, the older the applicant is, the more experience they have accumulated in both hours and the type of flying they have done. This tends to make it much more difficult for the older applicant to sit for up to 13 years as a Second Officer (sometimes watching a First Officer who is younger than him), than it is for a younger applicant who has a longer career ahead of him and is more willing to wait his turn. Experience has also shown that there is an intrinsic difficulty in keeping a Second Officer motivated in his job and this becomes even more difficult with older more experienced pilots than with younger ones.

Summarizing this scenario where an older, experienced pilot is allocated the junior role -- we often see him subordinate to a First Officer who has lower general or military aviation experience and this repeatedly has demonstrated motivational problems towards his routine, non-flying and monitoring responsibilities (recognized throughout most of the Industry as an apprentice role) to the point of impacting on Operational Safety. This has, therefore, been the focal point of a great proportion of competency problems and has frequently resulted in a deterioration of performance and in more extreme cases, dismissal.

If, in the case of discipline, the opportunity of a permanent Second Officer position is offered, as an alternative to dismissal, this will predictably entail a considerably lower salary, loss of self-esteem, lack of credibility with his peers and demonstrated difficulties in maintaining acceptable performance levels and must assuredly contribute to loss of motivation due to his retrograde position and dead- end career path."

Air Canada therefore submits that an older pilot entering employment in a junior second officer's role will react in a different manner than will his younger counterpart and that such reaction over an extended period of time can lead to such negative characteristics as boredom and lack of motivation towards his more routine duties. The younger applicant in the same position knows that he has a longer career ahead of him, is more willing to wait his turn and to put in the prolonged period of service as a second officer. Air Canada's concern is that the older second officer may well suffer a deterioration in his performance.

Career frustration, however, is not a product of age. It depends upon each individual's personality. There is no evidence that a younger pilot would cope with an extended period of

time in the second officer's seat any better than an older individual. Dr. Stanley Mohler, a medical expert called by the Commission, took issue with Dr. Busby in this respect. Dr. Mohler indicated that the dead-end phenomenon could arise within any individual regardless of age depending on how he perceives his employment opportunities. Dr. Mohler put it this way:

"Well, my opinion is that if a person enters a career and is motivated to work in that career, that person understands that as a mature individual there may be economic ups and downs of the corporation that the individual goes with and one may not advance as rapidly as one may wish, but that one takes a mature response to this; does not become frustrated; does not go out and get drunk; does not rail against the corporation or others, but simply works in a motivated, quality way. Therefore, I don't believe the dead end phenomena for mature, responsible individuals is a critical matter." (Transcript, p. 2250)

I must conclude that Air Canada's maximum age hiring restriction does not serve to lessen the risk of career frustration and its emotional side effects. These are not age related problems.

(iii) Seniority System: Respondent's counsel emphasizes that to a certain degree the problem of crew personality dynamics is compounded by the seniority system which is imposed by reason of the collective agreement between Air Canada and the Canadian Airline Pilots Association. The seniority system was described by Captain Sanderson in Exhibit R- 3, p. 1, as follows:

"All major airlines in North America have traditionally been governed in their promotional process by a contractual seniority system. This system, felt to be a derivative of railroad practice, determines that all new pilot employees are assigned a seniority number at the bottom of the list, which only increases in its effective value when pilots senior to him leave the top of the list, or when new junior pilots are added to the bottom of the list."

Seniority strictly governs promotional progress through pilot status (rank), aircraft type, salary, fringe benefits, etc., and contrary to popular interpretation, airlines are restricted by Collective Agreement not to assign more experienced or older pilots, to crew positions that they may otherwise appear to be suited for."

It was argued by the Respondent that an older pilot who enters the system and who is assigned a relatively low seniority number is adversely affected in that he finds himself immediately in an age reversal situation on the flight deck. He is therefore susceptible to the detrimental social and psychological pressures that were earlier mentioned.

I am of the view that this is not a problem which can be said to be unique to the older person. It depends entirely upon the personal characteristics of the individual involved and one cannot generalize about these effects upon an older group of people as a class. In any event, the seniority system arises out of a contractual relationship between two parties and it is clear that Parliament did not intend that the social policies contained in the Canadian Human Rights Act were to be so readily undermined by the structuring of a private contract: *The Ontario Human Rights Commission v The Borough of Etobicoke*, supra. The bona fide occupational requirement based upon an avoidance of personality disorders in the cockpit must stand on its own footing independent of the privately contracted seniority system. I have already stated that in my view

there is no probative evidence to support the contention that Air Canada's hiring age policy plays any role in reducing the risk of such interactional problems.

(iv) Motivation: Captain Sanderson was of the view that related to the problem of dead end phenomenon was the fact that it became increasingly difficult for older, more experienced pilots to maintain their motivation. Thus, it is important to examine the flying achievements of an older candidate prior to his application to Air Canada to determine whether he is sufficiently motivated to fly. His prior experience is more important than his empty assurances of a desire to become a pilot. Captain Sanderson explained it this way:

"The rationale was in part that we expected an older pilot to have demonstrated his sustained motivation in flying to the point that he had accrued extra time, extra qualifications.

For example, in many cases, we had applicants who had the flying hours but hadn't bothered to write the exams to qualify for higher licence ratings. This did not express to us a real motivation in getting a job, and making themselves accredited..." (Transcript p. 671)

Captain Sanderson singled out Mr. Sanz as an example. He had not flown since his leaving employment with Philippines Airlines in 1974. Furthermore, he did not possess a Canadian Instrument Rating and he acknowledged that he had made no effort to obtain one. Captain Sanderson stated that one would have expected a motivated applicant to at least apprise himself of the minimum requirements for employment with Air Canada. Captain Sanderson expressed the view that if a pilot lacks motivation, it may have a serious consequence upon his safely performing routine, non-flying, monitoring responsibilities.

By contrast, Captain Sanderson mentioned that younger pilots appear to be motivated to make use of the simulators in very early morning hours in order to develop their skills; whereas he noticed a tendency among mid-career pilots to make less of a commitment to work at their skills at the simulator at inconvenient hours.

The evidence does not bear out this argument. Motivation is a human characteristic along with maturity, stability, integrity and initiative, all of which are important personal qualities in a pilot's makeup (See Exhibit R- 3, p. 6). Motivation should be assessed and tested on an individual basis in the pilot selection process along with these other personal qualities.

In fact, a myriad of personality traits are subjectively assessed and graded by Air Canada at the initial employment interview. Such aspects of manner and attitude as impulsiveness, composure, emotion, aggressiveness, friendliness, pleasantness, introversion, extroversion, understanding, sensitivity, interest and versatility are specifically set out in the interview summary and are to be assessed by the interviewer (See Ex. R- 3, App. 4, p. 7).

Should the candidate advance to the Board interview, he is evaluated on among other things, his maturity, motivation, self-confidence, social awareness and attitudes, learning (growth) potential and general character (See Ex. R- 3, App. 4, p. 9).

On cross-examination, Captain Sanderson conceded that with respect to those who lacked motivation, he had particularly in mind, career second officers who had failed up-grading and who had become permanent second officers with no hope of future advancement within the airline. It would appear that this group of pilots is in a completely different category than the chronologically relatively older pilot applicants seeking employment with Air Canada. The former are demonstrated failures whereas the latter are untested as they are just embarking upon their new career.

There are other factors which have nothing to do with age that may diminish a pilot's motivation. The economic environment within the airline itself is one such factor. If the airline is not expanding commercially then a recently hired pilot will have to spend and will expect to spend a longer period in the second officer position. This is a problem which affects all pilots equally regardless of the age at which they entered employment. Moreover, motivation of an individual is something which is not totally confined to his career opportunities. It is very much affected by external factors such as his family life and financial circumstances. One cannot generalize how people are affected by the ups and downs in the life cycle. The ability to maintain the necessary motivation in the face of career impediments is very much a personal matter which depends upon the individual. It does not appear to be a product of age.

(e) Return on Investment: Younger pilot applicants are preferred by Air Canada for economic reasons as well. This is based on a "return on investment" philosophy which accepts the fact that it costs a major air carrier approximately \$328,000 (expressed in 1979 constant dollars) for the training investment in an individual pilot's career over a 35 year period. This sum of \$328,000.00 for one pilot projected over a 35 year career with expenses escalated at 8% annually translates into an actual investment outlay in excess of \$1.5 million. Air Canada, therefore, seeks to hire future captains and in so doing maximizes its career training investment. Air Canada states that if they were to hire a 45 year old applicant, he may well never upgrade to captain status; and a 50 year old pilot applicant may well never upgrade to a first officer's status, in which case, the airline's considerable monetary investment in training is not rewarded by service. Air Canada's desire is therefore to maximize career training investment by hiring young pilots who have before them a long period of service as a captain.

The new hire training costs in 1981 constant dollars for the second officer position varies from approximately \$10,700 to \$15,300 depending on the type of aircraft in question. The new hire training costs for the first officer's position on a DC-9 is approximately \$24,300.00. Commission counsel argues that although these initial training costs are fixed and will have to be incurred, the recurrent, on-going training costs should be less if an older applicant is hired since his career span will be shorter than would that of a younger individual. Moreover, because an older individual might not undergo conversion to different aircraft and promotion to higher ranks to the extent that a younger person would throughout his career since the older pilot's opportunities to do so will be fewer, those costs should be considerably less as well.

In any event, it has been accepted that economic considerations generally cannot be invoked to establish the bona fide occupational requirement defence. It was precisely against this type of excuse that age discrimination legislation has been enacted. For it could be said otherwise, that, in all cases involving initial training costs for an employer, hiring an older person would result in

adverse economic consequences in that the employer cannot exact as long a period of service as he could from a younger individual. Accordingly, a cost-justification defence is not usually available in such circumstances: See *Smallwood v United Airlines Inc.* (United States Court of Appeals, 4th Circuit, September 17th, 1981, unreported at p. 9); *City of Los Angeles v Manhart*, 435 U. S. 702 at 716 (1978).

The Supreme Court of Canada in *The Ontario Human Rights Commission v The Borough of Etobicoke*, supra, did state, however, at p. 7 that the bona fide occupational requirement "must be related in an objective sense, in that it is reasonably necessary to assure the efficient and economical performance of the job...", (emphasis added). If any extreme situation arose where for example, a qualified 58 or 59 year old person sought a position as pilot and the airline was faced with the prospect of incurring thousands of dollars of initial training costs and would obtain in return only one year's service before mandatory retirement at 60, then in those cases there might be justification for an economic defence. Having regard to the present ages of the Complainants, however, maintenance of the social policy which is the foundation of the legislation far outweighs any additional costs to be borne by the employer. In the circumstances, an age 27 hiring ceiling is not reasonably necessary to assure the efficient and economical performance of the job of pilot.

(f) Medical Considerations: Another subject matter raised in support of the bona fide occupational requirement defence was the medical effects of aging. It took the form of testimony of three doctors and certain documentary evidence, principally a study conducted by the American Institute of Medicine entitled: "Airline Pilot Age, Health and Performance: Scientific and Medical Considerations" and the Report of the National Institute on Aging Panel on the Experienced Pilots' Study. These documents were commissioned as a result of the United States Congress enacting Public Law 96- 171 on December 29th, 1979 to require a study of the desirability of mandatory age retirement for certain pilots and for other purposes. In question was the adequacy of medical certification procedures and examinations for commercial and airline transport pilots and, in particular, the "age 60 rule", which prohibits U. S. air carriers from assigning a person who reaches 60 years of age to piloting duties, either as pilot-in-command or co-pilot. The legislation required the Director of the National Institutes of Health in consultation with the Secretary of Transportation to conduct a study to determine inter alia whether an age limitation which prohibits all individuals who are 60 years of age or older from serving as pilots is medically warranted. In carrying out the requirements of Public Law 96- 171, the Director of the National Institutes of Health assigned primary responsibility for implementing the legislation to the National Institute on Aging. As the first major step in assuming this responsibility, the National Institute on Aging established an Inter Institute Committee which in turn awarded a contract to the Institute of Medicine of the National Academy of Sciences to provide an objective examination, summary and assessment by an expert committee of existing scientific knowledge relevant to the issues. Its report was delivered on March 31st, 1981 and is before this Tribunal. The National Institute of Aging Panel on the Experienced Pilot Study was formed for the purpose of assisting the National Institute of Health and reviewing and critically examining the Institute of Medicine's Report. The Report of the Institute of Medicine has served as the point of departure for the National Institute on Aging Panel in preparing its own report which was completed in August 1981 and was submitted by Respondent's counsel for the Tribunal's

consideration. The Congressional process is presently continuing and is therefore far from complete.

Much of the expert testimony before this Tribunal related to the physical and mental effects of aging. The Respondent proffered Dr. Antoine F. J. St- Pierre who is the Senior Medical Officer (Air) for Air Canada and has had considerable practical experience in dealing with flight crews. He regularly conducts medical examinations, is a permanent member of Air Canada's Pilot Selection Committee and is responsible for its pilots' health maintenance. In addition, Dr. Douglas E. Busby testified on behalf of Air Canada. He has worked in various areas of aerospace medicine. He has had practical experience as Deputy Federal Air Surgeon of the United States and as Medical Director for Continental Airlines. He has also held numerous academic positions and has published extensively, although, mostly on subject matter unrelated to pilot aging.

Dr. St- Pierre testified that the human body deteriorates physically and mentally with the progression of age. In particular, he singled out problems arising in an individual's vision, hearing, muscular skeletal functions, memory, personality traits, stamina and susceptibility to disease.

With respect to vision, he indicated that aging may result in a loss of accommodation known as "presbyopia" and a tendency to an increase in the intra- ocular pressure known as "glaucoma".

Furthermore, there is a loss of high frequency hearing as one gets older and there is a loss of speech intelligibility particularly in the presence of background noise.

He testified that increasing age affects the elasticity and strength of muscle tissue in ligaments with the result that older individuals are not as agile or quick in their movements and their co- ordination less precise.

The aging individual has a greater problem with short term memory in that he has increasing difficulty in storing new information that is immediately available for retrieval and that has an effect on his general learning ability. His long term memory becomes dominant and accordingly when faced with a learning situation he not only has increasing difficulty in acquiring this new knowledge but also has difficulty in eliminating his previously acquired knowledge which must now be replaced. In Dr. St- Pierre's words:

"unlearning also becomes more difficult as well as learning of new information". (Transcript pp. 1591- 1592)

Captain Ross, a former captain with Air Canada who retired in 1980 after 40 years of flying experience stated that he never worked so hard as he did at an older age to convert to a captain's position on a 747. Captain Ball, a retired pilot with Delta Airlines also stated that he had a much more difficult time qualifying for the captain's seat on a 747 even though that aircraft is as simple to fly as the DC- 8. He qualified on the 747 within six months of his retirement. Captain Stevenson who at the time of his giving evidence was the most senior flying captain with Air Canada, testified, on the other hand, that at the age of 59, he successfully converted from the captaincy on a 747 to the captaincy on an L- 1011 without any difficulty whatsoever.

Commission counsel submitted that this evidence just highlights how individualistic this problem is.

Dr. St- Pierre also went on to point to the consequences of this memory deterioration:

"There is a slowing down, an increasing difficulty in the sorting and the risk of overloading which obviously can lead to a wrong response to a given stimulus." (Transcript, p. 1595)

The age- related physiological changes are not always detected or even detectable because of the subtle nature of the deterioration particularly in reaction time, memory, ability to adapt to new situations, psycho- motor functions, information processing capability, other cognitive functions and personality any one of which could cause mistakes in judgment.

Dr. St- Pierre also referred to the familiar adage that "you can't teach an old dog new tricks" by stating that he, in his experience, has observed that individuals have a greater reluctance to change as they get older and become more set in their ways. They create habits for themselves and have established patterns of behaviour and of functioning from which they are reticent to deviate. That is one of the reasons, he explained, that Air Canada likes to start early in a pilot's career to try to teach him the principles of health maintenance and of developing a good lifestyle. Younger individuals are more easily influenced and more open to new ideas.

He also observed a general decrease in resistance to fatigue and a propensity to illness, particularly cardiovascular disease, with increasing age.

Accordingly, from a medical standpoint, Dr. St- Pierre testified that Air Canada looks for individuals who not only have normal health but who will have a tendency to maintain that health status free from disease throughout a productive career of 33 to 35 years.

Dr. Busby confirmed much of what Dr. St- Pierre said. He is of the opinion that age constitutes a justifiable factor in the hiring of airline pilots and he expressed a two- fold basis for this opinion:

(a) a need to minimize the potential for a pilot developing disqualifying medical conditions that could impact upon the safety of an aviation operation or upon the pilot's career;

(b) a need to maximize the pilot's psycho- physiological capacity to perform flight tasks safely throughout his career.

As to the former, Dr. Busby stated that it is best to select candidates who have the least capability of hiding those medical problems which normally arise with increased age. Therefore, a policy of hiring persons at a young age thereby enabling, by longitudinal health assessment, the early detection of any adverse health trends, would be useful, in this regard. Moreover, this period of evaluation could be used to inculcate in pilots good health and lifestyle habits. Further, a younger pilot force naturally lowers the average age on the airline's flight decks thereby reducing the risk of incapacitation.

Commission counsel called as its expert, Dr. Stanley R. Mohler. Dr. Mohler is Professor and Vice- Chairman, Department of Community Medicine, and Director of Aerospace Medicine, at Wright State University School of Medicine in Ohio. He was formerly Chief, Aeromedical Applications Division, Office of Aviation Medicine at the Federal Aviation Administration in Washington. He holds various academic appointments and has published widely and delivered speeches on the medical aspects of pilot aging.

His views differ markedly from Dr. Busby. This is not the first time that these two experts have confronted each other on their opposite viewpoints. They have testified against each other in hearings and various litigation on age related subjects in the United States. For example, See *Criswell v Western Airlines Inc.*, supra.

Dr. Mohler has moved considerably from the medical opinion that he once held that there should be an age restriction on pilot hiring. Although, Dr. Mohler has stated in published works that advancing age results in diminishing biological capabilities and that as a result age was a significant factor in pilot performance, he testified that his opinion has changed with the evolution of medical science and its increased sophistication. He now feels that there should be no age restriction on pilot employment or for that matter mandatory age 60 retirement. He believes that technology has now advanced to the state where it can reliably measure the risk factors which give rise to incapacitation of a pilot. He feels that they can be ascertained on an individual basis before any problem materializes. Moreover, in many cases, pilots who have suffered problems can be completely rehabilitated and returned to the flight deck. He believes that age should not be a factor in determining a pilot's ability to perform effectively. In his view: "aging process is a normal, continuing developmental process that begins with conception and follows through in the human to an upper maximum age of approximately 100, maybe more, if the person has a proper lifestyle and lives in a proper environment. It is not a disease. It does not necessarily ... until an advanced age -- and I am referring to well over the age of 70 or 80 -- cause significant derogations in the major functions of the body." (Transcript, p. 2221)

Dr. Mohler stated that chronological age is not a dependable way of assessing individuals. Physiological aging varies greatly among adults. In a similar vein, is the comment of Mr. Justice McIntyre in *The Ontario Human Rights Commission Borough of Etobicoke*, supra, at page 7:

"We all age chronologically at the same rate, but aging in what has been termed the functional sense proceeds at widely varying rates and is largely unpredictable..."

Rather, in Dr. Mohler's opinion, it is the risk factors in an individual and not the normal aging process which lead to health problems. Airlines have considerable skill, in examining candidates and pilots through their career, to detect at an early stage and/ or prevent unacceptable physical and mental deterioration. The Air Canada medical examinations of personnel are designed to elicit information in terms of these possible eventualities and to provide the medical department with information about the health status of the individual pilots. Dr. Mohler indicated that all of the problems cited by Dr. St. Pierre are not age related at all, but are individualistic problems which can be detected and diagnosed before their onset and even afterwards can be monitored and indeed corrected.

The United States Court of Appeals, Fourth Circuit in *Smallwood v United Airlines*, supra, accepted Dr. Mohler's position (he gave evidence in that case) and stated in this regard at pp. 11-12:

"It was conclusively shown at trial that United's physical examination program was effective in detecting potentially disabling medical conditions, and that future cardiovascular problems could be detected with a high degree of predictability. These preventive medical examinations must have the same degree of predictability as to future medical disabilities for newly-hired 48 year old pilots from other airlines as they would for career United pilots. In short, United's evidence at trial, while probative of the incidence of medical problems in pilots of advanced age and of the effectiveness of its own examination system, failed to show a relationship between a maximum age-at-hire limitation and airline safety. It has failed to show the impossibility or impracticality of dealing with applicants individually." It should be noted, however, that at least one Court has taken issue with Dr. Mohler's thesis. In *Houghton v McDonnell Douglas Corp. Inc.*, (1979) 20 F. E. P. Cases 915 at 921, the District Court Judge remarked:

"In support of plaintiff's case, Dr. Mohler did testify that psychomotor skills could be measured. However, the testimony in this case firmly established that Dr. Mohler's views do not enjoy widespread acceptance."

The Institute of Medicine Report considered the effect of aging on pilot performance and stated that the two areas of concern were acute incapacitation and subtle incapacitation.

With respect to the former, although it concluded that the average risk of acute incapacitation increases with age, it noted the great variability that exists among older individuals. Cardiovascular disease is the most significant disorder in this context. To some degree, Dr. Mohler's views find support in the Institute of Medicine Report as the Committee felt that risk factor profiles and a more thorough testing of high risk individuals were adequate measures to identify those pilots whose health status would represent a threat to safety because of possible acute incapacitation.

Subtle incapacitation arising out of decrements in hearing, vision losses, decreases in the capacity, speed and/or accuracy of attention, memory and intellectual skills, and perhaps susceptibility to fatigue and jet-lag, becomes a greater possibility with age, the Committee stated. It went on to add that there is great variability among individuals and there is reason to believe that well-practised skills would show little if any age-related decline. It did caution, however, that this had not been proved by appropriate research.

Although, the Committee believed that the more recognizable decrements in health could be tested for and assessed, there was uneasiness about the ability to detect the less apparent problems. The Committee explained it this way:

"Is assessment of individual level of function possible? A number of age related decrements in health or level of function have been established for the general population, on average. Those changes that are well established as being present among the pilot population and as being relevant to the safe performance of a pilot's job can be adequately assessed by individual tests.

However, there are other possible changes about which many unanswered questions remain. Age related changes in speed or accuracy of a number of perceptual, psychomotor, and intellectual functions have been observed, but the particular relevance of these changes to pilots and to the demands of a pilot's job is not yet established. Tests of these functions in individuals are not yet validated as predictive of level of function as a pilot." (Exhibit C- 98, p. 151)

The Institute of Aging Report took a much more conservative approach than the Institute of Medicine and emphasized the detrimental effects of aging on the pilot and the inability of modern medicine to discover with any assurance not only subtle decrements in cognitive functions but to predict the likelihood of incapacitating cardiovascular disease.

Therefore, the opinions expressed by Dr. St- Pierre and Dr. Busby find some confirmation in the Institute of Aging Report particularly in the following relevant passages which speak of the decline in function with advancing age and the unreliability of present medical appraisal systems to identify those pilots who are at risk beyond the age of 60:

"The Panel attaches no special medical significance to age 60 as a mandatory age for retirement of airline pilots. It finds, however, that age related changes in health and performance influence adversely the ability of increasing numbers of individuals to perform as pilots with the highest level of safety and, consequently, endanger the safety of the aviation system as a whole. Moreover, the Panel could not identify the existence of a medical or performance appraisal system that can single out those pilots who would pose the greatest hazard because of early, or impending, deterioration in health or performance." (p. 1)

... "Psychological tests designed to identify subtle changes in cognitive functioning have not been systematically administered to pilots. Their relevance to such essential skills as decision-making, resource management and vigilance under stress is therefore unknown." (p. 4)

... "Unfortunately, even the more comprehensive examinations cannot yet provide quantitative assessment of intellectual functions or reliable prediction, in individuals, of the likelihood of incapacitating cardiovascular disease. In this respect, it is important to take full account of the increasing unreliability of the screening tests in predicting cardiovascular accidents in individuals above age 60." (p. 7)

... "Moreover, criteria do not yet exist for adequate assessment of other complex functions that are also likely to deteriorate with advancing age. For example, as noted elsewhere in this report, performance of complex maneuvers under stress or in novel situations is more likely to be affected by aging than is the performance of well learned, familiar tasks." (p. 10)

...

"Nonetheless, interpolating data from general experience with aging populations indicates that the risk of an accident increases in the later life of a pilot and that such risk probably accelerates with advancing age.

The duties of pilots embrace not only maneuvering skill but also decision- making, crew coordination and resource management. Decline in cognitive and psychomotor performance, as well as in physiological performance, occurs with increasing age and will affect how these duties are executed. The health status of the pilot is apt to affect his/ her flying performance. In this regard, subtle decrements in performance due to aging processes or subclinical functional impairment are more likely to pose a problem than is complete failure of performance due to sudden incapacitation. However, even though subclinical impairment of the pilot- in- command may be recognized by others in the cockpit, the co- pilot might hesitate to report it or to assume command of the aircraft. This uncertainty at a critical time in flying, e. g. on a final approach to landing, could cause a serious accident.

Although it might at first seem that each of the components of a pilot's task (e. g., visual- motor control, visual information processing, auditory signal detection, decision- making) could be tested and performance deficits used for the purposes of this evaluation, this capability is, in fact, unproven. The IOM report -- particularly Chapter 10 -- points out the various age related decrements in simple behavioral tasks, but is careful to avoid definitive statements about their correlations with piloting. Slowing of information processing, difficulty in resisting distracting stimuli and decreasing short and long term memory are all age- related findings relevant to pilot performance. Limited information now available about the effects of jet- lag and fatigue suggests that these, too, may be age related." (p. 19)

... "While piloting performance can be expected to decrease with advancing age, it is not possible at this time to identify those persons who will show particular decrements in performance in the future. In addition, our ability to detect small decrements in performance that may seriously interfere with piloting duties in a novel or critical situation is extremely limited." (p. 21)

All of the medical evidence on this subject demonstrates the current scientific controversy among medical and aeronautic experts over the effects of aging on pilots in their advanced years. This evidence will be particularly germane to Tribunals and Courts or Parliament having to decide the age 60 question. It is of limited relevance, however, to the central issue facing this Tribunal because it is agreed that in the pilot population under 60, those in their 50's are the ones who are placed by the airlines in command of the wide- bodied aircraft,-- DC- 10's, B- 747 s and L- 1011's. That may be the product of the seniority system but surely Air Canada in permitting these "gray- haired" pilots to be captains in command, has not in any way compromised the safety of its passengers merely to abide by some private contract with the Canadian Airline Pilots' Association. Therefore, while much of the medical evidence may be pertinent to the question of functional loss in pilots of advanced age beyond 60 and of the effectiveness of the examination system of Air Canada in detecting incipient medical problems at that point in the life cycle, I find that this evidence is of little assistance in terms of the relationship between a hiring age limitation and airline safety. Indeed, none of the experts testified that the medical risks associated with aging up to age 60 should preclude those under 60 from continuing to fly.

For within the age bracket up to 60, at least, medical technology is sufficiently sophisticated to detect problems in pilots. Transport Canada has set minimum medical standards which a pilot must meet to hold each licence qualification. Air Canada's initial medical is much more stringent than the Transport Canada medical as it wishes to keep its employees' health above minimum

licence standards. Regular health examinations of pilots allows for a constant monitoring of their medical status. Air Canada's pilots are subjected to a medical examination every six months. Every two years, additional tests of a preventative nature are administered. After age 40, the pilots are subjected to more frequent electro- cardiogram testing. Thus, there is not the same uncertainty in monitoring the pilot up to age 60, that according to some experts, exists in trying to detect the subtle changes in pilots in their more advanced years beyond 60. It may be that tests for discrimination of performance below age 60 are not likely to be adequate beyond age 60. But so long as the assessments of health below age 60 are sufficiently reliable and pilots can be checked on an individual basis, there is no reason to insist upon an age at hire restriction.

In fact, Air Canada often ignored its own guideline and hired pilots over age 27 in a period of expansion when there was a demand for pilots. Thus, when there is an economic necessity, Air Canada has shown that it is quite willing to hire comparatively older individuals. It did, as well, when it took on the former navigators and flight engineers. In those situations, Air Canada obviously did not feel that by so doing it would be jeopardizing the safety of the travelling public.

(g) The Experience Factor: Moreover, whatever risk of decline in function results as a pilot's age advances toward 60, there is the compensating factor of maturity, experience and judgment. There may be indeed an optimum blend of age and experience at a particular age which provides the greatest safety for the flying public.

That also raises the question of whether it is in the interest of public safety that an airline pursue an age discriminatory policy which maximizes the number of years of experience of its captains. Of interest in this regard is *Murname v American Airlines Inc.*, supra. As mentioned earlier in these Reasons, in that case, the U. S. Court of Appeals for the District of Columbia Circuit dealt with a challenge to American Airlines' general guideline against hiring persons over the age of 30 for the beginning position of second officer. It is a policy of American Airlines to require all second officers to advance to the position of captain. No one is hired by the airline without this goal in mind. This is commonly known as an "up or out" policy. It requires that a second officer or a first officer who has received the maximum amount of training required for such position and is not qualified at that juncture to advance to the next cockpit position will be terminated from employment. This policy of American Airlines does not allow for a permanent career as either a second officer or first officer. It generally takes an average of 14 to 20 years to progress from the position of second officer to that of captain under American's extensive training system. Some employees, however, might advance to the captain's position in as few as 10 years.

Although, the Court concluded that the complainant in question would not have been hired on his own merits apart from age as he was not competitively qualified for the position of second officer, the Court also held that in any event American's age hiring guideline was a bona fide occupational qualification for the position. Although American Airlines maintained an age 30 policy, the Court considered it as an age 40 rule to conform to the definition of "age" in the U. S. legislation.

Before the District Court, American Airlines argued that its bona fide occupational qualification defence was justified on the following basis:

- "1. American has a statutory duty to conduct its business with the highest degree of care for the safety of its passengers.
2. In order to maximize safety and minimize risk of injury or death, the American Captain must undergo a long and intensive training program at American.
3. Since it takes an average of sixteen years to progress from Flight Officer to Captain, an applicant hired at an age above forty would not acquire the requisite experience needed to maximize safety, before being forced to retire at age sixty by the F. A. A. age 60 rule.
4. Consequently, elimination of the age below 40 hiring policy will increase the likelihood of risk of harm to passengers and crew."

((1980), 21 F. E. P. Cases, 284 at 291) The District Court found this argument persuasive. So did the United States Court of Appeals and it is useful to quote from its decision at some length:

"The evidence entered at trial indicates that 'pilot error' accounts for 90 percent of all aviation accidents, but that the incidence of aviation accidents decreases as the pilot gains experience. Moreover, the district court found 'credible and persuasive' evidence that 'the best experience an American Captain can have is acquired by flying American aircraft in American's three cockpit positions...' Thus, the safest Captain will be experienced, and as much of that experience as possible will have been with American.

But since it takes at least ten to fifteen years to progress from Flight Officer to Co-Pilot to Captain, if appellant were hired as Flight Officer in his forties he would probably not become Captain until his late fifties. The Federal Aviation Administration itself requires retirement at age 60 so that he would be able to serve only briefly as an American Captain before he had to retire. Appellant would then be replaced by another pilot, also new to captaincy in an American cockpit. On the other hand, by limiting its new hiring to relatively young pilots, American thereby ensures that the experience with American of its active Captains will be maximized. This, as we pointed out earlier, maximizes safety.

Appellant contends that the district court's findings indicate only a marginal increase in the safety of the passengers on an American aircraft, and that such marginal safety is insufficient to support a blanket age rule. He asserts that a BFOQ cannot be supported by a minimal increase in safety when balanced against the fact that many potential applicants will not be able to pursue their chosen careers. We disagree.

Indeed, on the contrary, we find the maximization of safety to be 'reasonably necessary to the normal operation' of American Airlines... Therefore, in our judgment, the airline industry must be accorded great leeway and discretion in determining the manner in which it may be operated most safely: *Usery v Tamiami Trail Tours, Inc.*, 531 F. 2d 224,236 n30 (5th Cir. 1976). This is in accord with American's view that 'safe' is not sufficient. Rather, the 'safest' possible air

transportation is the ultimate goal. Courts, in our view, do not possess the expertise with which, in a cause presenting safety as the critical element, to supplant their judgments for those of the employer.

Appellant's argument concerning the undisputed fact that all Captains, irrespective of their ages, must begin with no experience as Captains is similarly not persuasive. The fact remains, that as previously indicated, American's intended goal of maintaining a staff of Captains which has the longest possible record of experience in American cockpits is, in our opinion, completely justified. We believe that the district court's findings of fact, many of which were agreed to by the parties, support the conclusion that American's hiring policies, including the age forty guideline, might result in the death of one less person that were American required to abandon or modify these policies. See *Hodgson v Greyhound Lines, Inc.* 499 F. 2d 859, 863 (7th Cir. 1974), cert. denied sub nom. *Brennan v Greyhound Lines, Inc.* 419, U. S. 1122 (1975).

In sum, there was ample factual evidence and legal precedent to support the findings of the district court. We conclude that American's age forty guideline was a bona fide occupational qualification 'reasonably necessary to the normal operation' of American Airlines."

In the instant case, Captain Sanderson testified that every individual is hired by Air Canada with the objective of ultimately becoming an aircraft captain. There is, however, no equivalent "up or out" rule as exists with American Airlines. In fact, Air Canada does have and does permit some permanent career second officers and first officers.

Indeed, there is a curious anomaly within Air Canada in terms of promotion from first officer to captaincy. A first officer may attempt promotion when he has the seniority and a vacancy arises. If his conversion attempts-- he has two within six months-- however, are unsuccessful, he cannot return to his position as first officer. He must then qualify for second officer status. He thereby takes some risk in attempting to convert to captain. On the other hand, a first officer who refuses to take the conversion tests for fear of failing, or, because he does not wish to change his base of domicile or move his family, can remain in his first officer's position permanently. This was the exchange with Captain Sanderson on this point:

"The Chairman: I take it from that that someone who is a first officer can elect to become a career first officer. The Witness: Yes The Chairman: That is he is not obliged to qualify for a captaincy when it becomes available? The Witness: He is not. That used to be the case and is not now, and it does not exist in large numbers at all. The Chairman: To some degree he takes a bit of a chance. I guess that is the thesis of Mr. Hunter's questioning; he takes a chance because, if he fails, then he is going to be out of a job? The Witness: That chance exists, yes." (Transcript, p. 1069)

Moreover, it appears that the outside range for an individual to progress from second officer to the captain's seat is up to twenty- three years. He generally remains in the second officer's position for a period of two to ten years and it is possible to be in the first officer's position from six to twenty- three years with the balance of his career spent as a captain. These time periods vary with economic factors and the rate of expansion of the airline and the individual desire of the pilot to convert to a higher status.

Air Canada is desirous of maximizing the number of years that a pilot serves as a captain in order to provide a greater return on its investment of expensive training. There is nothing, however, in the evidence before this Tribunal to suggest that Air Canada's hiring policy is directed specifically, as it was in the Murname case, towards maximizing its captains' record of experience in the interests of safety. Indeed, with Air Canada it is not a policy at all since it allows individuals to stagnate at the second officer or first officer levels without imposing a necessity of seeking a higher cockpit position. Promotion to next higher position depends upon the economic circumstances of Air Canada and the individual desire of the pilot to upgrade when he has the opportunity. If, on such occasion, he wishes to remain a permanent second officer for example, and declines to upgrade, or, chooses to advance later at a more convenient time for him, he thereby frustrates any principle of maximizing the number of possible years of service as a captain that he could otherwise provide if he had to adhere to an "up or out" rule. In the absence of an "up or out" rule, therefore, it cannot be said that Air Canada's hiring age policy is directed to the advancement of safety by maximizing the experience of its group of captains. For this Tribunal to give effect to the principle in Murname in the circumstances of this case would be to act upon pure supposition or evidence which is "impressionistic" rather than substantive. (See *The Ontario Human Rights Commission v The Borough of Etobicoke*, supra, at pp. 8-9). The mere general assertion by Captain Sanderson that it looks upon every applicant as an "eventual captain" from an economic viewpoint cannot result in a conclusion, justified by probative evidence, that Air Canada's hiring policy is reasonably necessary for the enhancement of public safety. Even though the onus to establish bona fide occupational qualification on Air Canada is lighter in view of the hazardous nature of a pilot's occupation, it is not absolved from adducing credible evidence on the importance of maximizing its captains' experience from a safety point of view. Consequently, the Murname decision has little applicability to the actual evidence adduced in this hearing.

In any event, it would be difficult to reconcile the Murname principle with Air Canada's habit of ignoring, on occasion, its own policy and hiring older pilots in times of economic necessity. If public safety really is the paramount reason for adhering to a hiring age ceiling in order to enlarge the years of captaincy, then Air Canada's conduct in hiring older pilots when it is to its economic advantage would appear to belie this rationale.

6. CONCLUSIONS

The Complainants were all qualified for the position sought, in that, apart from their age, they were sufficiently possessed of the requisite job qualifications regularly accepted by Air Canada at the stage in the application process in which the Complainants were rejected. The Complainants have established that their applications for pilot employment to Air Canada were directly or indirectly rejected on the basis of a prohibited ground of discrimination, namely, age, both before and after March 1st, 1978, the operative date of Section 7 of The Canadian Human Rights Act; and thus, there has been a contravention of that section.

By reason of Air Canada's age hiring restriction, a chronologically older pilot applicant is required to have higher qualifications than a younger candidate. This policy deprives or tends to deprive a class of individuals over the age of 27 of employment opportunities on a prohibited

ground of discrimination, namely, age. This amounts to a discriminatory practice under Section 10 of The Canadian Human Rights Act.

As to the defence of bona fide occupational requirement raised by Air Canada, one must keep in mind the two- fold test propounded by the Supreme Court of Canada in *The Ontario Human Rights Commission v The Borough of Etobicoke*, supra. Although, there is no doubt that the first aspect of this test has been satisfied in that Air Canada imposed its age- at- hire policy "in good faith and in the sincerely held belief that such restriction was in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the [Act]," it is with respect to the second phase of the test that Air Canada has faced, if some licence may be taken, strong headwinds. One must apply the "business necessity" test as set out by the Supreme Court of Canada and it bears repeating: the bona fide occupational requirement "must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public".

It is clear that the essence of Air Canada's business is the safe transportation of its passengers. Accordingly, because of the interest of public safety, the standard of proof upon Air Canada to establish its bona fide occupational requirement defence on the balance of probabilities must be somewhat elastic and this Tribunal is prepared to accord it a lighter burden in this regard. However, I must take note of what the Tribunal said in *Bhinder v C. N. R.*, supra, at page 84:

"Where age is the requirement [as in these cases where there are safety implications for the public], the Respondent must show the actual ability is impossible or impractical to test. Thus, even though the burden of proof on employers is lighter in hazardous jobs, it is clear that the exception of bona fide occupational qualification should still be strictly construed and hence, discriminatory acts should still be carefully scrutinized."

The basis for this scrutiny is founded in the cornerstone principle of the Canadian Human Rights Act. It is set out in section 2(a) as follows:

"every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on ... age ...".

Having carefully examined each of the bases of the bona fide occupational requirement defence raised by Air Canada, I am led to the conclusion that it has not discharged the burden upon it to demonstrate from a business necessity point of view any factual basis for believing that all or substantially all pilots over the age of 27 with qualifications the same as younger candidates are incapable of safe and efficient job performance; or that it is impossible or impractical to test such individuals over a certain age on an individualized basis prior to the time of mandatory retirement to ensure that they meet the stringent qualifications required by the demands of safety. The evidence adduced does not justify a conclusion that there is a sufficient risk of pilot failure

for persons over the age of 27 to warrant the imposition of Air Canada's age- at- hire restriction. Consequently, I find the complaints herein to be substantiated.

I add that I am most indebted to both Mr. Hunter and Mr. Morley for their thorough research and argument.

The parties agreed that further inquiry into the question of relief and the Order to be made pursuant to Section 41(2) of The Canadian Human Rights Act would be dealt with at a subsequent time. Accordingly, counsel for the parties should arrange with the Tribunal Secretariat for a convenient date for the resumption of the hearing into this question.

Dated at Toronto this 9th day of March, 1982.

SIDNEY N. LEDERMAN, Q. C.