CANADIAN HUMA RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

GEORGE VILVEN

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

AIR CANADA

Respondent

- and -

AIR CANADA PILOTS ASSOCIATION
FLY PAST 60 COALITION

Interested Parties

AND BETWEEN:

ROBERT NEIL KELLY

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

AIR CANADA
AIR CANADA PILOTS ASSOCIATION

Respondents

DECISION

PANEL: J. Grant Sinclair 2009 CHRT 24
Karen A. Jensen 2009/08/28

I. INTRODUCTION

[1] This is the Tribunal's second decision regarding mandatory retirement at Air Canada.

[2] It involves complaints by George Vilven and Robert Kelly who were forced to retire from their positions as pilots with Air Canada when they turned 60 years of age. Their forced retirement was in accordance with the mandatory retirement provisions of the collective agreement in force between their union, Air Canada Pilots' Association (ACPA) and Air Canada.

[3] In its first decision, the Tribunal dismissed the complaints. The Tribunal held that 60 was the "normal retirement age" for positions similar to those occupied by the Complainants at the time of their retirement, as contemplated by section 15(1)(*c*) of the *Canadian Human Rights Act (CHRA)*. As a result, the termination of their employment did not amount to a discriminatory practice within the meaning of the *CHRA*.

[4] The Tribunal also concluded that 15(1)(*c*) did not violate subsection 15(1) of the *Canadian Charter of Rights and Freedoms*.

[5] The complainants and the Canadian Human Rights Commission applied to the Federal Court for judicial review of the Tribunal's decision. In its decision dated April 9, 2009, the Federal Court found that the Tribunal erred in its conclusion as to the "normal age of retirement" in this case pursuant to section 15(1)(*c*) of the *CHRA*.

[6] The Court found that the determination of the "normal age of retirement" should be based on the total number of positions within Canada that are similar to those occupied by the Complainants. "Similar positions" refers to pilots who fly aircraft of varying sizes and types, transporting passengers to both domestic and international destinations, through Canadian and foreign airspace.

[7] The evidence is that 56.13% of pilots in similar positions to those of the Complainants retired by the time they reached the age of age 60. Therefore, the "normal age of retirement" is 60. The Court noted that this method for interpreting s. 15(1)(*c*) allows Air Canada, because it employs the majority of pilots in positions similar to those of the Complainants, to set the normal age of retirement for the entire industry.

[8] On the constitutionally of s. 15(1)(*c*), the Court disagreed with the Tribunal, finding that this provision contravenes s. 15 of the *Charter* and remitted the complaint to the Tribunal to determine, on the basis of the existing record, whether s. 15(1)(*c*) of the *CHRA* can be demonstrably justified as a reasonable limit in a free and democratic society within the meaning of the s. 1 of the *Charter*.

[9] If not, the Tribunal must then decide whether the mandatory retirement provision in the collective agreement is a *bona fide occupational requirement (BFOR)* under s. 15(1)(*a*) and s. 15(2) of the *CHRA*.

[10] At the date of his retirement on September 1, 2003 at age 60, Mr. Vilven was flying as a First Officer on the Airbus 340 aircraft. Mr. Kelly retired on April 30, 2005 the day on which he turned age 60. At the time of his retirement, Mr. Kelly was flying as the Captain and Pilot-in-command of an Airbus 340.

II. CAN SECTION 15(1)(*C*) BE JUSTIFIED UNDER SECTION 1 OF THE *CHARTER*?

[11] To be saved under s. 1 of the *Charter*, the onus is on the respondents to establish that s. 15(1)(*c*) is a "reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society." The test for determining this was articulated by the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103.

[12] The *Oakes* test requires that two criteria be satisfied. First, the objective of the law must relate to a societal concern that is "pressing and substantial." Second, the means used to attain the objective must be "proportional." Proportionality requires that the measures chosen must be rationally connected to the objective and should impair as little as possible the right or freedom in question. It also requires that there be proportionality between the objectives and the effects. (*Oakes*, at para. 70.)

[13] The question of whether legislative provisions permitting mandatory retirement are justifiable under s. 1 of the *Charter* has been considered in a number of decisions. In *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, the Supreme Court held that section 9(a) of the *Ontario Human Rights Code* which limited the protection of the Code to those between the ages of 18 to 65 violated s. 15 of the *Charter* but was saved by s. 1. The appellants were university professors at the University of Guelph who were forced to retire at age 65 under the University's mandatory retirement policy.

[14] In finding that the provision was justified under s. 1 of the *Charter*, the majority in *McKinney* accorded a high degree of deference toward the legislature. Writing for the majority, La Forest J. stated that mandatory retirement involves a complex balancing of competing interests on which expert opinion is divided. In a democratic society, decisions on such complex questions are best made by the legislature. The courts should accord legislatures considerable room to maneuver in striking a balance.

[15] To provide the social and economic context for the s.1 analysis, LaForest J. traced the history of mandatory retirement in Canada, noting that by 1970, integrated public and private pension plans were in place to provide income security after age 65. He observed that by 1990, about half of the Canadian work force occupied jobs that were subject to mandatory retirement and about two-thirds of collective agreements provided for mandatory retirement at 65. Age 65 had become accepted as the "normal" age for retirement and mandatory retirement had become part of the very fabric of the organization of the labour market in Canada.

[16] In *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451, the Supreme Court dealt with the constitutionality of s. 8(1)(a) of the *British Columbia Human Rights Act* that permitted mandatory retirement. The Supreme Court declared that, for the reasons provided in *McKinney*, this provision which limited age protection to those between the ages of 45 and 65, was unimpeachable.

[17] Very recently, a decision was rendered in a grievance involving CKY-TV that dealt with the constitutionality of s. 15(1)(c) of the *CHRA: CKY-TV v. Communications, Energy and Paperworkers Union of Canada, Local 816 (Kenny Grievance)* (2008) 175 L.A.C. (4th) 29. That case involved the mandatory retirement at age 65 of a maintenance technician with CKY-TV. The union grieved the forced retirement and challenged the constitutionality of s. 15(1)(*c*) of the *CHRA* on which it was alleged to be justified.

[18] Arbitrator Peltz found that the provision violated s. 15 of the *Charter* and was not saved by s.1. He held that in *McKinney*, the court proceeded on the basis of contextual assumptions which no longer held up in the face of the expert evidence that was presented to him. This evidence demonstrated that the context had changed since the *McKinney* decision resulting in a different outcome under the *Oakes* test.

[19] In two other recent cases, the courts have indicated that the social and economic context in which the *McKinney* decision was rendered has changed sufficiently to render the majority's decision with respect to s. 1 of the *Charter* inapplicable to present day circumstances: *Association of Justices of the Peace of Ontario v. Ontario (Attorney General,* 92 O.R. (3d) 16 (C.A.); and *Greater Vancouver Regional District Employees' Union v. Greater Vancouver Regional District*, 2001 BCCA 435. Although these two cases do not deal specifically with legislative provisions like s. 15(1)(*c*) of the *CHRA*, they are instructive

because of the approach the courts took to the contextual evidence and the application of s. 1 of the *Charter*.

[20] In *Association of Justices of the Peace of Ontario*, the Ontario Superior Court of Justice found that the provision in the *Justices of the Peace Act* which provides for mandatory retirement of justices of the peace at the age of 70 violated s. 15(1) of the *Charter* and was not saved by s. 1. The Court noted that in the course of only three decades, there has been a striking change in the legislation and public attitudes concerning mandatory retirement in Ontario.

[21] The Court contrasted the situation in Ontario in 2008 to the social and economic context in which *McKinney* was decided in 1990. In the 16 years since the Supreme Court of Canada's decision, there has been a sea change in the attitude toward mandatory retirement in Ontario. The Ontario legislature confirmed that mandatory retirement involves age discrimination and abolished it in the public and private sectors in December 2006.

[22] At issue in *Greater Vancouver Regional District Employees' Union v. Greater Vancouver Regional District*, [2001] B.C.J. No. 2026 (C.A.) was a public sector employer policy which imposed mandatory retirement. Although not directly on point, it is useful to note that the British Columbia Court of Appeal made a forceful call for a reconsideration of *McKinney* based on the significant changes in the demographics of the workplace at large. The Court noted that since *McKinney* was decided, at least two other countries, Australia and New Zealand, have abolished mandatory retirement. It added that social and legislative facts now available may well cast doubt on the extent to which the courts should defer to legislative decisions made over a decade ago.

A. The Factual and Social Context of the Present Legislation

[23] In *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, the Supreme Court observed that the application of the *Oakes* test "requires close attention to the context in which the impugned legislation operates", and that "where the legislation under consideration involves the balancing of competing interests and matters of social policy, the *Oakes* test should be applied flexibly, and not formally or mechanistically" (at para. 85).

[24] The evidence in the present case establishes that there are significant differences between the factual and social context in which the *McKinney* decision was rendered and the present case. What follows is a description of the current context and the differences between that and the *McKinney* context.

[25] In 1990, when the Supreme Court was reviewing s. 9(a) of the *Ontario Human Rights Code*, mandatory retirement was part of the very fabric of the organization of the labour market in this country (*McKinney*, at para. 84). About one half of the Canadian work force occupied jobs that were subject to mandatory retirement. Sixty-five had come to be recognized as the "normal" age of retirement. The Court was concerned about the ramifications of disallowing a practice that had become so integral to the organization of the Canadian labour market. It was concerned that the abolition of mandatory retirement would affect almost every aspect of the employer-employee relationship.

[26] The evidence in the present case establishes that mandatory retirement is no longer as prevalent as it was when *McKinney* was decided. At the time of the hearing, only 3 provinces allowed for the imposition of mandatory retirement: British Columbia, Saskatchewan and Nova Scotia. In British Columbia and Saskatchewan there were Bills before the provincial legislatures to abolish mandatory retirement.

[27] In all of the other provinces and territories in Canada, mandatory retirement is either prohibited or is permitted, but only if it is based on *bona fide* retirement or pension plans, or *bona fide* occupational requirements. Mandatory retirement, therefore, is no longer as integral to the organization of the Canadian labour market as it was when *McKinney* was decided.

[28] Furthermore, there is expert evidence in this case that questions the concerns that the Court raised in *McKinney* with regard to the negative effects of abolishing mandatory retirement.

[29] Dr. Jonathan Kessselman, a labour economist at Simon Fraser University in the graduate program of Public Policy, testified that the abolition of mandatory retirement has not spelled the end of deferred compensation systems and all of the benefits such systems bring to the labour market.

[30] Deferred compensation is the practice of paying workers less than their productivity in earlier years and more than their productivity in later years. In addition, most deferred compensation systems, like that of Air Canada, provide deferred benefits such as pensions and post-retirement benefits that rise with the worker's tenure.

[31] Both employers and employees like the deferred compensation system. It permits wages to rise with age, promotes employee loyalty in the expectation of rich pension benefits and encourages employers to invest in worker training. In exchange for the deferred benefits, employees may agree to terminate their employment at a specific age.

[32] Professor Kesselman explained that, even accepting that deferred compensation systems have important benefits to labour and management, it is not essential that there be a mandatory retirement age. This is because most workers will not stay indefinitely in their employment. Unconstrained by a mandatory retirement policy, they still choose to retire at around age 62. This permits employers to provide a deferred compensation system and to plan and manage their financial obligations - particularly in the area of pension plans and other benefits - without the need for mandatory retirement.

[33] Professor Kesselman also testified that even without mandatory retirement, employers continue to invest in their workers. There is no evidence of costly new systems to monitor the performance of older workers to catch those who wish to stay on too long. Similarly, there is no evidence that the removal of mandatory retirement has had any effect on the seniority system.

[34] Professor Carmichael, a labour economist from Queen's University, agreed that in jurisdictions where mandatory retirement has been abolished deferred compensation, seniority and other positive features of the current labour regime have continued. And there are alternatives to mandatory retirement that have the effect of preserving the benefits of the current system.

[35] One such alternative is to provide a lump sum payment to employees upon retirement at a certain age to induce them to retire. He pointed out that this approach was introduced in Quebec universities when mandatory retirement was abolished in that province.

[36] Another alternative is to permit workplace parties to renegotiate the terms and conditions of employment at an agreed upon age. He stated that this has been successfully done in some Ontario universities where professors who reach a certain age agree to stay on as professors emeritus.

[37] However, Professor Carmichael does not necessarily subscribe to these alternatives. The abolition of mandatory retirement would allow the current generation of older workers to keep all of the benefits of a deferred compensation system and avoid the responsibility that comes with those benefits - passing them on when their time to retire comes.

[38] The essence of the right to equality is that no one is denied opportunities for reasons that have nothing to do with inherent ability. As Justice L'Heureux-Dubé stated in *McKinney*, mandatory retirement directly contradicts that right since it denies individuals the ability to continue working for reasons wholly unrelated to inherent ability. The detrimental impact of the loss of work on an individual's sense of self-worth and well-being has been frequently noted (see *Reference Re Public Service Employee Relations Act, [1987] 1S.C.R 313)*. The

fact that others in the workplace may experience the same loss of dignity and self-esteem when forced to retire is of little consolation.

[39] Recognition of the importance of the right to protection from age discrimination has evolved significantly since *McKinney* was decided. Employees may still agree, through their bargaining agent, to accept mandatory retirement. Although this may attenuate to some extent the impact of mandatory retirement on the right to equality, mandatory retirement is nonetheless, an affront to the right to equality.

[40] In its recent decisions in *Meiorin* and *Grismer*, the Supreme Court emphasized the importance of individual assessment and the accommodation of individual needs and abilities on a case-by-case basis. Viewed in this light, s. 15(1)(*c*) is a somewhat anomalous provision. It allows parties to contract out of the right to protection from age discrimination on the basis of a standard that is unrelated to individual needs and abilities.

[41] Professor Kesselman testified that since *McKinney*, the social and economic conditions in Canada have changed considerably. Forecasts show that by 2010, fully 70 percent of the net increase in the working age population from 2000 will arise in ages 55-to-64, and by 2020 all of the net increase will be in that age group.

[42] Moreover, growth in the population aged 65 and over is poised to accelerate rapidly. At the same time the health status of older people is improving, and the physical demands of most jobs falling. People are capable of working longer and many of them need to for financial reasons. Increased time spent in formal education before starting work has meant that, on average, people are starting work later in life.

[43] In addition, the Canadian and other global economies are facing skill and labour shortages. This is an issue which is increasing in importance with each passing year as the current workforce ages and is not being replaced in sufficient numbers by young workers. Professor Kesselman's view is that, in the face of these demographic changes, rather than mandatory retirement, we should be looking at ways to encourage longer working lives.

B. Are the Objectives of the Legislation Pressing and Substantial?

[44] The first step of the *Oakes* test demands a clear articulation of the objective of the legislation. The Federal Court found that the purpose of s. 15(1)(*c*) of the *Act* is to allow for the negotiation of mandatory retirement arrangements between employers and employees, particularly through the collective bargaining process (*Vilven and Kelly*, at para. 247).

[45] In the light of the above-noted considerations, can it be said that the goal of permitting mandatory retirement to be negotiated in the workplace continues to be of pressing and substantial importance? The alternatives to mandatory retirement, which are in use in other jurisdictions, effectively preserve the benefits of the current system without infringing a constitutionally protected right. How then can the goal of permitting freedom of contract in this area be sufficiently important to warrant overriding a constitutional right?

[46] The Respondents argued that deference should be shown in situations such as the present, when legislation is aimed at mediating between the competing claims of different groups. The government should be given "a margin of appreciation to form legitimate objectives based on somewhat inconclusive social science evidence" (*RJR-MacDonald*, para. 104; *Irwin Toy*, p. 990).

[47] But the social science evidence regarding mandatory retirement is no longer as inconclusive as it was when *McKinney* was decided. The experts who testified in the present case agreed that the link between mandatory retirement and the benefits that were traditionally associated with it is not as strong as it was once thought to be. There is no dispute that in jurisdictions that have abolished mandatory retirement, deferred compensation systems, seniority and other such socially beneficial systems have survived.

[48] Moreover, it is now clear that the workforce is aging and many individuals need and want to work past the mandatory retirement age. In the light of this fact, it might be argued

that preventing, rather than permitting age discrimination beyond the normal age of retirement has become a pressing and substantial need in society.

[49] Given that the benefits associated with mandatory retirement can be achieved without mandatory retirement, it is difficult to see how permitting it to be negotiated in the workplace is important enough to warrant the violation of equality rights that was identified by the Federal Court in the present case.

[50] Based on the above analysis, we have concluded that it can no longer be said that the goal of leaving mandatory retirement to be negotiated in the workplace is sufficiently pressing and substantial to warrant the infringement of equality rights.

(i) Proportionality

[51] Even assuming that the objective of s. 15(1)(*c*) remains pressing and substantial, the next question is whether the means chosen to achieve this objective are proportional.

[52] The first step in the proportionality analysis is to consider whether the objectives of the legislation are logically furthered by the means the government has chosen to adopt (*RJR-MacDonald*, at para.82; *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211 at p. 291).

[53] On the face of it, the objective of preserving an employment regime that allows for the negotiation of mandatory retirement seems to be logically furthered by immunizing such regimes from complaints of age discrimination. This prevents a significant legal barrier, complaints of age discrimination, from standing in the way of mandatory retirement arrangements.

[54] However, one anomaly of the "normal age of retirement" rule as noted by the Federal Court in *Vilven*, is that a dominant actor in the industry such as Air Canada, can set the mandatory retirement age for the entire industry. As a result, employees of smaller companies within the industry who have not negotiated mandatory retirement in exchange for wage and pension benefits may still be subject to the mandatory retirement age set by the dominant player in the industry. So, for example, Jazz Airlines could take advantage of the "normal age of retirement" set by Air Canada and impose mandatory retirement at age 60 upon its pilots.

[55] Another flaw with the alleged rational connection is that it assumes that the normal age of retirement will be the subject of negotiation within the workplace of the dominant player or players in the industry. But under s. 15(1)(*c*) there is no requirement that the arrangement be negotiated, only that that retirement occur at the "normal age."

[56] The "normal age of retirement" criterion is therefore, not rationally connected to the goal of allowing for negotiated mandatory retirement. It permits mandatory retirement to be imposed upon workers without negotiation, provided the retirement age corresponds to the industry norm.

(ii) Minimal Impairment

[57] The next question is whether s.15(1)(*c*) impairs the right to equal protection no more than is necessary to achieve its goal, i.e. permitting mandatory retirement to be determined in the workplace. The jurisprudence suggests that a more deferential approach must be given to the legislature when applying the *Oakes* test where there are competing rights and interests (*McKinney*, at p. 305; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 86; *Association of Justices of the Peace et al. v. Ontario (Attorney General)* (2008), 92 O.R. (3d) 16, at para. 142).

[58] As the Supreme Court said in *RJR-MacDonald*, a law will meet the requirements of minimal impairment if the legislation falls within a range of reasonable alternatives (at para.160). Even allowing for a range of reasonable alternatives, providing an exemption for mandatory retirement that corresponds to the normal age of retirement in the industry, fails this part of the test.

[59] Far less intrusive options can be contemplated. For example, as is the case in other jurisdictions, one option would be to permit mandatory retirement arrangements that constitute a *bona fide* occupational requirement (BFOR) under ss. 15(1)(*a*) and 15(2) of the *CHRA*.

[60] In *McKinney*, the majority examined the BFOR option, but did not find it to be a preferable alternative. Justice La Forest stated that in workplaces where there is a mandatory retirement policy, one is not necessarily concerned with individual accommodation. The goal of provisions like s. 9(a) of the former *Ontario Human Rights Code* is to permit the parties to an employment contract to agree to mandatory retirement. Implicit in that goal is the assumption that in the collective bargaining context, individual accommodation will not always be possible or even desirable.

[61] Additionally, Justice La Forest stated that the Legislature could not be expected to determine which industries should be permitted to maintain mandatory retirement policies on the basis of a *bona fide* occupational requirement. Nor was it obvious to the majority that the Human Rights Commission was necessarily the most appropriate body to make that determination.

[62] Concerns about the application of the BFOR test to mandatory retirement have not hindered other jurisdictions both internationally and in Canada, from adopting this method of justifying mandatory retirement. In the majority of Canadian provinces - Alberta, Nova Scotia, New Brunswick, Prince Edward Island, Quebec, Manitoba and Ontario - mandatory retirement is not permitted unless it constitutes a *bona fide* occupational requirement. Similarly, in Australia, New Zealand and the United States mandatory retirement is only permitted if it is justified as a *bona fide* occupational requirement.

[63] Moreover, it is arguable that the concerns expressed by Justice La Forest about individual accommodation in the collective bargaining context no longer have the weight they once had in the light of the Supreme Court decision in *Meiorin*, where the Supreme Court underscored the importance of assessing and accommodating factors related to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship (*Meiorin*, at paras. 62-63). Recognition of the equality of each individual must be built into workplace standards. These requirements apply even in the context of unionized workplaces.

[64] There may, however, be less intrusive means of achieving the goals of s. 15(1)(*c*) that would deal with the concern raised in *McKinney* that the BFOR test is inappropriate because individual accommodation within a collective bargaining context is not always feasible. As the arbitrator noted in *CKY-TV*, there may well be particular employment situations where mandatory retirement is demonstrably essential to maintaining a negotiated package of rights and benefits (at para. 218). A more carefully tailored version of section 15(1)(*c*), which limited the exception to these kinds of circumstances, might pass this branch of the s.1 test.

(iii) Proportionality Between the Effects of the Legislation and the Objective

[65] The final stage of the proportionality analysis requires the Tribunal to weigh the negative effects of the infringement of rights against the positive benefits associated with the legislative goal. The positive benefits associated with the legislative goal have been covered in some detail above and can be summarized as follows.

[66] Allowing mandatory retirement to be negotiated in the workplace provides a powerful bargaining chip to unions and employees to negotiate a number of important benefits including deferred compensation, the equitable distribution of benefits and job advancement opportunities. Mandatory retirement allows employers to plan for the flow of labor into a workplace, to manage wage bills and to plan their financial obligations.

[67] On the other side of ledger, however, the evidence is clear that depriving people who are the normal age of retirement of protection under the *CHRA* produces significant deleterious

effects. Both experts agreed that mandatory retirement arrangements are hard on people who need to work, for whatever reason, past the normal age of retirement. In particular, those who enter the workforce later in life or who have taken breaks from paid labour face considerable hardship when forced to retire. These workers do not have the time to amass significant pension benefits and may face a particular burden if they have to retire at a certain age. Professor Carmichael testified that this group is made up predominantly of women who have spent the early part of their career out of the labour force raising children, and immigrants who came to Canada as older adults. These individuals are thrust back out into the job market after they have been forced to retire.

[68] Professor Kesselman testified that even in those provinces that outlaw age discrimination beyond 65, seniors face significant difficulties in finding work that fully utilizes their skills and experience. The time required to find work after being laid off is much longer for workers 55-to-64 than for younger workers, and this disadvantage extends to workers terminated by mandatory retirement at 65. This results in a heavy personal and financial blow to the individual.

[69] Professor Carmichael stated that rather than removing the freedom to negotiate mandatory retirement, programs could be designed to compensate these groups for the financial disadvantages resulting from mandatory retirement. However, not only is it questionable whether financial aid would provide a sufficient degree of income security, it does not address, and indeed may even exacerbate the loss of dignity and pride that flows from being unemployed. As a result of s. 15(1)(*c*), these individuals are deprived of legal redress for the harm done to them when they are forced to retire at the "normal age of retirement"; they are deprived of the protection of a quasi-constitutional statute.

[70] In the Tribunal's view, the negative effects of the infringement of depriving individuals of the protection of the *Act* outweigh the positive benefits associated with s. 15(1)(*c*). As a final observation, perhaps one of the most disturbing aspects of this provision was the one first noted by the Court in *Vilven*: it allows employers to discriminate against their employees on the basis of age so long as that discrimination is pervasive in the industry.

[71] For these reasons, the Tribunal finds that the Respondents have not met their onus under section 1 of the *Charter*. Section 15(1)(*c*) of the *CHRA* is not a reasonable limit on the Complainants' equality rights under s. 15(1) of the *Charter*. Therefore, we refuse to apply it to the facts of the present case.

III. HAVE AIR CANADA AND ACPA ESTABLISHED A BFOR - SECTIONS 15(1)(*A*) AND 15(2) OF THE *CHRA*?

[72] The respondents Air Canada and ACPA argue that the mandatory retirement provision in the collective agreement which required Mr. Vilven and Mr. Kelly to retire at age 60, is a *bona fide* occupational requirement("BFOR") within s. 15(1)(*a*) of the *Canadian Human Rights Act* (*CHRA*). As such, in applying this policy, neither Air Canada nor ACPA has engaged in a discriminatory practice.

[73] To avail themselves of the BFOR defence, the respondents must satisfy the three requirements set out by the Supreme Court in *Meiorin*.

[74] They are, first, that the mandatory retirement provision was adopted for a purpose that is rationally connected to the performance of the job. Secondly, this provision was adopted in the honest and good faith belief that it was necessary to the fulfillment of a legitimate work-related purpose.

[75] And third, that the provision is reasonably necessary to the accomplishment of that legitimate work-related purpose. In this regard, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer or the union.

[76] Recently, however, the third aspect of *Meiorin* was clarified by the Supreme Court where it said that there is a problem of interpretation that arises from the use of the word "impossible". What is required to establish undue hardship is not proof that it is impossible to accommodate an employee who does not meet the standard. Rather, it is proof that accommodation will necessarily produce undue hardship that is needed, which can take as many forms as there are circumstances. *(Hydro-Québec v. Syndicat des employées de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)* 2008 SCC 43).

[77] The Supreme Court has provided some guidance in *Meiorin* on the question of accommodation where it said that courts and tribunals should be sensitive to the various ways in which individual capabilities may be accommodated. Some questions that may be asked in doing the analysis include:

Are there different ways to perform the job while still accomplishing the employer's legitimate work-related purpose?

Has the employer investigated alternative approaches that do not have a discriminatory effect?

If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented? (*Meiorin*, paras. 64, 65)

[78] In determining undue hardship, there is also the question of whether the Tribunal can go beyond consideration of the factors of health, safety and cost as listed in s.15(2) of the *CHRA*. In *Meiorin*, the Supreme Court indicated that the factors to be considered in determining whether accommodation imposes undue hardship are not entrenched, unless they are expressly included or excluded by statute (at para. 63).

[79] The Tribunal reached a similar conclusion in *Brown v. National Capital Commission,* [2006] C.H.R.D.No.26, deciding that the *Dairy Pool* factors are not expressly excluded by the *CHRA*. The Tribunal reasoned that s. 15(2) does not say that health, safety and cost are the only factors to be considered in deciding whether the point of undue hardship has been reached.

[80] Further support that the list of factors in s. 15(2) is not exhaustive is found in *McGill University Health Centre v. Syndicat des employes de l'Hopital general de Montreal,* 2007 SCC 4, where the Supreme Court emphasized that the factors that will support a finding of undue hardship should be applied with flexibility and common sense.

[81] The Court noted the cost of the possible accommodation; employee morale and mobility; interference with other employees' rights; and disruption of the collective agreement as examples of other factors that may be considered (at para. 15).

[82] The complainants and the Commission do not dispute that the first two requirements have been satisfied, i.e. that the mandatory retirement rule was adopted for a rational purpose connected with the performance of the job and with an honest and good faith belief that it was necessary to the fulfilment of this work-related objective.

[83] The real issue between the parties relates to the third aspect of the *Meiorin* test, namely, whether the complainants can be accommodated without causing undue hardship for the respondents.

[84] A major part of the remedy that both Mr. Vilven and Mr Kelly are seeking is an accommodation whereby they would be reinstated to the positions that they would have held if not required to retire at age 60. This would involve restoring their accrued seniority and provide them with the opportunity to fly wide bodied aircraft internationally, as was the case when they retired.

[85] Air Canada argues that it cannot do this without experiencing undue hardship. This is because of the constraints imposed by the ICAO standards. The evidence from Air Canada is that being able to fly lawfully over foreign countries is an integral part of the job of a pilot of

Air Canada. About half of Air Canada flying is international. Eighty-six per cent of its domestic flying involves over-flying the United States air space.

[86] Of the remaining 14 % of domestic flying which does not involve flying over American air space, about 25% requires United States alternative airports which are necessary for safety reasons or to deal with weather conditions.

[87] Under the ICAO standards pre-November 2006, captains over the age of 60 could not fly internationally. There was no upper age limit for first officers. Post-November 2006, captains under 65 can fly internationally, provided that one of the pilots in a multi-pilot crew is under 60 ("the "over/under rule").

[88] Air Canada argues that it could not accommodate captains over the age of 60 for international flights prior to November 2006 without incurring major financial burdens and disruption to its operations.

[89] ACPA's position on undue hardship derives from the Supreme Court of Canada decision in *Central Okanagan School District v. Renaud*, [1992] 2 S.C.R. 970, where the Court dealt specifically with undue hardship as applied to a trade union and its members.

[90] There the Court stated that the primary concern with respect to accommodating measures is not, as is the case with the employer, the disruption or expense to the union, but rather the effect on other employees. The duty to accommodate should not substitute discrimination against other employees for the discrimination suffered by the complainant. The test of undue hardship will often be met by showing a prejudice to other employees if the proposed accommodation is adopted (*Renaud*, para. 38).

[91] It is these considerations that ACPA references to support its position that the removal of the mandatory retirement provision would cause undue hardship to its members. ACPA argues that this would limit the number of positions available to pilots under 60. It would dilute their seniority. It would interfere with the ability of younger pilots to plan for their retirement in terms of timing and pension. This in turn would have a negative effect on pilot morale.

The ICAO Standards- Pre-November 2006

[92] It is clear that under the pre-November 2006 ICAO standards there was no bar to Mr. Vilven flying internationally as a first officer. Nor did Air Canada offer any evidence that to allow Mr. Vilven to do so would cause it any undue hardship.

[93] In Mr. Kelly's case, in this same time period, he could have continued to fly internationally, not as a captain/pilot in command, but as a first officer. Air Canada did not consider or offer this accommodation to Mr. Kelly. Nor did ACPA make any efforts to seek an accommodation for the two complainants. Both of the respondents merely followed and applied the terms of the collective agreement.

[94] For these reasons, we find that the respondents discriminated against Mr. Vilven and Mr. Kelly in that time period, on the basis of age and have not established a BFOR defence for their discriminatory conduct.

The ICAO Standards Post-November 2006

[95] With respect to the post-November 2006 ICAO standards, Air Canada's ability to accommodate the complainants is more problematic. Its position is that, given the ICAO over/under rule, it cannot produce a schedule to allow over 60 pilots to fly internationally without experiencing undue hardship to its operations or to its financial wellbeing.

[96] On this question, Air Canada relied primarily on the evidence of Captain Steven Duke. Captain Duke started with Air Canada in January 1997. His current job title is Six Sigma Black Belt for Flight operations, a management position that he has held since 2006. Six Sigma is a business improvement process adopted by Air Canada about four years ago. Persons are appointed in each branch as black belts, that is to say, they are recognized as experts in the business improvement process.

[97] Captain Duke's main flying experience with Air Canada has been as a captain on the CRJ regional jet. He also worked in the Training department as a senior flight instructor, chief instructor and flight manager on this aircraft. As flight manager, he was responsible for the day-to-day operation and the overseeing of the 150 Toronto based pilots. Captain Duke has held permanent management positions at Air Canada for about eight years.

[98] Captain's Duke's evidence consisted of 74 slides and his commentary on these slides. This evidence was grouped under the general headings of:

Background

Structure of Air Canada's Pilot Group

Crew Manning Steering Committee (CMSC) Review & Position Bidding Process

Effect of eliminating mandatory retirement at Age 60

Issue One: The inability of Air Canada to have captains over age 65 fly internationally.

Issue Two: The inability of Air Canada to have captains over age 65 fly domestically.

Issue Three: The very limited ability of Air Canada to accommodate captains and first officers who are age 60.

Issue Four: Eliminates the ability to predict hiring and training needs in advance and increases operational risk.

[99] The first heading contains descriptive information. It is the second heading, "The Effect of Eliminating Mandatory Retirement at Age 60" and the issues raised thereunder that are specifically relevant to the BFOR issue.

[100] Dealing with Issue One, the Tribunal agrees that because of the current ICAO standard, Air Canada cannot schedule pilots in command over 65 to fly internationally because it would prevent Air Canada from flying many of its international routes.

[101] As to Issue Two, as noted earlier, both Mr. Vilven and Mr. Kelly indicated in their evidence and final submissions that they want to resume their respective positions as first officer and pilot in command on wide body aircraft flying internationally for Air Canada. Accordingly, the issue of flying domestically need not be addressed.

[102] As to Issue Three, Captain Duke's evidence is that Air Canada can only accommodate a very limited number of potentially restricted pilots (potentially restricted pilots are captains over 60 and under 65 and first officers over 60, who would be subject to the "over/under rule") before pilot scheduling becomes unworkable.

[103] Captain Duke presented demographic evidence showing that as of November 2006, 85% (47/55) of Air Canada's Vancouver A-340 captains were 55 or older. As for Toronto A-340 captains, 78% (98/126) were 55 or older.

[104] If mandatory retirement at 60 was abolished, then in five years, 85% of Vancouver A-340 captains would be potentially restricted as would 78% of Toronto A-340 captain**s.**

[105] With respect to B-767 aircraft which Air Canada flies internationally, the demographics in November 2006 were that 70% (105/150) of Vancouver B-767 captains were 55 or older as were 53% (98/186) of Toronto B-767 captains. These captains would also be potentially restricted in five years.

[106] As for Vancouver A-340 first officers as at November 2006, 12/73 or 17% were age 55 or older. There were no statistics given for Toronto first officers.

[107] Captain Duke also produced the November 2006 demographics for all of the Air Canada pilots. This showed that there were 1408 captains, 1505 first officers and 168 relief pilots. Of these, 11 captains and 4 first officers turned 60 in that month.

[108] He then projected these demographics to 2011 with no retirements. The eleven captains would then be restricted because they would be over 65. Of the other pilots, 583 would become potentially restricted, 483 captains, 91 first officers and nine relief pilots. By 2016 with no retirements, there would be 505 potentially restricted captains, 279 first officers and 14 relief pilots in that category.

[109] These projections assume that all of the pilots would choose and were medically and operationally qualified to continue to fly with Air Canada. Of course, this is an unknown factor since all pilots are required to retire at 60.
[110] Captain Duke then posed the question: what number of potentially restricted pilots can Air Canada accommodate? To answer this question, he ran two experiments, one for Vancouver A-340 captains and first officers and a second for Toronto A-340 captains and first officers.
[111] The Vancouver experiment assumed, that as at January 2007, ten per cent of the Vancouver A-340 captains and first officers are potentially restricted on the basis of age so that they could not fly together as part of a two pilot crew.
[112] Captain Duke said that the experiment did produce a solution. But a number of the first officers' seniority was not respected. Several who were awarded blocks on the basis of their seniority, now received materially lower quality monthly schedules including being placed on reserve schedules.
[113] He noted that this raises two concerns for Air Canada. First, pilots on reserve get a minimum monthly guarantee even if they don't fly. More importantly, potentially restricted pilots may not be useful as reserve pilots.
[114] For example, if a first officer is off sick or for some other reason cannot fly, a potentially restricted first officer on reserve cannot replace him if the captain on an international flight is over 60. Thus, there would be uncertainty as to the reserve coverage.
[115] For the second phase of the Vancouver experiment, the numbers were increased to 20 per cent of potentially restricted captains and 11 per cent of potentially restricted first officers. The result was that no solution was possible. No pilot schedule could be generated.
[116] Captain's Duke's evidence is that where there are a number of potentially restricted pilots above this threshold, Air Canada either would have to go through the seniority list to find a first officer who is unrestricted or hire another pilot under 60 at full salary for the A-340 first officer position. Either action could involve ignoring the seniority list.
[117] According to Captain Duke, seniority is a fundamental provision for ACPA under the collective agreement. He speculated that if Air Canada ignored seniority rights it could bring Air Canada to a halt.
[118] In addition there would be the cost of hiring an additional pilot at a full A-340 first officer salary while continuing to pay the pilots above 60 on the reserve list whose services cannot be used.
[119] For the Toronto A-340 pilots, Captain Duke ran the experiment with various numbers of potentially restricted captains and first officers. This experiment showed two things: no solution is possible for any number above 30% of captains potentially restricted and 30% of first officers potentially restricted; and no solution is possible for any number above 20% of captains potentially restricted and 40% of first officers potentially restricted.
[120] With the first result, Air Canada would have to hire a least one additional pilot at full salary into the same position while continuing to pay the pilots above 60 whose services cannot be used.
[121] For the second result, each increase in the percentage of potentially restricted pilots would cause first officers to receive a materially lower quality monthly schedule.
[122] It is our view that this evidence is not sufficient to demonstrate undue hardship for Air Canada. The Vancouver experiment is based on January 2007 demographics. There is no evidence as to the actual number of restricted pilots included in the 10% cohort. Based on the November 2006 Vancouver A-340 statistics it would appear to number about five captains and two first officers.
[123] But the results of the experiment show "solution obtained". According to Captain Duke, this means all of the captains could be accommodated and some first officers. But

"many" first officers would be affected by receiving "materially" lower quality monthly schedules or be placed on the reserve list.

[124] Unfortunately, Captain Duke did not provide any evidence as to how he arrived at these conclusions or even the resulting schedules produced from the experiment.

[125] More importantly, we have no evidence as to what is a materially lower quality schedule or why this is so. Further, there is no evidence coming from this experiment as to how many is "many", i.e. the number of first officers who would receive a less desirable schedule.

[126] The evidence is also lacking as to the potential cost to Air Canada of hiring at least one additional pilot while continuing to pay the reserve pilots whose services cannot be utilized.

[127] When the experiment shifts to 20 % of captains and 11 % of first officers, we are told that there is no solution, i.e. no schedule can be produced for any of the pilots. Again, no explanation is given for this result.

[128] These same observations apply to both phases of the Toronto A-340 experiment.

[129] Captain Duke's evidence on Issue four, Air Canada's ability to predict hiring and training if the retirement age is extended to 65 or eliminated is that Air Canada would be faced with unexpected retirements because there is nothing that requires pilots to give notice of their retirement**.**

[130] He testified that it takes about three months to schedule and train a pilot and that Air Canada would require a minimum of three months notice of a pilot's retirement. He did agree however, that if the Tribunal ordered that pilots must give at least one year prior notice of their decision to retire, this would not be an issue.

IV. DOES THE ELIMINATION OF MANDATORY RETIREMENT CAUSE UNDUE HARDSHIP TO ACPA?

[131] ACPA and Air Canada agreed to incorporate the age 60 retirement rule into the collective agreement. ACPA therefore shares a joint responsibility with Air Canada to seek to accommodate the affected employees (*Renaud*, para. 26).

[132] ACPA argued that accommodating over 60 pilots would impose a significant and unreasonable cost on pilots who are under 60 years of age. In particular, ACPA claimed that over 60 pilots are seeking to deny younger pilots the right to move into the highest paid positions at Air Canada. That difference in salary is measured in tens of thousands of dollars. The denial of the right to move into the highest paid positions would interfere with the ability of younger pilots to plan for their retirement.

[133] The evidence does not support the conclusion that younger pilots would be denied the right to move into the highest paid positions at Air Canada. Rather, the evidence establishes that if mandatory retirement was removed, there would likely be a delay, not a denial in the career progression of younger pilots.

[134] Professor Kesselman testified, on the basis of his research, that about three to 10 percent of the labour force would choose to work past age 65 in jurisdictions that don't allow mandatory retirement. If that percentage was applied to Air Canada's workforce, and one assumes that each member of that group chose to work an additional three years at Air Canada, an additional one to four months on average would be added to the working lives of the Air Canada pilots. As a result, the promotion prospects of younger flight crew members would also be delayed by about one to four months.

[135] Offset against the delay in career progression would be the fact that the younger pilots would have the freedom - when they reached age 60 - to work as long as they needed or wished to work.

[136] Professor Kesselman also testified that within a few years, one would know with a fair degree of precision, the average age at which pilots retire. In addition, requiring pilots to

provide notice of their retirement date would enhance this certainty and would give pilots the ability to plan for their retirement.

[137] For these reasons, Professor Kesselman was of the view that the impact on the promotion prospects and the ability of pilots to plan for their retirement would be minimal if mandatory retirement is removed.

[138] Professor Carmichael disagreed. He thought that because being a pilot at Air Canada is so rewarding in every sense of that word, a higher percentage of pilots would stay on past age 60 if mandatory retirement was removed. This would result in a greater delay to the career progression of younger pilots. However, he could not specify exactly what that delay might be. ACPA bears the burden of proof in this regard.

[139] A delay in career progression would also mean a delay in salary increases. It is not as ACPA stated, that the over 60 pilots would be taking money out of the younger workers' pockets if the age 60 rule was removed. Rather, the younger pilots would take longer to achieve the salary increases that they desire.

[140] There was no evidence that a delay in the career progression and salary increases of younger pilots would cause a substantial interference with the rights of these employees. Even if the delay was double the length calculated by Professor Kesselman, it is hard to see how this could constitute a substantial interference with the rights of other employees. Furthermore, given that there are other ways of determining the end dates of pilots' careers that allow for adequate planning, the Tribunal finds that accommodating over 60 pilots would not cause such interference either.

[141] Moreover, as LaForest J. noted in *McKinney*, forcibly retiring older workers in order to make way for younger workers is discriminatory since it assumes that the continued employment of some individuals is less important to those individuals, and of less value to society at large, than is the employment of other individuals, solely on the basis of age (McKinney, at p. 303).

[142] Although this statement was made in the context of the constitutional analysis of mandatory retirement, it is relevant in the present context. In *Renaud*, the Court indicated that the objections of employees to the accommodation of a fellow employee which are based on attitudes inconsistent with human rights are an irrelevant consideration.

[143] The objections of younger pilots to accommodating older pilots are based on the view that younger pilots will not be able to enjoy the benefits of seniority if the older pilots are not forced to retire. This objection has not been established on the evidence nor is it consistent with the above stated human rights principle in *Renaud*.

[144] In the circumstances of this case, insisting that the *absolute* preservation of a younger pilot's seniority takes precedence over the continued employment of his or her older colleagues amounts to making a purely age-based-and therefore arbitrary-value judgment about the relative worth to society of the work performed by each age group. And about the relative importance of employment to each age group.

[145] ACPA also argued that if mandatory retirement is removed, Air Canada would be forced to implement the one over/one under rule. It was asserted that the implementation of that rule would limit the positions available to pilots under 60 since over 60 captains could not be paired with over 60 first officers.

[146] As a result, the seniority rights of those under 60 pilots would be further "diluted" while at the same time, the seniority rights of the over 60 pilots would be given full measure. This would have a significant effect on pilot morale.

[147] Seniority at Air Canada is the cornerstone of the collective agreement; it determines the base, the equipment, the salary and the schedule that a pilot will receive. A refusal to respect the seniority system at Air Canada would amount to a substantial interference with the rights of these employees, in the submission of ACPA.

[148] Even assuming that the over/under rule would produce these consequences (which has not been established) Captain Duke agreed that he did not consider any other solutions to the conundrum that resulted from the two experiments that he conducted.

[149] However, there may be alternatives to potential scheduling problems that arise from the implementation of the over/under rule. For example, it may be that instead of requiring under 60 first officers to accommodate the over 60 captains, the respondents could agree that in the event of a scheduling problem, the over 60 captains would be required to bid into other positions where they could be accommodated.

[150] This is similar to what was done at Air Canada Jazz to accommodate over 60 Captains when the pre-November 2006 ICAO restrictions prevented them from flying internationally. Age 60 captains were required to bid a monthly Block which consisted solely of domestic pairings. An age 60 captain who was unable to hold a Block containing solely domestic pairings was assigned a Reserve Block. If after 6 months, an age 60 captain could not hold a domestic Flying Block, he or she was required to choose from a list of specified options or, at the Company's discretion, remain in his/her position.

[151] The kinds of arrangements made by Air Canada Jazz to accommodate over 60 captains are consistent with Professor Carmichael's evidence. He testified that mandatory retirement is not the only way to protect the seniority and deferred compensation systems. Instead of forcing workers to retire at a certain age, the parties can agree that at a certain age, the terms and conditions of employment will change.

[152] Finally, ACPA argued that removal of the age 60 retirement provision of the collective agreement would require ACPA and Air Canada to renegotiate significant aspects of that agreement. That level of disruption and the inevitable prospect of interference with other employees' rights fit squarely within the concept of undue hardship.

[153] The respondents bear the onus of presenting evidence to establish that the renegotiation of the collective agreement would constitute undue hardship. The simple assertion without more is not sufficient. On the contrary, there is the evidence of Captain Duke who indicated that with some cooperation, changes to the workplaces rules could be made.

[154] As he said, "We are being pushed into a new world here and we are going together in this, so we have to make it work for everyone." Presumably as a co-respondent and prompted by the Tribunal's decision, Air Canada would be motivated to cooperate in this process.

V. CONCLUSION

[155] The Tribunal has concluded that the respondents have not met their onus under s. 1 of the *Charter*. Section 15(1)(*c*) of the *CHRA* is not a reasonable limit on the complainants' rights under s. 15(1) of the *Charter*. Therefore, we refuse to apply s. 15(1)(*c*) to the facts of this case.

[156] The Tribunal has also concluded that the respondents have not established that the mandatory retirement provision in the collective agreement is a BFOR within ss. 15(1)(a) and 15(2) of the *CHRA*.

[157] For these reasons the Tribunal finds that the complaints of Mr. Vilven and Mr. Kelly have been substantiated.

VI. REMEDY

[158] The complainants seek a number of remedies including reinstatement; restoration of seniority and service; damages for lost income, as well as lost pension and other benefits. The Commission asks for a cease and desist order and significant revision to the respondents' workplace policies on mandatory retirement.

[159] These requests involve considerable readjustment to the current workplace regime and their disposition will require much more information than has been presented to the Tribunal.

[160] Accordingly, it will be necessary to provide further evidence and submissions taking into account this decision. A timetable for this will be established in consultation with the parties. The Tribunal remains seized with this matter for the purposes of remedy.

"*Signed by*"

J. Grant Sinclair, Chairperson

"*Signed by*"

Karen A. Jensen, Member

OTTAWA, Ontario
August 28, 2009

PARTIES OF RECORD

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DECISION OF THE TRIBUNAL DATED:	August 28, 2009
APPEARANCES:	
Robert Neil Kelly	For himself
George Vilven	For himself
Daniel Pagowski	For the Canadian Human Rights Commission
Maryse Tremblay Fred Headon	For the Respondent
Bruce Laughton, Q.C.	For the Air Canada Pilots Association
Raymond D. Hall	For the Fly Past 60 Coalition