

FEDERAL COURT

BETWEEN:

Robert Adamson, Robert David Anthony, Jacob Bakker,  
Donald Barnes, Michael Bingham, Doug Boyes,  
Kenneth Buchholz, Daniel Burrows, David G. Cameron,  
Wayne Caswill, George Cockburn, Bert Copping, Gary Delf,  
James E Denovan, Maurice Durrant (Estate of), 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, 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, James Millard, Brian Milsom,  
Howard Minaker, George Morgan, Greg Mutchler, Hal 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, Ray Thwaites, Dale Trueman,  
Andre Verschelden, and Douglas Zebedee

Applicants

– and –

AIR CANADA,  
AIR CANADA PILOTS ASSOCIATION and  
CANADIAN HUMAN RIGHTS COMMISSION

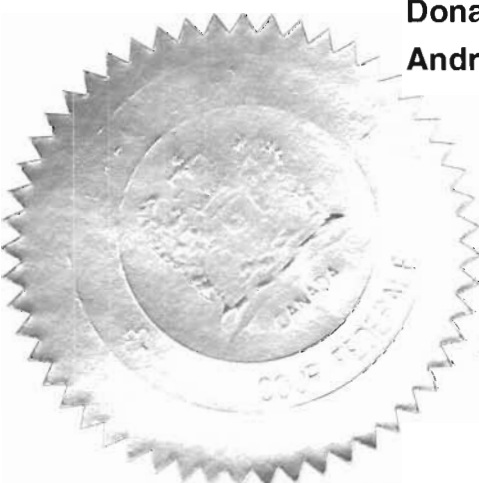
Respondents

APPLICATION UNDER Sections 18 and 18.1 of the *Federal Courts Act* and  
Rules 300 and 317 of the *Federal Court Rules*

---

**NOTICE OF APPLICATION FOR JUDICIAL REVIEW**

---



TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Toronto.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

September 6, 2011

**ORIGINAL SIGNED BY  
SANDRA MCPHERSON  
A SIGNÉ L'ORIGINAL**

Issued by: \_\_\_\_\_  
(Registry Officer)

**Courts Administration Service  
P.O. Box 10065, 3rd Floor  
701 West Georgia Street  
Vancouver, B.C. V7Y 1B6**

TO: **Air Canada**

**c/o Heenan Blaikie LLP**

1250 boul. Rene-Levesque oust, Suite 2500  
Montreal, QC H3B 4Y1  
Tel.: (514) 846-1212  
Fax.: (514) 846.3427

Attn: Ms. Maryse Tremblay

I HEREBY CERTIFY that the above document is a true copy of  
the original issued out of / filed in the Court on the \_\_\_\_\_  
day of **SEP 06 2011** A.D. 20 \_\_\_\_\_

Dated this \_\_\_\_\_ day of **SEP 06 2011** 20 \_\_\_\_\_

*Sandra McPherson*

AND TO: **Canadian Human Rights Commission**

344 Slater Street, 8<sup>th</sup> Floor  
Ottawa, ON K1A 1E1  
Tel.: (613) 947-6399  
Fax.: (613) 993-3089

Attn: Mr. Daniel Poulin, Counsel

AND TO: **Air Canada Pilots Association**

**c/o Laughton & Company**

Suite 1090, 1090 West Georgia Street

Vancouver, BC V6E 3 V7

Tel.: (604) 683-6665

Fax.: (604) 683-6622

Attn.: Bruce Laughton, Q.C.

AND TO: **The Canadian Human Rights Tribunal**

900 – 473 Albert Street

Ottawa, ON K1A 1J4

Tel.: (613) 995-1707

Fax.: (613) 995-3484

Attn.: Ms. Nicole Bacon, Registry Officer

AND TO: **Attorney General of Canada**

Justice Building

239 Wellington Street

Ottawa, ON K1A 0H8

Tel.: (613) 957-4222

Fax.: (613) 954-0811

**FEDERAL COURT**

BETWEEN:

**Robert Adamson, Robert David Anthony, Jacob Bakker, Donald Barnes, Michael Bingham, Doug Boyes, Kenneth Buchholz, Daniel Burrows, David G. Cameron, Wayne Caswill, George Cockburn, Bert Copping, Gary Delf, James E Denovan, Maurice Durrant (Estate of), 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, 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, James Millard, Brian Milsom, Howard Minaker, George Morgan, Greg Mutchler, Hal 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, Ray Thwaites, Dale Trueman, Andre Verschelden, and Douglas Zebedee**

Applicants

– and –

**AIR CANADA,  
AIR CANADA PILOTS ASSOCIATION and  
CANADIAN HUMAN RIGHTS COMMISSION**

Respondents

**APPLICATION FOR JUDICIAL REVIEW**

1. This is an application for judicial review of the Canadian Human Rights Tribunal (“Tribunal”) decision 2011 CHRT 11 released August 10, 2011 in which the Tribunal dismissed the complaints of the Applicants and two other complainants (who are not Applicants in this proceeding, Mr. Brock Higham and Mr. Don Paxton).
2. The hearings in respect of Tribunal files T1196/0807, T1197/0907, T1246/5807, T1247/5907, T1263/7507, T1279/0908 T1280/1008, T1336/6608 & T1337/6708,

T1380/0609, T1390/1609, T1402/2809, & T1218/4409 for which the August 10, 2011 was rendered, were held in October and November, 2009 and January, 2010.

3. On August 17, 2009, the Tribunal directed that the hearing of the complaints commence in the week of October 5, 2009 and continue in the week of October 26, 2009.
4. On September 23, 2009, the Complainants to the proceeding filed and served a *Notice of Constitutional Questions* in respect of the complaints. Service was made upon the Respondents, the Attorney General of Canada and the Attorneys General of Canada's Provinces and its Territories.
5. On September 25, 2009, Air Canada filed in the Federal Court an application for judicial review of a separate Tribunal decision, 2009 CHRT 24, a complaint involving two Air Canada pilots, Mssrs. Vilven and Kelly, complainants whose complaints were substantially similar to the complaints filed in the Tribunal proceeding leading to this Application, namely complaints regarding mandatory retirement at age 60.
6. On September 25, 2009, Air Canada filed with the Tribunal and served upon the parties to this proceeding a motion to adjourn the scheduled hearing of the complaints of the Applicants pending the outcome of the judicial review application in the Vilven-Kelly proceeding. Air Canada cited as grounds for its motion to delay the scheduled October 5, 2009 commencement of the hearing of the complaints in this proceeding, among other grounds, being provided insufficient notice to adequately prepare evidence and expert reports in support of a defence to the constitutional questions, should the hearing commence as scheduled on October 5, 2009.
7. The Tribunal, after receiving submissions from all of the parties in respect of the motion, issued a direction on October 2, 2009 that stated, in part:

The Tribunal has reviewed in detail the motion and supporting materials of Air Canada, the submissions of ACPA in support of Air Canada's motion and the responding materials and submissions of the complainants; The Tribunal has

concluded that the hearing into the complaints should go forward on October 5<sup>th</sup>. The evidence and legal submissions shall be directed to s. 15(1)(c), 15(1)(a) and 15(2) of the *Canadian Human Rights Act*.

The question of the constitutionality of s. 15(1)(c) will not be considered by the Tribunal at this time. After the conclusion of the evidence on s. 15(1)(c), s. 15(1)(a) and s. 15(2) of the *CHRA*, the parties, if so advised, may make submissions as to whether the Tribunal should hear evidence and argument on the constitutional question, and if so, the Tribunal will set dates for the hearing of this question.

8. The constitutional issue was then deferred pending the outcome of the hearing into Paragraph 15(1)(c) of the *Act* on its merits. The subsequent Tribunal hearing concerned itself only with the other two outstanding issues, the "normal age of retirement" defence or exception, and the *bona fide* occupational requirement ("BFOR") defence.
9. In its decision of August 10, 2011 in respect of the first issue, the Tribunal concluded at Paragraph [182]:

[182] Given this conclusion, the mandatory retirement imposed on the Complainants at age 60 pursuant to the collective agreement between the Respondents by virtue of s. 15(1)(c) of the *CHRA* does not constitute a discriminatory practice. ...

10. In respect of the second issue, the Tribunal made findings in respect of each Respondent's BFOR defence. In respect of ACPA's BFOR defence, the Tribunal stated at Paragraph [346]:

[346] For these reasons, I have concluded that ACPA has failed to satisfy steps one and two of the *Meiorin* test. The result is that ACPA cannot rely on the BFOR defence provided by s. 15(1)(a) of the *CHRA*.

and at Paragraph [405]:

[405] The choice is difficult. But in my opinion, the impact of eliminating the age 60 retirement rule does not reach the threshold of "undue" hardship. I have concluded therefore that ACPA has not satisfied the third step of the *Meiorin* test.

11. In respect of Air Canada's BFOR defence, the Tribunal stated at Paragraph [429]:

[429] At the end of it all, my opinion is that Air Canada has not met the burden of proving that it will suffer undue hardship with the elimination of the age 60 retirement rule. Accordingly, it cannot rely on the BFOR defence under s. 15(1)(a) of the *CHRA*.

12. In its conclusion, the Tribunal dismissed the complaints by reason of its finding in respect of the Paragraph 15(1)(c) issue. At Paragraph [430] it stated:

[430] I have concluded that the Respondents can rely on s. 15(1)(c) of the *CHRA* so that the mandatory retirement policy at age 60 does not amount to a discriminatory practice. Accordingly, the complaints are dismissed.

13. The Applicants make application for:

- A. an order quashing Tribunal decision 2011 CHRT 11, dated August 10, 2011, in part; namely, quashing:
  - 1. the dismissal of the complaints; and
  - 2. the Tribunal's finding in respect of Paragraph 15(1)(c) of the *Act*, namely the finding "that the Respondents can rely on s. 15(1)(c) of the *Canadian Human Rights Act* so that the mandatory retirement policy at age 60 does not amount to a discriminatory practice;"
- B. an order awarding costs to the Applicants; and
- C. such further and other relief as this Honourable Court considers just.

14. The grounds for the application are as follows. The Tribunal erred in law and fact and failed to observe principles of natural justice and procedural fairness and exceeded its jurisdiction:

- A. in failing to consider the entire legislative and jurisprudential context of the *Act* and of Paragraph 15(1)(c) of the *Act* in the application of Paragraph 15(1)(c) to the facts of the complaints of the Applicants;
- B. in failing to *narrowly construe* the defence or exception to a discriminatory practice provided by Paragraph 15(1)(c) of *Act*;
- C. in electing to use a statistically-based (50% plus one) method of determining the "normal age of retirement," in the circumstances where the number of pilots employed by the dominant carrier in the market, the Respondent Air Canada, has the effect of so skewing the statistical

analysis as to effectively allow Air Canada to unilaterally "set" the "normal age of retirement," contrary to the intentions of Parliament and the purposes Paragraph 15(1)(c) of the *Act*;

- D. having chosen to use a statistically-based method of determining the "normal age of retirement," failing to narrowly construe the defence or exception in Paragraph 15(1)(c) of the *Act* so as to properly apply the law to the facts of these complaints in the context of the purposes of the *Act* and the intentions of Parliament in enacting the defence or exception under Paragraph 15(1)(c);
- E. in misconstruing the proper test required to determine which Canadian airline pilots are "employees working in positions similar" to the Applicants;
- F. in misconstruing the proper test required to determine that age 60 is "the normal age of retirement" for "employees working in positions similar" to the Applicants and/or whether a "normal age of retirement" for those employees even exists;
- G. in concluding that the Respondent Air Canada had discharged its onus under Paragraph 15(1)(c) of the *Act* to demonstrate that age 60 is the "normal age of retirement for employees working in positions similar to the position" of the Applicants;
- H. by dismissing the Applicants' complaints, having erroneously found that Air Canada had discharged its onus under Paragraph 15(1)(c) of the *Act* to demonstrate that age 60 is the "normal age of retirement for employees working in positions similar to the position" of the Applicants;
- I. by dismissing the complaints, having previously directed that constitutional issue be addressed after the conclusion of dealing with the issues in s. 15(1)(c), s. 15(1)(a) and s. 15(2) of the *Act*; and
- J. such further and other grounds as counsel shall advise and this Honourable Court shall permit.

**15.** The Applicants plead and rely on:

- A. Sections 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended;
- B. Rules 300 and 317 of the *Federal Court Rules*, SOR/98-106;
- C. Paragraph 15(1)(c) of the *Canadian Human Rights Act*; and
- D. Such further and other statutes as counsel may advise and as this Honourable Court may permit.

17. This application will be supported by the following material:

- A. a supporting affidavit on behalf of the Applicants served and filed in accordance with Rule 306;
- B. the relevant documentary exhibits and written submissions that were before the Tribunal; and
- C. such further and other evidence as counsel may advise and this Honourable Court may permit.

Respectfully submitted this 6<sup>th</sup> day of September, 2011



Raymond D. Hall

Barrister & Solicitor  
2226 West Taylor Boulevard  
Winnipeg, MB  
R3P 2J5  
Tel.: 204-897-9000  
Fax: 877-778-8482  
E-Mail: [raymond@flypast60.com](mailto:raymond@flypast60.com)

Counsel for the Applicants