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T1263/7507; T1279/0908 T1280/1008; T1336/6608 &
T1337/6708; T1380/0609; T1390/1609; T1402/2809; &
T1218/4409

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

Robert Adamson, Jacob Bakker, Donald Barnes, Michael Bingham, Doug Boyes, Kenneth Buchholz, Daniel Burrows, David G. Cameron, Wayne Caswill, George Cockburn, Bert Copping, Gary Delf, Jim E Denovan, Maurice Durrant, Colm Egan, Eldon Elliott, Leon Evans, Robert Ford, Larry Forseth, Grant Foster, Guy Glahn, Kenwood Green, Jonathan Hardwicke-Brown, Terry Hartvigsen, James Hawkins, George Herman, James Richard Hewson, Brock Higham, Larry Humphries, George Donald Iddon, Peter Jarman, Neil Charles Keating, George Kirbyson, Robin Lamb, Stephen Lambert, Les Lavoie, Harry G. Leslie, Robert Lowes, George Lucas, Donald Madec, Don Maloney, Michael Marynowski, Brian McDonald, Peter McHardy, Glenn Ronald McRae, Jim Millard, Brian Milsom, Howard Minaker, George Morgan, Greg Mutchler, Helmut Osenjak, Sten Palbom, Michael Pearson, David Powell-Williams, Paul Prentice, Michael Reid, Patrick Rieschi, Steven Ross, Gary Scott, Phillip Shaw, Andrew Sheret, Michael Shulist, Donald Smith, Owen Stewart, Raymond Thwaites, Dale Trueman, Andre Verschelden, and Douglas Zebedee

**(hereinafter referred to as the “*Coalition Complainants*,”); and
Robert David Anthony and Donald Paxton**

Complainants

– and –

AIR CANADA, and AIR CANADA PILOTS ASSOCIATION

Respondents

– and –

CANADIAN HUMAN RIGHTS COMMISSION

The Commission

Outline of Argument of the Coalition Complainants

David Baker and Raymond Hall
Counsel for the Coalition Complainants

Outline of Argument of the Coalition Complainants

I. Overview

1. There are 70 Complainants in this proceeding, 68 of whom are represented by the same legal counsel. For ease of reference above, we have referred to these 68 Complainants as the “Coalition Complainants.” Representations in this our argument are being made in respect of only the Coalition Complainants, and where the term “Complainants” is used below, it is intended that that term be interpreted to mean “Coalition Complainants” only; no representations whatsoever are made in respect of the two Complainants who are not part of the Coalition.

2. Under the provisions of the *Canadian Human Rights Act* (the “Act”), it is incumbent upon the Complainants to establish a *prima facie* case of discrimination. Once a *prima facie* case of discrimination has been established, the onus then shifts to the Respondents to establish, on a balance of probabilities, a defence under *Act*.

3. The argument in respect of the defences raised by the Respondents is divided into two parts corresponding to the two issues before the Tribunal: first, the Respondents’ defence under Section 15(1)(c) of the *Act*, and second, the Respondents’ defence under Section 15(1)(a) and Section 15(2) of the *Act*.

4. It is the submission of the Complainants that the onus rests upon the Respondents to establish the defence under either or both of the above-referenced sections of the *Act*. It is the further submission of the Complainants that neither Respondent discharged that onus in respect of either of the above defences in this proceeding, and that therefore the complaints of the Complainants under the *Act* have been substantiated.

5. It is the irony of human rights cases that the case before the Tribunal is not about individuals experiencing discrimination, but rather about the air carriers facing the prospect of losing their ability to continue their discriminatory practices. There is a further irony that these issues all depend upon evidence of the Respondents (defences to the established *prima facie* case of discrimination) but the Complainants must present their evidence first.

6. The starting point of our submissions is the decision of Madam Justice MacTavish: we are dealing with quasi-constitutional legislation that has been enacted to give effect to

Outline of Argument of the Coalition Complainants

the fundamental value of equality. The objective is to ensure that individuals have an equal opportunity to make for themselves the life that they are able to, without discrimination on the basis of age.

- 2009 FC 367, Paragraphs 75 to 77;
- *Canadian Human Rights Act*, Section 2;

7. Madam Justice MacTavish warns against taking a strict legalistic approach, which means that when discussing defences, the Supreme Court of Canada reminds us that the *prima facie* case is to be given a large liberal interpretation and the defences are to be interpreted narrowly. Ambiguities are to be interpreted in a way that reflects the *Canadian Human Rights Act* having remedial goals, in favour of the Complainants.

- 2009 FC 367, Paragraphs 78-80, 83;

8. The onus is on Air Canada and ACPA to establish that age 60 is normal age of retirement for persons occupying similar positions to the Complainants.

- 2009 FC 367, Paragraph 85;

II. **Prima Facie Case**

9. The *prima facie* case was made out by the Complainants, in that the termination of employment of each individual was based solely upon the provisions of the collective agreement and its referenced pension plan agreement that specify that each pilot's employment shall be terminated on the first day of the month following which the individual acquires the age of 60.

- Exhibit C-1, Complainant Employment History;
- Exhibit R-8, Tab 1, Air Canada—ACPA Collective Agreement
- Exhibit R-8, Tab 5, Air Canada Pilot Pension Plan,
Page 7: Definition of Normal Retirement Age;
Page 17: Section 5.1, Normal Retirement Date

III. Defence Under Section 15(1)(c) of the Act

1. Positions Similar

10. Madam Justice MacTavish first reviews the many factors established by the Tribunal in its decision of 2007 CHRT 36 to determine the “normal age of retirement of employees working in positions similar” to the Complainants:

- regularly scheduled flights;
- large wide-bodied aircraft;
- many international destinations;
- major international airline (legacy carrier); and
- prestige and status that goes with the uniform of a pilot;

These were the “essential features” of the job, in the view of the Tribunal.

11. She offers a fairly clear opinion that the Tribunal erred in its opinion of the essential features. In our submission, the Tribunal erred in all five of those essential features.

- 2009 FC 367, Paragraph 106;

12. What we know:

- (1) The comparator group will not be restricted to regularly scheduled flights; we include charter and executive jet services doing other types of flights;
- (2) We are not restricted to wide-body aircraft. The comparators could be flying aircraft of varying sizes and types;
- (3) The comparators fly to domestic and international destinations, not just internationally; and
- (4) It is the functional requirements of the pilot that determines which pilots of which airlines make up the comparator group. It’s about pilots.

- 2009 FC 367, Paragraphs 106, 107;

Outline of Argument of the Coalition Complainants

13. Regularly scheduled? No issue—one of the comparators that Air Canada puts in its comparator group is a Charter airline. Small aircraft, large aircraft, medium sized aircraft. All sizes of aircraft are relevant to the question. Domestic. International.

14. Does size of the airline matter? Air Canada cites Air Canada Jazz: 1,386 pilots. Air North Charter: 16 pilots. The comparator that Air Canada is urging upon the Tribunal spans the range of airline types. Hence the size of the airline does not matter. We agree.

15. We need to look at *all* airlines in Canada, therefore, to find our comparator. There will be some limiting criteria, but we do not start by looking at airlines that look exactly like Air Canada, saying that that is the end of the story. It would be the end of the story if that was done because Air Canada's comparator does not include WestJet, Air Transat, Skyservice or Cargojet—the main competitors to Air Canada, the other major airlines within Canada.

(5) prestige and status

16. The Court told us to focus on the qualifications of the individual relative to the actual objective functional requirements of the position, rather than on a subjective perception of what a qualified candidate should be, or should be able to do. No dispute.

- 2009 FC 367, Paragraph 108;

17. Hence we have some agreement on what should be the essential features of the position, as identified by the Court—we are looking at qualified pilots, licensed pilots, who are working for Canadian airlines of any size (e.g. Air North Charter—just about as small as they get). The size of the aircraft flown is not a limiting factor. We are not limited to regularly scheduled flights. Carriers that do charters are included—where would a charter take you, domestic or international? Agreed by all parties. Why? The Federal Court has spoken. Agreed. So why are we here in this proceeding?

18. There is a will to create litigation. In the case before the Tribunal in 2007, there was an Agreed Statement of Facts as to which Canadian airlines made up part of the comparator group: namely, AC Jazz, Air Transat, WestJet, SkyService, Zoom, Harmony and CanJet.

Outline of Argument of the Coalition Complainants

19. Air Canada now appears to be urging the Tribunal to include in the comparator group only one of these airlines, namely Jazz. Air Canada wants to remove six of the seven from the comparator group accepted by the Federal Court.

20. Neither Mr. Vilven nor Mr. Kelly had any resources to be able to gather information with respect to the carriers. They went along, with some regret.

21. Zoom and Harmony went out of active service in 2007 and 2008 respectively. It is acknowledged by all that they operated during the relevant period. But according to information provided to the Tribunal and ultimately to the Federal Court, Zoom and Harmony were identified in the Agreed Statement of Facts as having a mandatory retirement age of 60. This issue was therefore never explored by the Tribunal or by the Federal Court.

22. This Tribunal now has evidence before it that neither of those airlines in 2005 to 2009 had a mandatory retirement policy. How do we know that? The onus is on Air Canada, but Air Canada has not called any evidence on that point. We have the surveys completed by representatives of those airlines that are further confirmed by Captain Maloney.

- [Exhibit C-14, Tab 37](#)
- [Transcript of Evidence, Captain Maloney, October 7, 2007 \[pp. 227-228\]:](#)

Q- *What type of aircraft did Zoom fly, to your knowledge?*

A- Zoom flew 767, as well as 757, and I was so rated on both of those.

Q- So, is your evidence, then, that it would have been – if you had have been hired, that you would have been able to make the transition to their airline without a lot of training?

A- I would have been able to make an easy transition to their operation, without any long training necessary.

Q- And did Mr. Baldasaro or Captain – was it Captain or Mr. Baldasaro?

A- Captain Baldasaro.

Q- And his position? Do you know what his position was?

A- He told me his position was Chief Pilot, and he was the person who did the hiring of the pilots, and that would be in late spring, as well, of two thousand and seven (2007).

Q- So, that's when you made the contact with him?

A- That's the initial contact.

Q- And what did he tell you were the requirements for being hired by Zoom?

A- First of all, I advised him, similar to Skyservice, that I will be forced to retire because of my age in October of – October the first (1st), two thousand and eight (2008). And I'll be looking for continuation of employment in the aviation field, and I'll be – just trying to set and make the contact with him at that time, so that if any recruitments required some time around my leaving of Air Canada, that he will give me some consideration.

Outline of Argument of the Coalition Complainants

- Q- So, did you then enter into a discussion with him of some form with respect to the age sixty (60) issue?
- A- I did enter into a very good discussion with him, because I said that I'll be age sixty (60) at September the third (3rd), leaving Air Canada on October the first (1st), two thousand and eight (2008), and if there's any objections to hiring people of my age? He said, "No. The policy of Zoom does not have an age sixty (60) restriction."

23. We have similar evidence from Captain Prentice provided to him by one of the Complainants in this proceeding, an Executive of Harmony Airlines, confirming the same absence of a mandatory retirement policy at Harmony.

- Exhibit C-14, Tab 37
 - Transcript of Evidence, October 6, 2009, Testimony of Captain Prentice:
- Q -Now, are Harmony or Zoom Airlines on your list?
- A - They are not on my list. I did have them initially on my list, and I did make an inquiry with their chief pilot. I didn't inquire about Zoom, but I did inquire about Harmony.
- Q- Why did you leave them off your list at Tab 7?
- A- Zoom had gone into bankruptcy, and there was no way for me to contact – or at least I didn't have any contacts available to me.
- Q- And I note that at Schedule B, Zoom is indicated as having an age sixty (60) age of mandatory retirement. Do you see that?
- A- Yes, I do.
- Q- And with respect to Harmony, I note on Schedule B, age sixty (60) mandatory retirement age?
- A- That's correct.
- Q- Did that enter into your thinking with respect to these two (2) airlines?
- A- Well, I had conflicting information, the first information I got from the chief pilot at Harmony, when I called them, was that they did not retire their pilots at sixty (60), and, in fact, they had anticipated the ICAO regulation, and so the chief pilot at that present time believed that he was – that there was not a mandatory retirement age for Harmony.
- Q- But you were aware that in the Schedule B document that was prepared by Air Canada, that age sixty (60) was said to be the mandatory age of retirement?
- A- That is correct.
- Q- So, what did you decide to do with respect to your table?
- A- What I decided to do was contact the chief pilot that is currently working for Harmony – even though they're not operating there is an airline – it's fairly hard to describe – they have an operating certificate, but they have no aircraft, but the pilot that I talked to, who's the chief pilot, who contacted – the chief pilot at the time, who's now working in Kuwait, and at that point he told me that there was – he confirmed with me that there was no retirement date. However, because of the conflicting evidence, I left them off my list.

24. It is the position of the Complainants that each of the seven airlines that were included in the comparator group in the Vilven-Kelly proceeding are and should remain in the comparator group in this proceeding.

25. Air Canada stands alone as the only airline in Canada, be it a Transport Canada Part 705 airline, Part 704 airline, or Part 703 airline, that has a mandatory retirement age of 60.

Outline of Argument of the Coalition Complainants

26. Madam Justice MacTavish notes that when you have Air Canada, Zoom and Harmony on one side of the retirement equation and the other five major Canadian airlines on the other side of the retirement equation, you find 56.13% of the positions are positions with mandatory retirement at age 60.

- 2009 FC 367, Paragraph 173;

27. However, when you move Zoom and Harmony back over to the side of the equation where they should have properly been in the first place, Air Canada has only 51.7% of the pilots (December, 2006 numbers) or 54.2% of the pilots (January, 2007 numbers) that have mandatory retirement at age 60. We are very close to the line here. A few layoffs. A new airline sprouting up could change the balance completely. It's teetering on the brink.

28. In the instant proceeding, we do not have an Agreed Statement of Facts. We are looking at it from a fresh perspective. The facts before this Tribunal are different from the facts that were before the Tribunal in 2007.

29. Let's now move to the comparator group definition itself. Quote:

[111] The essence of what Air Canada pilots do is to fly aircraft of varying sizes and types, transporting passengers to both domestic and international destinations, through Canadian and foreign airspace.

- 2009 FC 367, Paragraph 111;

30. Note that the Court is talking about transporting passengers. There was no evidence before the Court about transporting freight. Madam Justice MacTavish was apparently unaware that Air Canada is in the business of hauling a large amount of freight and that a significant portion of its revenue comes from the transportation of freight (4th Quarter, 2007: \$142 million). Similarly, she was apparently unaware that a large component of many pilot's flying is or was flying freight. Air Canada is not just a passenger airline. It's a passenger and cargo airline. For Captain Kelly, flying cargo is what he did for a very large proportion of his career at Air Canada.

- Exhibit R-8, Tab 8, Air Canada Annual Report, Page 177
- Testimony of Captain Neil Kelly, October 8, 2009, Transcript of Evidence, Page 17:

Outline of Argument of the Coalition Complainants

- Q- Did you have experience to fly – can you tell me how many years that you were employed in flying primarily cargo aircraft alone?
- A- Yes, of my almost thirty-three (33) years with Air Canada, I would estimate that approximately eleven (11) were flown on freight or passenger/ freight combination aircraft.
- Q- And did any of those years include exclusive freight aircraft?
- A- Yes, it did. I was a Captain on the DC-8 prior to its retirement. At that time the fleet was six (6) freighter aircraft, with an additional two (2) freighter aircraft added towards the end of its tenure with Air Canada.
- Q- And what kind of operations did Air Canada conduct with those freighter aircraft?
- A- The freighter aircraft at that time were largely involved in a Purolator contract, Purolator being a courier company which is a sub-division of Canada Post. It flew an extensive domestic schedule coast-to-coast with a hub in Winnipeg where loads were interchanged. And on weekends they flew almost exclusively internationally from a base at Brussels, with several cargo charters from Brussels and around the world.

31. What Madam Justice MacTavish is putting forward in Paragraph 111 is not the definition of the normal age of retirement *for all time*, but rather *she is providing some definition of the factors that appear to be helpful to the Tribunal in establishing the determination of the comparator group*. The comparator includes airlines that do not exclusively fly passengers, because according to the Court, that's what pilots do. The pilot's job is to fly the plane. The payload is irrelevant, be it passengers or cargo.

- [Testimony of Captain Neil Kelly, October 8, 2009, Transcript of Evidence, Pages 13-14:](#)

- Q- At that time, I've written here, Air Canada operated purely all passenger or all freighters.
- A- I'll just rephrase that. At that time, Air Canada operated DC-8 aircraft. The DC-8 aircraft fleet comprised of all passenger, passenger/cargo and pure freight aircraft.
- Q- Okay.
- A- There was no differentiation from a pilot's point of view between these aircraft. The bidding process was the same, the working conditions and contractual limitations were the same, and at no time was the operations segregated from the general body of flying.

32. Air Canada has Boeing 777s. Those aircraft have a major cargo capacity in the belly of the aircraft. When Air Canada took delivery of those aircraft, it cancelled its wet lease contract with the third party freight operator because it could then carry the freight using its own Boeing 777 scheduled aircraft, instead of contracting out the freight uplift to a third party. Air Canada pilots now operate the flights that carry the Air Canada freight that was previously carried by a third party. Air Canada pilots fly cargo aircraft. Those cargo aircraft carry the same amount of cargo as does a dedicated cargo company's airplane—it just so happens that the Air Canada pilot's aircraft happens to also carry passengers seated on the level above the cargo.

Outline of Argument of the Coalition Complainants

33. The purchase of the Boeing 777 airplane type was largely based upon its aircraft belly cargo capacity.

- [Testimony of Mr. Harlan Clark, October 28, 2009, Page 62:](#)

Q- So, after two thousand and seven (2007), Air Canada resumed flying its own cargo operations, is that right?

A- No, the wet lease was extended for a one (1) year period, because all of the 777s that were anticipated at the time were not in yet. And there was one particular market that Air Canada Cargo wanted to protect, and that was the Frankfurt market. And so there was an agreement to maintain a limited wet lease arrangement from June of two thousand and seven (2007) to June of two thousand and eight (2008) in order to maintain that market share until they had sufficient 777 bellies based to replace that. And there was a wet lease payment that was made to ACPA for that year and it's my understanding that Cargo actually didn't make any money on that particular deal on that year, through that year, because of these wet lease payments, but wanted to protect that particular market share.

34. Even if an aircraft flown by another Canadian airline is a dedicated cargo aircraft, that aircraft still requires human (passenger) attendants when live cargo is carried.

- [Exhibit C-14, Tab 17, CargoJet Flight Operations Manual Pages, re Passenger Requirements;](#)

35. Madam Justice MacTavish endorsed a statistical approach to determining the appropriate comparator group, so we must identify comparator airlines. When one goes to the Transport Canada web site, we see a huge number of airlines that could meet the Court's definition of an appropriate comparator. Those airlines are listed on the Transport Canada web site according to separate classifications, base on the type of airline operation and the size of the aircraft. The classifications are found in Parts 705, 704 and 703 of the Canadian Air Regulations ("CARs").

- [Exhibit C-2, Tabs 4, 5](#)

36. There is no available listing within the Transport Canada web site, or necessarily on the web sites of the respective airlines, that would enable anybody to determine how many pilots are employed by each of those respective airlines. That information is confidential to the respective airlines. Similarly, someone who needs that information to establish or confirm a "normal age of retirement" statistical calculation cannot simply call them up and expect them to freely provide their pilot employment data. One has to obtain a subpoena to obtain the information.

Outline of Argument of the Coalition Complainants

37. Air Canada has some influence with some of these carriers to obtain some of this data (as evidenced by the data that Air Canada placed in the 2007 Vilven-Kelly proceeding Joint Statement of Facts, Exhibits A and B), but even Air Canada had to obtain subpoenas to in order to secure a comprehensive set of this data from many of its competitors for this proceeding.

38. Captain Prentice, acting on his own upon his termination of employment, mindful of the *Campbell v. Air Canada* case, conducted his own statistical analysis of Canadian comparator airlines in 2007 to calculate the number of pilots in comparator airlines that imposed mandatory retirement at age 60. He called friends in the industry to determine the actual number of pilots in positions similar to those of Air Canada pilots, and very shortly was able to determine that Air Canada pilots, the only pilots in Canada forced to retire at age 60, constitute much less than 50% of the appropriate comparator group. Without conducting an exhaustive analysis of all of the comparator airlines in Canada, once he determined that Air Canada was in the statistical minority, he stopped looking further and submitted his complaint to the Commission.

- [Exhibit C2, Tab 7](#)
- [Campbell v. Air Canada CHRT Decision 10 / 81](#)

39. The Complainants in this proceeding went to the CARs, looked at Part 705 airlines and looked at the number of pilots at those airlines. Some of the Part 705 carriers also own and operate Part 704 aircraft. There are 87 Part 704 airlines. Not all of the 99 Part 704 airlines are in Mr. Prentice's Table because when one determines that the number of pilots in the table exceed 60% of the pilots in the comparator group, one need not continue adding other carriers. That doesn't mean that the other carriers are not comparator carriers—its simply means that the case is adequately satisfied and that it is no longer necessary to look further.

40. Captain Prentice estimated that there are an additional 1,500 pilots working at the Part 704 carriers, based on the number of aircraft owned by those carriers and the number of crews (in most cases, two pilots per crew, and in many cases, more than one crew per aircraft due to monthly duty limitations) required to operate those aircraft on a daily basis.

Outline of Argument of the Coalition Complainants

- Testimony of Captain Paul Prentice, October 6, 2009, Transcript of Evidence, Page 97:

Q With respect to the other airlines, the other eighty-six
6 (86) 704 airlines in Canada which are licensed to
7 fly internationally, can you estimate the total
8 number of pilots that would be working for those
9 eighty-six (86) airlines?

10 A- Well, first of all, I didn't contact any of those
11 airlines, but I would estimate that it would be
12 approximately fifteen hundred (1,500) pilots that
13 would work for the eighty-seven (87) subpart 704
14 carriers.

15 Q- And how did you arrive at that figure?

16 A-Basically, I arrived at that figure because the fleet
17 sizes are available through Internet searches, and
18 there's typically a figure that can be derived
19 basically from the number of airplanes that these
20 carriers do operate. And that number seems fairly
21 consistent with the number of airlines (sic) that
22 Air Alliance have, where they specify that they had
23 a hundred and sixty-five (165) pilots, it's fairly
24 consistent with that number.

41. There are also Part 703 airlines. He didn't include those airlines in the Table because he already had enough pilots in the appropriate comparator group to show that Air Canada pilots could not possibly constitute 50% or greater of the appropriate comparator group.

42. Let's now look at Air Canada. Mr. Harlan Clark testified that he and Ms. Tremblay sat down, looked at the Federal Court decision and came up with Air Canada's interpretation of the Court's determination of the appropriate comparator group. But they misread the words "domestic destination" and used the words "domestic flights" instead.

- Cross-examination of Mr. Harlan Clark, October 28, 2009, Transcript of Evidence, Page 67:

Q- I believe - and please correct me if I'm wrong - I believe you've explained that by "Varying Sizes of Aircraft", you mean the definitions set out by the CTA of small, medium and large, is that right?

A- Yes, that's what I said yesterday.

Q- Okay. I want it to be clear, because in portions of your testimony, I didn't interject, but you were saying "Transport Canada" and I...

A- Oh, I'm sorry.

Q- I think you were referring to CTA, but I did want to give you the opportunity to confirm that. And we have the definitions of small, medium and large, and the word "varying" is kind of interesting. This is of course not a CTA or Transport Canada definition, this is your word,

Outline of Argument of the Coalition Complainants

is that right?

A- Correct.

Q- Developed in consultation with Ms. Tremblay?

A- We talked about it, yes.

Q- Okay. And if I understand it correctly, "varying", by your definition, means an airline that has small and medium? That'd be a varying?

A- Yes.

Q- Medium and large?

A- Yes. Small and large? Yes.

Q- Small and large seems a little unlikely, but small and large?

A- Yes.

43. Madam Justice MacTavish said that restricting the definition of the comparator to only those that travel to international destinations was too restrictive. Domestic destinations should also be included. But Justice MacTavish did not intend that the list of comparators should be more restrictive than the list of comparators that the Tribunal identified. She did not intend that an airline could be within the comparator group if and only if they flew to both domestic destinations and international destinations, because that is even more restrictive than the comparator group originally chosen by the Tribunal that was rejected by the Court as being too restrictive.

44. Regarding the carriage of passengers, look at Paragraph 170. There is no reference to passengers in that definition of the comparator. Where did the requirement for passengers go? Answer: She wasn't defining a restrictive interpretation of the appropriate comparator for all time—she was setting down guidelines for the Tribunal to use to determine the appropriate comparator group.

- [2009 FC 367, Paragraph 170;](#)

45. She refers to three other cases, *McAllister*, *Stevenson* and *Campbell*. In *Stevenson*, there is some interesting language there, "invariably at Air Canada and at other Canadian airlines..." The Court is looking at "*other Canadian airlines*" as the comparator. That interpretation is inclusive, not exclusive—it is intended to be expansive, rather than exclusionary (as Air Canada would have you interpret it). She states that she followed that interpretation.

- *McCallister v. Maritime Employers Association*, (1999), 36 C.H.R.R. 446
- *Stevenson v. Air Canada* [1984] 2 F.C. 691
- *Campbell v. Air Canada*, CHRT Decision 10 / 81

Outline of Argument of the Coalition Complainants

- 2009 FC 367, Paragraph 170;

46. In *Campbell*, the Tribunal was dealing with flight attendants with Canadian airlines. That is what the case is about. No limitation, no restrictions in order to meet the criteria. If you are an airline that has a flight attendant, you are part of the comparator group. Look at Page 6 of the decision: “if one is to take the number of flight attendants in the industry in Canada, by far the majority retire at age 60.” There is no question about whether those flight attendants are flying domestically or internationally, nor what type of airplane they fly on, large or small. That restriction is just not there.

- *Campbell v. Air Canada*, CHRT Decision 10 / 81

47. Justice MacTavish was aware of this jurisprudence and relied upon it. She looked at the entire industry.

2. Domestic versus International Destinations

48. Did Justice MacTavish intend to distinguish between domestic destinations and domestic flights? She did. Domestic flights she defines in Paragraph 101; domestic destinations, Paragraph 111.

- 2009 FC 367, Paragraphs 101, 111.

49. How does Air Canada interpret the term, “domestic destination?” Recall Captain Duke’s testimony. We asked him, “If you fly an airplane from New York to Toronto, are you flying to a domestic destination?” He said, “Yes, you are.” Self-evident.

- Cross-examination of Captain Duke, October 30, 2009, Transcript of Evidence, Question 346:

23 Q- Is that right? And then under Canada here on the
24 list, that's a country, and there are destinations
25 in Canada, would those be international
destinations?
A- For a flight from Toronto?
2 Q- Sure.
3 A- No.
4 Q- Okay. So from the standpoint of Air Canada, would
5 a flight from New York to Toronto make Toronto an
6 international destination?
7 A- I wouldn't think so, but perhaps someone else in the
8 company would. I don't understand the context to
9 the question.
10 Q- I'm just asking the question and you've answered it

Outline of Argument of the Coalition Complainants

11 as well as you can, I assume, is that right?
12 A- That's correct.
...

50. Air Canada says that only airlines that serve both domestic and international destinations qualify for the comparator group. We say that is not the correct interpretation, but even if it were, the Complainants' airline sample would still meet the criteria. That was the whole point of Captain Prentice's evidence. We don't agree with their definition, but even if it were correct, which it is not, Air Canada would not meet the test for having a majority of the pilots who retire at age 60.

51. Regarding Captain Duke's testimony, how did he establish that they did or did not fly to international destinations? He called them and asked them, "Do you fly internationally?" He did not ask them if they operate international charters. He did not ask them, "Do you ever operate charters to the USA?" He put a "No" in the box on the Table. That is the issue that was raised by Dr. Kelly, and her evidence of the responses to those questions is set out in Exhibit C-14.

- Cross-examination of Captain Duke, October 30, 2009, Transcript of Evidence, Questions 389-395:

18 389 Q-Thank you. So, let's leave aside the license
19 because that's not really what I'm asking you about
20 is, I'm asking you whether you asked these airlines
21 they were willing to fly a person seeking to
22 charter an aircraft to the United States, would they
23 fly it?
24 A- No, I did not ask that question.
25 390 Q- Okay. And just to be clear, with respect to the
1 relevant period, did you ask these contact people
2 with whom you spoke or emailed whether they had
3 actually flown charter flights to international
4 destinations during the relevant periods?
5 A- (Inaudible), so is the important part now the
6 charter part? I mean, I don't think I discussed the
7 charter specifically, no.
8 391 Q- Okay. So you assumed that in asking your contacts
9 whether or not they flew internationally or flew to
10 the U.S...
11 A- M'hm.
12 392 Q- ... that they would assume that that would include
13 charter flights...
14 A- That's correct.
15 393 Q- ... is that correct?
16 A- M'hm.

Outline of Argument of the Coalition Complainants

17 394 Q- Okay. And if, for example, these contacts or people
18 in comparable positions with these airlines were
19 asked the question "Would you or have you flown
20 international charter flights?" and they answer
21 "Yes" to questions where you have the answer "no",
22 that the possibility is that they may have
23 misunderstood your question as being restricted to
24 scheduled flights to the U.S..
25 A- Possible.
1 395 Q- ... or to international? The answer again?
2 A- It's possible.

52. In the cases where the airline went to the trouble of acquiring a licence to fly internationally, that evidence is sufficient to demonstrate that they should be considered as flying to international destinations. Why would they go to the substantial trouble and expense of obtaining and maintaining a licence to operate to international destinations, if they didn't intend to use that licence to fly to those destinations?

3. Various Size of Aircraft

53. According to Air Canada, only three airlines in the list of all Canadian airlines meet the criteria of varying "size" of aircraft: Air Canada Jazz, Voyageur, and a tiny airline, Air North Charter that has only 16 pilots. Why? Air Canada says that the CTA definition of size is the limiting factor. Air Canada came up with this extremely broad criterion of size so that the aircraft of almost all the airlines in Canada would have airplanes that fit only in one size category, not two—hence those airlines cannot meet the criteria for varying size of aircraft.

54. The record before the Federal Court did not include the Canadian Transportation Agency definition of size. Yet according to Air Canada, a 90-seat Embraer **is the same "size"** as a 350-seat Boeing 777-300: namely, "Large." It is common knowledge that the Boeing 777 is several times larger in physical dimension and seating capacity than the Embraer, capable of flights over ten hours longer, and carries more weight in fuel than the entire weight of an Embraer with passengers and fuel on board. The hull of the Embraer could likely fit within the width of one of the engines on the Boeing 777. Would Madam Justice MacTavish realistically say that these two aircraft are the same size?

Outline of Argument of the Coalition Complainants

55. Air Canada came up with this broad definition of size so as to ensure that as few airlines as possible would get through its maze into the appropriate comparator group. Most of the six principal Canadian airlines that the Federal Court referred to in its calculation of the number of Canadian pilots in the appropriate comparator group do not even meet Air Canada's criteria for comparator definition of "size."

56. Different witnesses defined size differently. For Captain Prentice, size was related to weight. Weight is more relevant to a pilot. Bigger airplanes weigh more than smaller airplanes; hence a heavier airplane is likely to be a different size of aircraft.

57. Transport Canada sets out criteria for size of aircraft.

- Exhibit C-2, Tabs 4, 5

58. Air Canada witness Harlan Clark stated clearly that he did not offer the airlines any definition of size, when he asked them about the various aircraft that they flew. He said that he decided the sizes—he made a subjective assessment of the size of aircraft flown by the airlines that he contacted.

- Examination of Mr. Harlan Clark, October 27, 2009, Transcript of Evidence, Questions 225-226:

225 Q- Okay. Now, I'd like to present to the witness Exhibit C-
20 3.

So, this exhibit, Mr. Clark, as you know, has been entered as an exhibit by the Complainants, it's the application guide produced by the Canadian Transportation Agency. Can you tell us what guided your analysis of the varying sizes of aircraft in building your table, looking at the definitions in the CTA application guide?

A- Certainly. I used the definitions in the CTA, they're
5 found on page... one... two... three... on the fourth page. And the sizes are broken into three (3) categories: large, medium and small. And using the definitions here, a large aircraft is an aircraft that's equipped for the carriage of passengers, and having a
10 certified maximum carrying capacity of more than eighty nine (89) passengers. A medium aircraft...

226 Q- M'h'm.

A- ... has the carrying capacity of more than thirty-nine
15 (39) but less than eighty-nine (89). And then a small aircraft has a limit of carrying capacity of not more than thirty-nine (39) passengers. So, it's one to thirty-nine (1-39), forty to eighty-nine (40-89), and then ninety (90) and greater for the three (3) categories, small, medium and large.

Outline of Argument of the Coalition Complainants

- Cross-Examination of Mr. Harlan Clark, October 29, 2009, Transcript of Evidence, Page 118:

Mr. DAVID BAKER:

15 No, I'm going to ask him about what he relied on
for an answer "yes or no". I mean, there's more than
three (3). You've indicated that...

THE CHAIRMAN:

He only relied on three (3).

Mr. DAVID BAKER:

20 No, no. I mean, he said "sizes of aircraft"...

374 Q- Is that right? Your own knowledge about sizes of
aircraft?

A- Well...

375 Q- Correct?

A- Yes.

4. Various Types of Aircraft

59. Captain Prentice referred to Transport Canada's definitions of "types" of aircraft. If the aircraft is made by a different manufacturer, it is obviously a different type of aircraft.

- [Exhibit R-22](#)

60. One of the significant airlines that did not meet Air Canada's criteria for the comparator group because it flies *only one type of aircraft*, is Porter Airlines. Why should Porter Airlines not be included in the appropriate comparator group? Do their pilots do anything functionally different than what Air North Charter pilots do? Than what Air Canada pilots do?

5. Comparators, Years 2005 to 2009

61. Nowhere in Justice McTavish's decision is there any reference to the varying number of pilots in the comparators over the various relevant years in question. The whole point is that it is almost impossible to get an accurate count of pilot numbers for any given day, month or year. There are too many unknowns to be able to say for certain that on January 1st, Year X, there were exactly so many fewer pilots in the comparator group than on January 1st, Year Y. You have to look at the total numbers, and after you get so far below 50% as Air Canada's constituent value, you simply quit counting. The onus is on Air Canada to show that the situation is otherwise.

IV. Defences Under Section 15(1)(a) and Section 15(2) of the Act

1. Legal Context

62. The starting point for an evaluation of a BFOR defence is the statute itself. Specifically, Section 15(1)(a):

Exceptions

15. (1) It is not a discriminatory practice if

- (a) 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;

The key words here are “established by an employer...” That is a statutory requirement. The BFOR must be established by the employer. Only an employer, not a union, can establish or plead a BFOR defence. If Parliament had intended that a union should be allowed to establish a BFOR defence, it would have said so in the statute. It did not. Therefore, pursuant to the *expressio unius est exclusio alterius* principle, it is not open to the union to even plead a BFOR defence.

63. A union may be able to provide evidence to support a BFOR defence pleaded by an employer, but it cannot plead a BFOR defence itself, because the statute specifically precludes it from doing so.

64. So now, let’s look at ACPA’s Statement of Particulars with respect to the BFOR defence that it is improperly attempting to establish (Paragraph 14):

14. It is the position of ACPA that the retirement date contained in the Collective Agreement is reasonably necessary to the accomplishment of legitimate purposes and goals. Those purposes are to ensure that all pilots employed by Air Canada can obtain the benefits which flow from their seniority. Those benefits include:

- Salary,
- Pension,
- Age at which they may retire,
- Their ability to bid into preferred positions, aircraft and bases.

Outline of Argument of the Coalition Complainants

65. ACPA’s BFOR pleading has no connection whatsoever to the BFOR that was pleaded by the employer (namely, undue hardship by reason of ICAO restrictions on the airline operations). Further, the evidence that ACPA brought to the Tribunal bore no relation whatsoever to the BFOR defence pleaded by the employer. From its Statement of Particulars, we see that it makes no submission whatsoever with respect to the employer’s BFOR case. Further, ACPA’s pleaded BFOR, for which it states “Those purposes are to ensure that all pilots employed by Air Canada can obtain benefits which flow from their seniority...” has *no bearing whatsoever* on any alleged undue hardship that the employer would suffer should the defence not be allowed—it relates strictly to matters that are within the internal affairs of the union and that are irrelevant to the *tasks* required of the job. Consequently, 100% of ACPA’s evidence and argument in this regard is improperly before the Tribunal and should bear no weight whatsoever in the determination of the issues properly before the Tribunal.

- November 18, 2009, 1:30 PM, Transcript of Evidence, objection of Complainants to admission of ACPA evidence in respect of its pleaded BFOR:

1 In the year two thousand and nine (2009), on this
2 eighteenth (18th) day of November:
3
4 THE CHAIRMAN:
5 Mr. Laughton.
6 Mr. BRUCE LAUGHTON:
7 Yes, Mr. Chair, Air Canada, as you my notice,
8 has not closed its case, but what we’re doing is
9 we’re calling Mr. Salamat out of order to be able to
10 get him on, so that’s the process.
11 Mr. DAVID BAKER:
12 We have agreed to that and we’ll have our
13 discussion about the documents Air Canada is
14 preparing. May I just say with respect to this
15 witness and the evidence of this witness that the
16 Complainants are taking the position that this
17 evidence is irrelevant, but we are not making legal
18 submissions at this point so as to expedite the
19 process and reserve comment. The Chair is aware of
20 the decision in Vilven referencing Renaud and is
21 more than aware of the references (inaudible) on
22 this issue.

66. That includes all of ACPA’s evidence and argument with respect to the evidence of its expert, Mr. Salamat, including any alleged harm that would result to the junior pilots by the removal of the age 60 limit on employment—all of it must be disregarded as improper and irrelevant to the legitimate questions before the Tribunal.

2. The Meorin Test

67. Now, let us assume, for the sake of argument, that ACPA is entitled to plead its own BFOR defence. How would its BFOR stand up against the criteria necessary to qualify its validity? The proper test for a BFOR defence is articulated in *Meorin*—it is a three-step test. ACPA’s BFOR, were it allowed to be pleaded, would fail each of the three steps of the test. The Supreme Court of Canada said:

Para. 54: Having considered the various alternatives, I propose the following three-step test for determining whether a *prima facie* discriminatory standard is a BFOR. An employer may justify the impugned standard by establishing on the balance of probabilities:

- (1) that the employer adopted the standard for a purpose rationally connected to the **performance** of the job; [Emphasis added]

Obtaining benefits that flow from seniority bears no relationship whatsoever to the performance of a pilot’s job. That objective relates only to the *employment* characteristics, not *job* characteristics. “Obtaining benefits that flow from seniority” is not an *input* criterion with respect to a job—its is an *output* criterion with respect to employment—and not a characteristic of the work required to be performed. ACPA therefore fails the first step of the three-step test.

- (2) that the employer adopted the particular standard *in an honest and good faith belief* that it was *necessary to the fulfilment of that legitimate **work-related** purpose*; [Emphasis added] and

Obtaining benefits that flow from seniority bears no relationship whatsoever to the fulfillment of a necessary, legitimate work-related purpose because none of the criteria that ACPA identifies are necessary to the fulfillment of any work-related purpose—they are all related to factors that may or may not flow from the employment relationship and that, in many cases, are not even present in similar pilot employment relationships. ACPA therefore fails the second step of the three-step test.

- (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose.

None of ACPA’s criteria are either *reasonably necessary* or *even necessary at all* to the accomplishment of any legitimate work-related purpose. None have any connection

Outline of Argument of the Coalition Complainants

whatsoever to the job requirements. ACPA therefore fails the third step of the three-step test.

68. Not only is ACPA *not entitled* to establish these components, but ACPA fails the three-part test because the factors that it states are “*reasonably necessary to legitimate purposes and goals*” have *absolutely nothing to do with the performance of the job*. Salary has no rational connection to the ability to perform a job—it is not a component of a BFOR; indeed, many people work in jobs for low salary or no salary at all. A pension plan is not a job requirement—many airline pilots in Canada do not participate in pension plans. The age at which a pilot may retire bears no relation to the requirement for the job—Transport Canada has removed all maximum age restrictions on pilot licensing. Finally, the ability to bid into preferred positions is similarly not a job requirement. Many airlines do not even use seniority systems or bidding systems—instead they use a flight assignment system completely different from the system set out in the Air Canada—ACPA collective agreement.

69. More importantly, the words of the Supreme Court clearly lay ACPA's BFOR argument to rest:

Para. 59: If there is no *rational relationship between the general purpose of the standard and **the tasks properly required of the employee***, then there is of course no need to continue to assess the legitimacy of the particular standard itself. Without a legitimate general purpose underlying it, the standard cannot be a BFOR. [Emphasis added]

The tasks properly required of the employee bear no relation whatsoever to the characteristics that ACPA is submitting to this Tribunal to be job requirements. Pilots do not need pension plans, seniority systems or specific pay arrangements in order to fly airplanes. Those employment characteristics form no part of a task-related criterion for a BFOR. However, pilots do need pilot licences that are issued by the appropriate licensing authority, endorsed for the type of aircraft that the individual is flying and for the environmental conditions required of the pilot's job (visual or instrument flight conditions)—licences that are based on job-specific requirements, such as medical fitness and professional competency, licences that are recognized by the governments of the countries in whose airspace they operate their aircraft. Those are BFORs. ACPA's list of contractual

Outline of Argument of the Coalition Complainants

employment arrangements contains no BFORs at all. Its argument, therefore, in addition to being improperly before the Tribunal, fails to contain any merit whatsoever in respect of any *bona fide occupational requirement*.

70. Recognition of a Canadian pilot licence by foreign governments, we have conceded, may constitute a BFOR, depending on the factual circumstances as of the date in question. Regardless, the evidence before the Tribunal indicates that the current and previous maximum international age restrictions apply only to pilots-in-command (currently over age 65), not to other members of the cockpit crew (augment Captains, First Officers or Relief Pilots), and therefore do not trigger a BFOR in the case of any Complainant before this Tribunal.

71. *Meorin* is also helpful in putting to rest another ACPA proposition, namely, that some form of *accommodation* is required of the over-age 60 pilots—accommodation that would then lead to a *balancing of accommodation* with younger pilots affected by over-age 60 pilots remaining in or returning to the workplace. That proposition is derived from fallacious reasoning that starts with an *assumption* that accommodation is necessary or appropriate. *Meorin* clearly demonstrates that no such accommodation is required, and consequently there is no need for any ensuing *balancing of accommodation*:

Para. 72: To show that the standard is reasonably necessary, 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. [Emphasis added]

None of the Complainants in this proceeding possess any human rights “characteristic” that requires any accommodation whatsoever, be it gender, race, religion or even age. Age 60 is not a characteristic that requires accommodation—age 60 is simply *an arbitrary age* chosen by the union in collaboration with the employer for the sole purpose of discriminating against a group of individuals who are otherwise fully qualified and fully entitled to continue working in their chosen profession, absent the arbitrary age restriction chosen and imposed by the union and the employer. Hence, the issue of accommodation does not even arise.

Outline of Argument of the Coalition Complainants

- Para. 57: The first step in assessing whether the employer has successfully established a BFOR defence is to ***identify the general purpose of the impugned standard*** and *determine whether it is rationally connected to the performance of the job*. The initial task is to determine what the impugned standard is generally designed to achieve. [Emphasis added]
- Para. 58: The employer must demonstrate that there is ***a rational connection between the general purpose*** for which the impugned standard was introduced ***and the objective requirements of the job***. [Emphasis added]
- British Columbia (Public Service Employee Relations Commission) v. BCGSEU [1999] 3 S.C.R. 3

Again: “the *employer* must establish... that the *employer* adopted the standard...that is rationally connected to the *performance* of the job ... the *employer* must demonstrate that there is a rational connection...”

3. ACPA’s Submission Re Accommodation

72. As set out above, ACPA is arguing that in order to allow pilots at Air Canada to remain employed after age 60 that there must be *an accommodation by the over-age 60 pilots* of the needs of the union’s younger pilots. This argument, we submit, attempts to turn the case law regarding accommodation on its head.

73. A necessary *precondition* to the balancing of the needs of the *younger employees in the workplace* (i.e. others in the workplace who will ultimately be affected by the accommodation of individuals who possess a fundamental human rights characteristics that requires accommodation) with those of the older employees in the workplace (i.e. those who *allegedly* possess a human rights characteristic that must be accommodated) is the existence of some *fundamental human rights characteristic in the older employees that must be accommodated!*

74. The over-age 60 pilots at Air Canada do not possess any fundamental human rights characteristic that requires *any accommodation whatsoever*. They are not comparable, for example, to individuals with legitimate religious beliefs that are foreclosed from working on

Outline of Argument of the Coalition Complainants

the Sabbath, whose scheduling needs then must be accommodated in balance with the needs of those who must be required to work weekends in order to accommodate the legitimate human rights needs of those who cannot work on the Sabbath.

75. There is absolutely no human rights characteristic in an age 60 pilot that requires *any form of accommodation* whatsoever. The licensed Air Canada pilot at age 60 is identically qualified to the licensed Air Canada pilot at age 59. The only difference between a licensed, qualified Air Canada pilot at age 60 and a licensed, qualified Air Canada pilot at age 59, is that the age 60 pilot has passed *an arbitrary age of the union's and the employer's choosing*. That arbitrary age has no connection whatsoever with any fundamental human rights characteristic that requires accommodation.

76. Therefore, none of the case law related to accommodation (*Renaud, and other cases*) is applicable to the factual situation before this Tribunal in respect of these Complainants.

77. What ACPA is attempting to do is to introduce into this proceeding evidence and argument for the purpose of *confounding* the law in respect of legitimate accommodation with the law prohibiting discrimination on the basis of age. ACPA is attempting to have the Tribunal apply the case law of accommodation in circumstances where there is no requirement for accommodation, in order to have the Tribunal *usurp the authority of Parliament* by “reading in” to the *Act's* absolute prohibition of discrimination on the basis of age the proviso that the absolute prohibition should be *limited to an arbitrary age of the employer's and the union's choosing*—namely age 60.

78. Differential treatment on the basis of an arbitrary age is something that the statute expressly prohibits—it is not something that the Tribunal has the authority to contemplate or to authorize, no matter how it is disguised. The prohibition against discrimination on the basis of age is absolute (save for BFOR, which is not applicable on the facts of this case).

79. It is entirely repugnant of ACPA to suggest to this Tribunal that *these Complainants must change their attitude* about going back to work as Captains because the younger pilots cannot tolerate the removal of the age 60 restriction! It is repugnant that ACPA

should suggest to this Tribunal that its arbitrary choice of a limiting age should be used to exchange one form of discrimination on the basis of age for another—namely modifying the collective agreement to get through the back door what it is prohibited from getting through the front door: a handicap of the human rights potential of the over-age 60 pilots imposed because ACPA can't handle the fact that the law of Parliament supersedes the provisions of their collective agreement. That is ACPA's problem; it is not the Complainants' problem, and the solution to that problem lies at the doorstep of ACPA once the discriminatory practice is prohibited by this Tribunal, not at the doorstep of the Complainants who would be denied their fundamental human right to be treated without discrimination.

4. Re: ICAO Restrictions

(a) Re Over-Age 65 Pilots-In-Command

80. As we stated earlier, there may be some merit in Air Canada's proposition that undue hardship may arise in some cases where pilots over the age of 65 are to be reinstated to operate flights as pilots-in-command. Our position is simply that that issue is not before this Tribunal with respect to these Complainants, and therefore is irrelevant to the decision that the Tribunal must decide in relation to them. It is up to the employer, we submit, to operate its workplace as it sees fit, in compliance with the laws prohibiting discrimination on the basis of age. There are a number of options that are obviously available to Air Canada, however, termination of the Complainants' employment is not one of them given that pilots face no international restrictions from continuing to work in capacities other than as pilot-in-command.

81. The question that is before this Tribunal is, "Was the termination of employment of each of these pilots at their respective dates of termination, at age 60, conducted in accordance with the *Act*?" Was the human rights equivalent of *capital punishment* the only appropriate alternative for the employer in the circumstances? The obvious answer to that question is, "No. Not even close."

82. A significant portion of the alleged evidence adduced by Air Canada at the hearing was actually not evidence, but speculation: speculation about Air Canada's ability to predict

Outline of Argument of the Coalition Complainants

its manpower requirement, absent the age 60 limitation; speculation about Air Canada's ability to match its over-age 60 pilots-in-command with under-age 60 First Officers and Augment pilots. Speculation about what will happen two years from now, five years from now, or ten years from now, and especially speculation that is based on assumptions that are totally unfounded in evidence, should form no basis for the Tribunal's conclusions about the employer's liability for unlawfully terminating the employment of the individual Complainants months or years ago. Speculation is not fact—it is not evidence.

(b) Alternatives to Termination of Employment

83. What evidence did Air Canada provide to this Tribunal of alternative means of dealing with its doomsday scenarios? No evidence. It simply suggested that if this age restriction is not upheld, it will be either cancelling flights or paying pilots to sit idle. That is not evidence, and it is not consistent with the airline's current means of dealing with various contingencies such as irregular weather operations. Alternatives were and are available to Air Canada. The alternatives that Air Canada did not canvas include using pilots from different pilot bases to cover temporary shortages, using supervisory pilots to fill in for shortages of line pilots, using Captains as augment pilots or as First Officers, and providing a minimal amount of extra simulator training to Relief Pilots in order to have them meet the ICAO augmented crew qualification requirements. Those are some of the options available to them that they didn't tell you about—instead Air Canada came here simply with dire predictions and inflexibility as its only options. It is Air Canada's business to explore those options—it is not up to this Tribunal to tell Air Canada how to accommodate those contingencies. Were there alternatives for Air Canada to accommodate these individuals? Of course there were. But Air Canada didn't want you to know about them.

84. There was absolutely not a single shred of evidence whatsoever placed before this Tribunal as a justification for terminating the employment of any of these Complainants. There was no BFOR justification for *termination of employment*. Although ICAO Standards are implement as law in the regulations of each members state, ICAO's Recommended Practices are not law and have no legal effect anywhere in the world. Hence there is no legal reason for terminating the employment of a Captain, when he or she can legally

Outline of Argument of the Coalition Complainants

remain employed in a capacity other than as pilot-in-command. There is no legal reason whatsoever why pilots who are not employed as pilots-in-command cannot be employed to age 65 and beyond, so long as they maintain their medical and professional competency. That was one of many feasible and reasonable alternatives that Air Canada did not consider.

85. It is Air Canada's business how it employs pilots who are over age 65. We told them, "That is up to you. Deal with them as you must, but there is no legal basis for terminating their employment." That has been our position all along. When Air Canada gets to the point where it actually has to adjust a pilot's Position Assignment because he becomes potentially subjected to ICAO restrictions, then Air Canada can adjust it. If the pilot is aggrieved, he may attempt to bring that issue back through the Commission at some date in the future. So be it. But that issue is not something for this Tribunal to decide today.

86. The onus is on the employer to accommodate the individual who has special needs. These individuals before this Tribunal do not have any special needs. None. At least not now. They don't have any needs. They are ordinary people. They are licensed pilots and they work. All of them. And the only time that they would ever require accommodation is when they cross the barrier of the regulatory framework—namely age 65 as pilot-in-command.

87. So there is no accommodation required for any of these Complainants. None. Period. They were fully competent on the day their employment was unjustly terminated, and their employment should have continued right up to age 65 and beyond.

(c) Complainants Terminated Before November 23, 2006

88. For those Complainants whose employment was terminated prior to the implementation of the ICAO changes on November 23, 2006 (maximum age for pilot-in-command, age 60), those individuals could have been easily accommodated within the rubric of the existing Position Assignment, as described above. For those whose employment was terminated shortly before the change came into effect, it would have simply meant operation for a few months in a lower-rated capacity, such as First Officer, in

Outline of Argument of the Coalition Complainants

many cases without any significant amount of training required. ICAO gave six months notice of the change, but information was available in the industry for some period long before the implementation date was announced. If Air Canada would had accommodated the Complainants at that date by allowing them to remain employed in a different capacity, all of those Complainants would now be re-engaged as pilots-in-command. Accommodation would have taken care of that.

89. Why did Air Canada not accommodate those pilots instead of terminating their employment? It simply did not want to change. It wanted to continue discriminating on the basis of age. It wanted to maintain the *status quo*, with the collective agreement provision determining the fate of its pilots. That is the case, even after the Tribunal's decision of August 28, 2009 that found that the Air Canada—ACPA collective agreement provision violated the provisions of the *Canadian Human Rights Act*. What was Air Canada's response? *Ignore the decision!* Continue terminating the employment of its pilots, contrary to the prohibition of the *Act*. In fact, Air Canada is still terminating pilots' employment at age 60. Why? Because it can! And it will continue to do so until it is ordered to do otherwise. The only thing that will stop Air Canada from violating the rights of these pilots is a formal order of this Tribunal that forces Air Canada to stop violating these pilots' rights.

(d) Re Over-Under Rule

(i) ICAO Convention and Annex 1

90. The starting point for analysis of the Over-Under Rule is the ICAO Convention and Annex 1, S.2.1.10.1 provision itself:

2.1.10.1 A Contracting State, having issued pilot licences, shall not permit the holders thereof to act as pilot-in-command of an aircraft engaged in ***international commercial air transport operations*** if the licence holders have attained their 60th birthday or, in the case of operations with more than one pilot where the other pilot is younger than 60 years of age, their 65th birthday. [Emphasis added]

- Exhibit R-8, Tab 13 A

The key words in the above provision are ***international commercial air transport operations***. The Over-Under rule applies only to international commercial air transport operations. It does not

Outline of Argument of the Coalition Complainants

apply to domestic commercial air transport operations. Domestic flights within any country do not fall within the purview of the rule, *even if the flights temporarily transit international airspace.*

- ICAO documents in support of this proposition were not allowed to be admitted into evidence, notwithstanding the fact that the USA Federal Administration Agency, the regulatory arm of the USA government charged with the promulgation and enforcement of air regulations, incorporates the ICAO documents by reference into its regulations.

91. Contrast this Annex 1 provision with ICAO Convention Article 40 that identifies restrictions with respect to “international air navigation:

40. No aircraft or personnel having certificates or licenses so endorsed shall participate in ***international air navigation*** except with the permission of the State or States whose territory is entered.... [Emphasis added]

- Exhibit R-8, Tab 11

Article 40 specifies that personnel engaged in “international air navigation” (i.e. those operating flights that transit international airspace) must have their licenses recognized by the state over which they are passing, whereas ICAO Annex 1 Over-Under rule applies only to international flights. The difference is subtle, but critical.

92. Namely, domestic flights may transit international airspace (for example, a flight from Toronto to Halifax will normally transit the airspace of the State of Maine), and pilots operating those flights must have their licenses recognized by the host state (the USA), but the pilots operating that flight do not have to comply with the Over-Under rule because the flight is a domestic flight, not an international flight. Recognition of licenses encompasses factors such as the ICAO age 65 limit, so pilots-in-command over the age of 65 cannot legally operate domestic flights in Canada that transit USA airspace, but two pilots over the age of 60 but under the age of 65 could operate the flights, because the Over-Under rule is not applicable to domestic flights, even if those flights transit USA airspace.

(ii) Captain Duke / Mr. Tarapasky Models

93. As we pointed out in our original objection, prior to the testimony of Mr. Tarapasky, the scheduling model that he presented to the Tribunal is entirely flawed and worthless,

Outline of Argument of the Coalition Complainants

due to its failure to account for the offsetting beneficial impact of Augment Pilots in the flight pairing allocation process:

- Transcript of Hearing, October 29, 2009, Pages 60-61, Objection by Complainants to admission of evidence:

Mr. RAYMOND HALL:

This is also the point where I'm going to be making my objection.

10 Ms. MARYSE TREMBLAY:

May I ask, Mr. Hall, which of the slides are problematic so that I can look at them maybe...

Mr. RAYMOND HALL:

Every one from this point onward.

15 THE CHAIRMAN:

So for the rest of the tab?

Mr. RAYMOND HALL:

Yes. I may have to qualify that, but anything... and here's the... maybe you'd like to hear the

20 objection...

THE CHAIRMAN:

Yes.

Mr. RAYMOND HALL:

... before we break?

25

THE CHAIRMAN:

Yes, we're not going to break until eleven (11:00).

Mr. RAYMOND HALL:

Okay. Based on the document that's presented

5 there, we're talking about pilots who are over age sixty

(60) and the term that's used in the document is I

believe "potentially restricted". There is no indication

in this document that the model that was used to develop

these numbers includes any of the relief pilot or augment

10 pilots who are allowed to be and quite frequently and

regularly are on the flights that change the validity or

the ability of the company to operate these flights,

and...

THE CHAIRMAN:

15 Isn't this more a question of cross-examination

argument?

Mr. RAYMOND HALL:

No, my objection is garbage in - garbage out, the

entire model is flawed. So there should be no

20 consideration of this model whatsoever. There... every

single one of those charts says, "Captain and first

officer" and there's no accountability for the fact that

if there was an augment pilot on there, if they had to

prepare that kind of document, then we

could go through and I could cross-examine on the issue.

But a very large proportion of Air Canada's

flights, especially on the overseas long haul flights,

include additional pilots and, therefore, the model

5 should include an adjustment in terms of all of the

numbers, captain and FO, to accommodate the reality that

the (inaudible) constraints on the over/under rule can be

Outline of Argument of the Coalition Complainants

met or cannot be met. That is not in here at all, it's one hundred percent (100%) rubbish.

This flaw is succinctly summarized in the testimony of Professor Jonathan Kesselman, (Transcript of Evidence, November 19th, Pages 228-233) but essentially goes like this:

1. All pilots, either Captains or First Officers, are identified by the Preferential Bidding System computer (the "Optimizer") as either under age 60 (unrestricted), over age 60 (potentially restricted) or over age 65 (restricted);
2. Artificial increases are made to the ages of varying percentages of pilots on the 2009 Pilot Position Assignment List for various pilot bases and equipment, because Air Canada does not currently employ pilots over age 60; the assumption is made that the most senior pilots in the specific position on the Pilot Position Assignment List are the oldest pilots; the model simply adds varying percentages of years to the ages of various pilots in order to assume an over-age 60 population for the purpose of the model.

The validity of this assumption is unsubstantiated and extremely unlikely to reflect the true situation, were the age 60 restriction to be removed, given the existing pilot demographics and Position Assignment List bidding options. The model is entirely inconsistent with the actual data available with respect to the number and proportion of pilots in their current position who reach age 60 as First Officers, as opposed to as Captains.

3. Specifically, no account is taken for the very real likelihood that senior First Officers on the specified Pilot Position Assignment List, especially those nearing the age at which their qualification period for their lifetime pension is calculated (i.e. best 60 consecutive months), would, in the ensuing years not remain as First Officers but would bid to the position of Captain on a different airplane;
4. The Optimizer is run to find the blocking solutions, first for the Captains, then for the First Officers;
5. First Officers who either bid or are assigned Augment First Officer pairings and who are awarded those flights cannot be matched with over-age 60 Captains, regardless of the age of the other First Officer on the flight, by reason of a design flaw in the programming of the model;
6. The award of the First Officer pairings, including the Augment First Officer pairings, to the blocking solution is done in seniority sequence, so that the flight assignment is done first for the #1 First Officer, then for the #2 First Officer, and so on down the list. All First Officers (including Augment First

Outline of Argument of the Coalition Complainants

Officers) who are assumed to be over age 60 (potentially restricted) are flagged so that the Optimizer refuses to match those pilots with Captains who are over age 60, regardless of whether the other First Officer ultimately assigned to that flight crew is potentially restricted;

7. This is precisely the opposite of the ICAO requirement for augmented crews; under ICAO, the flight can operate if *either* First Officer is under the age of 60; under Mr. Tarapasky's programming logic, *both First Officers are required to under age 60!*

What should be an "*Either / Or*" solution is instead programmed as the inappropriate and much more restrictive "*Both / And*" solution, that yields totally inappropriate results and negates the entire value of the model by producing output that bears no relationship whatsoever to the ICAO constraints. This error is most predominant on the very aircraft where the most benefit of the ICAO augmented crew requirements exists, namely, the Boeing 777.

- [Exhibit C-12, Tab 9, ICAO Augmented Crews FAQ](#)

8. The flawed logic in the programming occurs at the beginning of the Optimizer runs, and thus renders all later programming solutions invalid;
9. The only way to correct the logic of this programming error is to have the computer evaluate the combination of operating First Officer and the Augment First Officer together, to determine if either one or the other is under age 60; this would require a completely different and more sophisticated model than was used by Mr. Tarapasky;
10. Consequently, all of results of Mr. Tarapasky's modeling, including the Tables produced, are of zero evidentiary value; similarly, the reliance of Captain Duke on the outcomes of the flawed models put forth by Mr. Tarapasky render all of Captain Dukes conclusions based on those models of zero evidentiary value as well.

94. Verification of the flaw in Mr. Tarapasky's model was confirmed by Mr. Tarapasky in the cross-examination conducted by Mr. Poulin:

- [Transcript of Evidence, Cross-Examination of Mr. Tarapasky, October 29, 2009, Pages 54-55:](#)

247 Q- Okay. There's something I want to understand and I must admit that all that talk about augment pilot and relief pilots and two (2) augments and relief, et cetera, at some point, I get lost. I want to understand your table and I want to understand your results. If we have one captain and two (2) FOs - okay? - you would have a

Outline of Argument of the Coalition Complainants

problem...
15 THE CHAIRMAN:
What ages are they?
Mr. DANIEL POULIN:
They're potentially restricted... assume... we're
going to talk about... I want to see how the table was
20 developed and how it was created.
248 Q- When is there a problem? It's when the two (2), captain
and FO, are potentially restricted. That's when there is
a problem?
A- Yes.
249 Q- Okay. If we have one captain and two (2) FOs, if any one
of the two (2) FOs are potentially restricted, there's a
problem?
A- They can't fly with that captain.

Conclusion: garbage in, garbage out. Evidentiary value: zero.

(c) Re FAA Operations Specification

95. The FAA Operations Specification (“Ops Spec.”) is a document issued by the USA aviation regulatory authority to foreign air carriers whose operations include flights to and from USA destinations, pursuant to Part 129 of the USA Code of Federal Regulations (CFR). Any non-USA carrier intending to use USA airports as points of departure or points of landing, including airports used as alternates to domestic destinations, is required to apply for and obtain an Ops Spec. The details of the requirements are set out in Part 129 of the CFR. Without an Ops Spec, an airline’s flights may land and take-off within the USA only in circumstances of emergency.

- Exhibit R-8, Tab 20

96. Airlines that transit USA airspace without the intention of landing at or taking off from USA airports are not required to obtain an FAA Ops Spec.

- Code of Federal Regulations, Part 129 (Not in evidence)

97. The fact that Air Canada coincidentally has an FAA Ops Spec because of its extensive routine operations into and out of USA airports is irrelevant to the fact that Canadian domestic flights that do not operate to or from USA airports do not require an Ops Spec, notwithstanding the fact that they may transit USA airspace in the course of a domestic flight. The USA Ops Spec is therefore inapplicable to domestic Canadian flights,

Outline of Argument of the Coalition Complainants

and the Over-Under rule compliance under the FAA Ops Spec is inapplicable on to those flights as well.

98. Although Air Canada argued and would have the Tribunal believe that the FAA Ops Spec is applicable to Canadian domestic flights. That proposition is incorrect, and Air Canada knows that it is incorrect. In any event, the onus rests upon Air Canada to prove that the proposition is valid—it has not discharged that onus, for one reason and one reason only—it cannot prove a falsehood.

99. The ICAO Over-Under rule has been in effect internationally since November 23rd, 2006—i.e. for over three years. It is applicable to ICAO's 190 member states and their almost 800 international airlines worldwide that operate regularly scheduled international flights. Despite the hundreds of thousands of flights operated by the international airlines since the inception of the Over-Under rule in 2006, Air Canada did not bring to this Tribunal one single piece of evidence suggesting that the application of the Over-Under rule was problematic to *any of those airlines* or that would support its proposition that Air Canada would have difficulty complying with the requirements in its operations. There was no evidence provided to this Tribunal by Air Canada that any airline had any difficulty whatsoever complying with the restrictions, let alone difficulty that would raise the issue to the level of undue hardship.

100. In fact, the evidence (as opposed to speculation) that it brought to this Tribunal by its own witnesses indicated just the opposite—namely, none of the Canadian carriers who routinely operate flights under more restrictive conditions than Air Canada (non-augmented crews) expressed any difficulty complying with the ICAO rule. Air Canada Jazz witness Mr. Newhook, for example, testified that it was the pilots' Association, not the employer, that proposed the introduction of Letter of Understanding 40 to supersede LOU #2, in order to facilitate the accommodation of over age-60 pilots.

- Testimony of Mr. Kirk Newhook, Transcript of Evidence, October 9, 2009, Pages 156-165.
- Exhibit R-10, Air Canada Jazz LOU #40

Outline of Argument of the Coalition Complainants

101. Witnesses from Flair, Air Georgian, WestJet, Skyservice and Air Transat all testified that the Over-Under rule posed no significant problem to their operations, despite the fact that none of them operate flights with augmented crews (that mitigate against the adverse impact of the restriction). Madame Bujold of Air Transat testified that Air Transat has operated its flights since long before November, 2006 with pilots-in-command over the age of 60, that its long-haul flights exceed eight hours duration, that it does not put augment pilots on its flights, and that she was completely unaware of any operational difficulties in complying with the Over-Under rule restriction.

- Transcript of Evidence, October 8, 2009, Pages 185-186

102. So how is it then that, with no evidence whatsoever that any airline anywhere in the world that has been operating under this constraint for over three years has any difficulty whatsoever, let alone difficulty to the point of undue hardship, that Air Canada, with fewer constraints (especially, the predominance of augmented crews on the very aircraft that would be most affected by over age-60 pilots—the Boeing 777), should be *believed* when it postulates that it will experience not just difficulty, but difficulty to the point of undue hardship as a result of the Over-Under rule restriction if the age 60 restrictions is removed? It just doesn't make any sense!

103. If the Over-Under rule did cause problems, Air Canada could easily work around those problems, just as Air Canada Jazz, Air Transat and other airlines have done.

- Cross-Examination of Mr. Kirk Newhook, Transcript of Evidence, October 9, 2009, Pages 156-165
- Exhibit R-10, Air Canada Jazz LOU #40
- Cross-Examination of Ms. Bujold, Transcript of Evidence, October 8, 2009, Pages 180-181
- Exhibit R-9, Tab 2, Air Transat Collective Agreement, Page 89

Outline of Argument of the Coalition Complainants

104. They can accommodate this restriction with little effort. For example, the evidence of Captain Duke was that Captains could be used as Augment Pilots and/or as Relief Pilots.

First Officers could be used as Relief Pilots:

- Cross-Examination of Captain Duke, November 18, 2009, Transcript of Evidence, Question 27:31

15 27Q- So, the captain then... and perhaps I can refer you
16 to the collective agreement definitions of augment.
17 Right in the front section, in the definitions of
18 the book, at page 2-4, article 2.27, "Augmentation
19 pilot". Is it a common practice at Air Canada that
20 captains can be used as augmentation pilots?
21 A- It's not common, but it's not unusual.
22 28Q- It does happen?
23 A- Yes.
24 29Q- So, the augmentation pilot then, be it a captain or
25 a first officer, can be used to substitute for in
1 the event of unavailability of a augment first
2 officer for that augment first officer?
3 A- Yes.
4 30Q- Can that captain also be used to substitute for the
5 relief pilot?
6 A- Yes.
7 31Q- Okay. Can a first officer be used to substitute for
8 the relief pilot?
9 A- Yes.

105. Captain Duke also agreed that Relief Pilots (who operate only on flights where the Over-Under rule is applicable) could be given a very, very small amount of additional simulator training to bring them to the standard required by ICAO to satisfy the Over-Under rule requirements.

- Cross-Examination of Captain Duke, November 18, 2009, Transcript of Evidence, Question 47:64

25 47Q- Okay. So then, what would it take to make a relief
1 pilot a fully qualified pilot, the same as a first
2 officer?
3 A- They'd have to take the first officer's course.
4 48Q- And what is the difference between the relief
5 pilot's course and the first officer's course?
6 A- I don't know the specifics of the simulator
7 difference. The ground school I think would be the
8 same. The simulator program would have some
9 differences in it and then the line indoctrination
10 is completely different.
11 49Q- Okay, let's just go back through the phases...
12 A- M'hm.
13 50Q- ... there, break down your answer a little bit. So
14 the ground school is essentially the same, you said?

Outline of Argument of the Coalition Complainants

15 A- That's my opinion, yes.
16 51Q- Okay. So, then, the simulator training session,
17 they would probably not be required to do training
18 in approaches, landings, these other elements that
19 you referred to?
20 A- Not to the same extent.
21 52Q- They are familiar with it, of course?
22 A- Yes, there'd be... that's it, they'd be exposed to
23 that for the purpose of familiarization, not for the
24 purpose of...
25 53Q- Performing.
1 A- ... raising to a standard.
2 54Q- Okay. And how many days of training then is it
3 different for a pilot that goes on course for a
4 relief pilot as to a pilot that goes on course to
5 become a first officer in the simulator phase?
6 A- I'm not sure.
7 55Q- Could you give me an estimate?
8 A- Two (2).
9 56Q- Okay.
10 THE CHAIRMAN:
11 57Q- Two (2) what, two (2)...
12 Mr. RAYMOND HALL:
13 Two (2) days.
14 A- Two (2) last days.
15 58Q- Okay. And what about the actual... you refer to it
16 as line indoctrination.
17 A- M'hm.
18 59Q- That's where they're actually out on operating
19 flights?
20 A- That's correct, with real airplanes and real
21 passengers.
22 60Q- Under evaluation by a line indoctrination training
23 captain?
24 A- It's training, it's not evaluation.
25 61Q- Okay, training... okay, and eventually, a first
1 officer would undergo the same line indoctrination
2 training but to a different standard, is that...
3 A- A first officer would undergo more.
4 62Q- Okay.
5 A- The relief pilot, I believe, can get away with as
6 little as two (2) flights.
7 63Q- Okay.
8 A- The first officer, it's a minimum of four (4) and
9 it's more time requirement, it's twenty-five (25)
10 hours.
11 64Q Okay. So, what we're talking about then in the
12 difference, we're talking about two (2) days in the
13 simulator and a number of extra hours in the actual
14 line indoctrination process to make a relief pilot
15 qualified to be a first officer, is that correct?
16 A- Yes.

106. Training some or all of the Relief Pilots to the standard to meet ICAO augmented crew requirements would essentially totally eliminate the Over-Under rule restrictions on

Outline of Argument of the Coalition Complainants

the very flights where those restrictions are needed—namely long-haul flights on the Boeing 767, the A330 and the Boeing 777, for only a minor cost. No additional pilots would need be hired, no pilots would sit idle, and no flights would be cancelled.

107. Air Canada doesn't want to do that—it would prefer that this Tribunal negate the entire prohibition against age discrimination altogether, rather than requiring that Air Canada take even the most miniscule steps to accommodate the requirement, should that need for accommodation arise. Air Canada is not pleading undue hardship—it is pleading that it should be exempt from the law that prohibits discrimination on the basis of age. It is asking that this Tribunal allow it to continue its discriminatory practices.

V. Statutory Interpretation of Section 15(1)(c)

108. We again respectfully remind the Tribunal that it should consider the extensive case law from the Supreme Court of Canada that clearly states that when human rights statutes are being interpreted by the Tribunals and the Courts, due to the quasi-constitutional nature of the statutes, the rights of the individuals must be interpreted broadly and expansively, and the defences to those rights must be construed narrowly. In addition, any ambiguity whatsoever with respect to the interpretation of a human rights statutory provision must be resolved in favour of the Complainants, not the employer. [Please see Paragraph 7 above on this point.]

109. In the over 30 years since the enactment of the *Canadian Human Rights Act*, Section 15(1)(c) (formerly Section 14(1)) has been interpreted by several Tribunal panels and several courts, including the Federal Court, the Federal Court of Appeal and the Supreme Court of Canada. Many of the decisions of the Tribunals and the courts have been reversed on review or appeal. Even the Supreme Court of Canada overturned its own 1996 decision with respect to the ability of the Tribunal to interpret and apply the provisions of the *Canadian Charter of Rights and Freedoms* to Section 15(1)(c) of the *Canadian Human Rights Act* in the case involving an airline pilot required to retire at age 60.

- *Cooper v. Canada (CHRC)* [1996] 3 S.C.R. 854
- *Administrative Law in Context*, Colleen M. Flood and Lorne Sossin, 2008, Edmond Montgomery Publications Limited, Toronto

110. Moreover, with piecemeal interpretations of *Canadian Human Rights Act* Section 15(1)(c) and other statutory provisions of the various Tribunals and Courts in Canada leading to a proliferation and array of sometimes anomalous and occasionally conflicting interpretations, the Supreme Court of Canada has not been the least reluctant of late to insist on a more systematic and comprehensive interpretation of statutory provisions by all judicial and quasi-judicial bodies, including Tribunals. In fact, it has mandated such an approach, imposing upon all Tribunals, including the this Tribunal, a positive duty to complete a comprehensive analysis of the statutory provision in question prior to undertaking an application of the facts to the provision of the statute. The Supreme Court

Outline of Argument of the Coalition Complainants

of Canada's requirement that Tribunals and Courts undertake a comprehensive analysis of statutory interpretation, we submit, supersedes the Federal Court's determination of the interpretation of Section 15(1)(c) in the precedent case to this hearing: 2009 FC 367. The Court in that case failed to complete such an analysis. Therefore, when the Tribunal properly interprets Section 15(1)(c) as mandated by the Supreme Court of Canada, the interpretation of that section to the facts of this case may properly differ from the interpretation arrived at by the Federal Court.

111. One of the most obvious examples of where this required comprehensive analysis was mandated by the Supreme Court of Canada is the 2006 case, *Canada 3000*, in which Justice Binnie interpreted (and essentially *rewrote* the definition of) the word, "owner" to accord with the statutory intent of Parliament in dealing with disposal of assets remaining following the bankruptcy of an airline, in effect overriding the common law meaning of the word that would otherwise have been applicable in the circumstances of the leasing arrangements in question in that case.

- *Nav Canada et al. v. Intl. Lease Finance Corp. et al.* ("Canada 3000")
[2006] SCC 24; Complainants' Book of Authorities, Binder A, Tab 7, Paragraphs 36-45

112. The *Canadian Human Rights Act* was enacted in 1978, four years prior to the enactment of the *Charter*, and seven years before the invocation of the equality rights in Section 15 of the *Charter*. It is our suggestion that, notwithstanding the words of Madame Justice MacTavish in her review of Tribunal decision 2006 CHRT 36 (below) and the words of arbitrator Peltz in *CKY*, the dilemma posed by the anomaly of tolerating discrimination when an employer essentially sets the statistical measure of "normal age of retirement" by reason of its dominance in the industry, allowing it to essentially "contract out" of the *Canadian Human Rights Act*, can be resolved by principles of statutory interpretation alone:

[181] While this is indeed a troubling question, I agree with the arbitrator in *CKY-TV* that it is indicative of a more fundamental problem with paragraph 15(1)(c) of the *Canadian Human Rights Act*, which is that the provision allows for discrimination to occur, as long as it is pervasive within an industry: see para. 133. However, as the arbitrator also noted, if the process is flawed, the remedy is under the Charter: see para. 134.

Outline of Argument of the Coalition Complainants

Invocation of the *Charter* is not necessary to give proper meaning and application to Section 15(1)(c). Indeed, prior to the enactment of the *Charter* Section 15 equality provisions (1985), there would have been no other way to resolve the anomalies created by the statutory provision, than by proper interpretation of Parliament's intent in enacting the provision through the principles of statutory interpretation now mandated by the Supreme Court of Canada.

- *CKY-TV v. Communications, Energy and Paperworkers Union of Canada, Local 816* (Kenny Grievance), [2008] C.L.A.D. No. 92 at para. 216 (“CKY-TV”)

1. **Interpretation Act**

113. Our starting point for the proper interpretation Section 15(1)(c), however, is the *Interpretation Act*, which provides, *inter alia*:

Law always speaking

10. The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it *shall be applied to the circumstances as they arise*, so that effect may be given to the enactment according to its true spirit, intent and meaning.

Principe général

10. La règle de droit a vocation permanente; exprimée dans un texte au présent intemporel, elle s'applique à la situation du moment de façon que le texte produise ses effets selon son esprit, son sens et son objet.

Enactments deemed remedial

12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

Principe et interprétation

12. Tout texte est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

Outline of Argument of the Coalition Complainants

Words in regulations

16. Where an enactment confers power to make regulations, expressions used in the regulations have the same respective meanings as in the enactment conferring the power.

Terminologie des règlements

16. Les termes figurant dans les règlements d'application d'un texte ont le même sens que dans celui-ci.

- Complainants' Book of Authorities, Binder A, Tab 1

2. Canadian Human Rights Benefit Regulations

114. By reason of Section 16 of the *Interpretation Act*, the provisions of the *Canadian Human Rights Benefit Regulations* SOR/80-68, are relevant. Namely, although the *Canadian Human Rights Act* does not include a definition of the term “normal age of retirement,” the definition of the same term that is found in the *Canadian Human Rights Benefit Regulations* is deemed to have the same meaning as in the *Canadian Human Rights Act*.

- Complainants' Book of Authorities, Binder A, Tab 1

115. Consequently, those words in the *Act* must be construed in accordance with the definition set out in the Regulations. To date, to our knowledge, this legal requirement has yet to be acknowledged or applied by this Tribunal or by any court that has reviewed the decisions of this Tribunal in respect of the provisions of Section 15(1)(c) of the *Act*:

“normal age of retirement”, in respect of any employment or position of a person, means the maximum age applicable to that employment or position referred to in paragraph 14(b) of the *Act* or the age applicable to that employment or position referred to in paragraph 14(c) **[now 15(1)(c)]** of the *Act*, as the case may be; (âge normal de la retraite)

« âge normal de la retraite », pour un emploi ou un secteur professionnel, désigne l'âge maximal dont il est question à l'alinéa 14b) de la Loi, ou l'âge visé à l'alinéa 14c) **[now 15(1)(c)]** de la Loi; (normal age of retirement)

- Canadian Human Rights Benefit Regulations, SOR 80/68, Definitions

3. Driedger Analysis

116. The principles set out in Sullivan and Driedger, “*On The Construction of Statutes*,” cited with approval by the Supreme Court of Canada on numerous occasions, and now *required by the Supreme Court of Canada to be applied in all cases involving the interpretation of any statutory provisions*, dictate that a complete contextual analysis of the legislative provisions be conducted prior to arriving at the correct construction of a statutory provision. Despite the effluxion over 30 years since the enactment Section 15(1)(c), this complete contextual analysis has never been undertaken in the precedent Tribunal and Court decisions. This contextual analysis, when complete, after taking into consideration all relevant factors, we submit, refutes the “statistical analysis” comparison previously used by the majority of the Tribunals and Courts in its review of this provision, replacing it with a more global interpretation of the intent of the legislature in the enactment of Section 15(1)(c) of the *Act*.

- Complainants’ Book of Authorities, Binder A, Tab 3, at Pages 210-211.

117. The Dreiger principles endorsed by the Supreme Court of Canada suggest looking at all indices of legislative intent, including records related to the deliberation and passage of the legislation:

Non-legislative statements of purpose.

The reports of Law Reform Commissions, Parliamentary Commissions and other similar studies have long been admissible as evidence of the mischief or evil legislation was designed to overcome. More recently, the courts have begun to look to these and other sources as direct evidence of legislative purpose.⁵⁶ Statements made about a statute in the legislature, especially by Ministers introducing or defending it, are admissible and may be considered sufficiently reliable to serve as direct or indirect evidence of legislative purpose.⁵⁷ Statements issued by government departments or agencies involved in the development or administration of legislation may also be looked at.

- Complainants’ Book of Authorities, Binder A, Tab 3, at Pages 210-211.

4. Directive From The Supreme Court of Canada

118. The Supreme Court of Canada, in *Francis v. Baker*, after citing the oft-quoted passage from an earlier version of Driedger in another Supreme Court of Canada case

Outline of Argument of the Coalition Complainants

[Binder A, Tab 8], stated emphatically that the Driedger principles *must be applied* in all cases of statutory interpretation, :

34 In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, Iacobucci J. adopted the following passage from Driedger's *Construction of Statutes* (2nd ed. 1983), at para. 21:

Today there is only one principle or approach, namely, the words of an *Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament.

Iacobucci J. went on to state at para. 22 that every *Act* shall receive "such fair, large and liberal construction and interpretation" as will best attain the objects of the *Act*. More recently in *Chartier v. Chartier*, [1999] 1 S.C.R. 242, I confirmed that this is also the proper approach to the interpretation of family law related legislation.

35 Proper statutory interpretation principles *therefore require* that *all evidence of legislative intent be considered*, provided that it is relevant and reliable. ... [Emphasis added]

- Complainants' Book of Authorities, Binder A, Tab 10, Page 20

5. House of Commons Proceedings

119. This then leads to the record of the Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs of the House of Commons, March 10, 1977. In the hearings into the passage of the Bill that was eventually to become the *Canadian Human Rights Act* [Binder C, Tab 1, at Page 6:21, left column, near the bottom of the page] Mr. Fairweather questions Deputy Minister Strayer as to the intent of the provision of Section 15(1)(c) (then, Clause 14(c)) and specifically as to whether the Bill, by allowing an exemption to the general prohibition against age discrimination, is actually condoning systemic discrimination. Deputy Minister Strayer responds:

What Clause 14(c) means is that *as long as the individual is obliged to retire at the same age as everyone else in his kind of employment*, then it would not be treated as a discriminatory act to require him to retire. The problem is in knowing what to do to go beyond that. As the Minister says in his statement, public service employment, which is one of the largest areas of employment covered by the bill, is already governed by law as far as the retirement age is concerned. As for the rest, I believe retirement is often a matter of collective bargaining, it is also a matter of personal negotiation, and as far as we could determine *the next best arrangement would be to somehow enable the commission to review what was a reasonable retirement age in that particular employment.* [Emphasis added]

Outline of Argument of the Coalition Complainants

- Complainants' Books of Authorities, Binder C, Tab 1, at Page 6:21

120. The Deputy Minister, the *very person* responsible for drafting the Bill that became the *Canadian Human Rights Act*, states that there were essentially two options considered by the government. The first option was the proposed legislation in the Bill. The next best option was to allow *the Commission* to determine the normal age of retirement in each case. Parliament chose the first option.

121. The Deputy Minister clearly states that it was not Parliament's intent to use a 50%-plus 1 form of statistical analysis to determine what is the *normal age of retirement*. The intent of the legislative provision is to exempt mandatory retirement from the general prohibition provided that 100% of individuals ("everyone else") are required to retire at the same age. Upon receiving that answer from the Deputy Minister, the Committee member then asks no further questions on that subject.

122. Nowhere in his answer does the Deputy Minister suggest that because mandatory retirement is often a matter of collective bargaining, that that fact should offset the requirement to have 100% of individuals similarly affected by the legislation. Nowhere in that passage does the Deputy Minister suggest that because a large proportion of employees are subjected to mandatory retirement by reason of collective bargaining that that entitles their employers and unions to essentially contract out of the legislative requirements to have 100% of employees all similarly affected by the proposed legislative provisions. Not only would such an implication be improper, but such a mechanism would violate the supremacy of Parliament in enacting laws that affect all equally.

123. Notwithstanding the subsequent inferences by some members of the judiciary in interpreting Section 15(1)(c), collective bargaining is not a justification for moderating Parliament's intent to allow the mandatory retirement exemption to be applied only if it affects all of the members of a classification of employment, not just a proportion greater than 50%. There is no legislative justification for any dominant employer "setting the standard" or defining the "normal age of retirement," based on the proportion of its own employees bound by its own collective agreement, thus allowing that organization to

Outline of Argument of the Coalition Complainants

become essentially exempt from or contract out of the general prohibition against discrimination base on age.

124. A further indication of Parliament's refusal to defer to the private sector to determine the normal age of retirement through collective bargaining is found in Parliament's passage of the above Bill, notwithstanding the submission made to the above Committee by the largest labour union in the country, the Canada Labour Congress, opposing the exemption for mandatory retirement under Section 15(1)(c). The full text of their submission of March 29, 1977 is located in our materials at Binder C, Tab 2, starting at Page 7A:2. In particular, the following passage is of note:

9. The whole area of retirement and retirement ages is not a simple one. Nevertheless, we strongly urge the committee to remove provisions in Bill C-25 that will permit older workers to be refused a job solely on the grounds of age.

- Complainants' Book of Authorities, Binder C, Tab 2, Page 7A:5

125. Although the words of the Deputy Minister cited above have often been used by the Tribunal and the courts as a form of "conditioning" of Parliament's supposed inarticulate premise for the exemption to the general prohibition, the Tribunal and the Courts have consistently overlooked the context of his words and more importantly they have overlooked his express disallowance of a variable, uncertain mathematical measurement of the term "normal age of retirement.

126. The intent of the legislative provision as expressed by the Deputy Minister, (namely, "*as long as the individual is obliged to retire at the same age as everyone else in his kind of employment, then it would not be treated as a discriminatory act to require him to retire,*") is entirely consistent with the definition of "normal age of retirement" that is incorporated by reference into the Act, "*the age applicable to that employment or position.*" Namely, a specific age that is known to everyone as the normal age of retirement of individuals performing similar work, not an age that must be determined *after the fact* that can be determined only by undertaking extensive research using Tribunal-ordered subpoenas following the unlawful termination of one's employment.

Outline of Argument of the Coalition Complainants

127. It could not have been the intention of Parliament, in enacting Section 15(1)(c), that a person whose employment is terminated should be forced to undergo laborious efforts to determine whether his termination met a statistical test of 50% plus one, based upon a set of uncertain comparators whose employment data is wholly private and otherwise unavailable. A statutory provision should be certain and unambiguous.

128. Indeed, a statistical analysis of any kind whatsoever is wholly inconsistent with realistic probability that a “normal age of retirement” may not exist for a particular profession. This very failing was dealt with properly by the House of Lords.

6. British Case Law

129. The House of Lords construed “normal retiring age” under its statutory provision in the same manner as it is construed in the Canadian Human Rights Benefit Regulations (“the age applicable,” i.e. a specific age known in advance and recognized as such) and in the same way that it was construed by Deputy Minister Strayer in his representation to the Standing Committee on Justice and Legal Affairs (“the same age as everyone else in his kind of employment,” i.e. a specific age known in advance and recognized as such). The House of Lords clearly distinguished between the “normal retiring age” (a specific, known age) and “the usual retiring age,” i.e. an age arrived at through computation of a statistical average—a variable age, calculated from the acquisition of industry data:

Having regard to the social policy which seems to underlie the Act - namely the policy of securing fair treatment, as regards compulsory retirement, as between different employees holding the same position - the expression “normal retiring age” conveys the idea of an age at which employees in the group can reasonably expect to be compelled to retire, unless there is some special reason in a particular case for a different age to apply. [Emphasis added]

“Normal” in this context is not a mere synonym for “usual”. The word “usual” suggests a purely statistical approach by ascertaining the age at which the majority of employees actually retire, without regard to whether some of them may have been retained in office until a higher age for special reasons - such as a temporary shortage of employees with a particular skill, or a temporary glut of work, or personal consideration for an employee who has not sufficient reckonable service to qualify for a full pension. [Emphasis added]

The proper test is in my view not merely statistical. It is to ascertain what would be the reasonable expectation or understanding of the employees

Outline of Argument of the Coalition Complainants

holding that position at the relevant time. The contractual retiring age will *prima facie* be the normal, but it may be displaced by evidence that it is regularly departed from in practice. [Emphasis added]

Hence, normal age of retirement is a *fixed age* that is recognized as such to everyone *prior* to the termination of employment.

130. The House of Lords then went on to say that a “normal retiring age” may not in fact exist, by reason of abandonment of any standard employed within the specific industry:

The evidence may show that the contractual retirement age has been superseded by some definite higher age, and, if so, that will have become the normal retiring age. *Or the evidence may show merely that the contractual retiring age has been abandoned and that employees retire at a variety of higher ages. In that case there will be no normal retiring age...* [Emphasis added]

- Complainants’ Books of Authorities, Binder B, Tab 2, at Page 662.

In other words, once the circumstances envisaged by Parliament are no longer valid—once the industry moves from a fixed, accepted normal age of retirement to a series of ages of retirements at different companies within the industry where the similar work is performed, the exemption of mandatory retirement may no longer applicable. If there is no *normal age of retirement*, then there can be no standard by which the termination of employment can be measured, and the statutory exemption can no longer be valid. That may very well be the situation in the case before this Tribunal.

131. The *Canadian Human Rights Act* was enacted when employment, economic and industrial conditions were far more stable than today, when Parliament properly presumed and expected a constancy in industry. The *CHRA* was enacted when most professionals were aware of the then uniform age of retirement. Everyone in a given profession could reasonably be expected to retire at the same age (for airline pilots, age 60). Those conditions no longer exist, especially in the volatile, competitive international industries of today, such as the airline industry. Pilots retire at different ages, or at no specific age whatsoever. So how can a law of the 1970’s, enacted upon an assumption of stability that is no longer evident, be used to enforce an exemption from a prohibition against discrimination of a fundamental human rights characteristic today? It can’t, because the assumption on which it is based is no longer valid.

Outline of Argument of the Coalition Complainants

132. The Supreme Court of Canada compels the Tribunal, prior to reviewing the facts and evidence presented to in respect of Section 15(1)(c), and prior to applying the precedent case law relevant to Section 15(1)(c) to the facts, to read the wording of the Section 15(1)(c) in its entire context, in its grammatical and ordinary sense harmoniously with the scheme of the Act and the intent of Parliament, to arrive at its own construction of that Section. That construction—how the Tribunal construes the meaning of “normal age of retirement” may or may not be consistent with prior judicial constructions of the same provision. We suggest that the Tribunal ought properly to come to a different, but correct construction of this statutory provision, given the relevant contextual factors that the Tribunal is obligated to consider, including contextual factors that have yet to be properly considered by other judicial or quasi-judicial bodies, including:

- the *Interpretation Act*, Section 16; [Binder A, Tab 1]
- the *Canadian Human Rights Benefits Regulations* definition of “normal age of retirement that is necessarily incorporated into the *Canadian Human Rights Act*;
- statements of the Deputy Minister to the Standing Committee on Justice and Legal Affairs, in articulating the meaning of Section 15(1)(c);
- principles of statutory interpretation as put forward in Driedger, *On the Construction of Statutes*, including those principles approved by and mandated by the Supreme Court of Canada in recent case law: *Canada 3000* [Binder A, Tab 7], *Francis v. Baker* [Binder A, Tab 10], *Rizzo and Rizzo Shoes* [Binder A, Tab 8] and *Bell ExpressVu* [Binder A, Tab 7]; and
- case law from the House of Lords reviewing the almost identical statutory provisions in the British domain, that rejects the use of a statistical evaluation [Binder B, Tab 2];
- the social context in which objectives of that the law are based; and, most importantly
- the *Canadian Human Rights Act* Section 2 (the “purpose clause.”)

In particular, we suggest that the construction arrived at by the Tribunal *should not be* a construction that applies any sort of necessary statistical calculation, *ex post facto* the termination of an employee.