CITATION: VILVEN *v.* AIR CANADA, 2009 FC 367, [2010] 2 F.C.R. 189

T-1674-07
T-1678-07
T-1680-07

George Vilven (*Applicant*)

v.

Air Canada, Air Canada Pilots Association and **Canadian Human Rights Commission** (*Respondents*)

T-1678-07

Robert Neil Kelly (*Applicant*)

v.

Air Canada, Air Canada Pilots Association and **Canadian Human Rights Commission** (*Respondents*)

T-1680-07

Canadian Human Rights Commission (*Applicant*)

v.

George Vilven, Robert Neil Kelly and **Air Canada Pilots Association** (*Respondents*)

INDEXED AS: VILVEN V. AIR CANADA (F.C.)

Federal Court, Mactavish J.—Ottawa, November 24, 25, 26, 27, 2008; April 9, 2009.

Human Rights — Judicial review of Canadian Human Rights Tribunal's dismissal of age-based discrimination complaints — Pilots with Air Canada forced to retire from positions at 60 years of age — Tribunal finding 60 "normal age of retirement" for positions similar to those occupied by applicants at time of retirement, as contemplated by Canadian Human Rights Act, s. 15(1)(c), termination of employment thus not amounting to discriminatory practice within meaning of Act — Tribunal also finding Act, s. 15(1)(c) not violating equality rights provision under Canadian Charter of Rights and Freedoms, s. 15(1) — Onus on Air Canada, Air Canada Pilots Association to establish applicants Vilven, Kelly (applicants) retired in accordance with normal age of retirement for similar positions — Tribunal mischaracterizing essential features of applicants' positions, choosing wrong comparator group — To establish s. 15(1)(c) defence, shared meaning of English, French versions thereof requiring age of retirement in issue be normal, customary, standard within relevant industry sector — Existence of binding rule mandating retirement at particular age not required — Determination of normal age of retirement requiring statistical analysis — Tribunal's conclusion 60 normal age of retirement for employees in positions similar to those occupied by applicants reasonable — Applicants' forced retirement not amounting to discriminatory practice within meaning of Act, s. 15(1)(c) — Fundamental problem with paragraph 15(1)(c): provision allowing for discrimination, as long as pervasive within industry — Remedy available under Charter, s. 15(1) — Act, s. 15(1)(c) denying older workers equal protection of law, perpetuating group disadvantage, prejudice — Only serving to perpetuate stereotypical view older workers less capable, deserving of recognition, value as human beings, members of Canadian society — Act, s. 15(1)(c) violating Charter, s. 15(1) — Applications in T-1674-07, T-1678-07 allowed; application in T-1680-07 dismissed.

Constitutional Law — Charter of Rights — Equality Rights — Constitutionality of limiting provision in human rights legislation — Canadian Human Rights Act, s. 15(1)(c) providing termination of employment not discriminatory where person having reached normal age of retirement for employees working in similar positions — Whether Act, s. 15(1)(c) violating Charter, s. 15(1) — S. 15(1)(c) denying workers over "normal

age of retirement" equal protection, benefit of Act — Applicants disadvantaged by being forced to leave positions merely because having reached age 60, without regard to individual abilities, skills, capacities — Act, s. 15(1)(c) thus violating Charter, s. 15(1).

Construction of Statutes — Whether binding rule required for there to be "normal age of retirement" for purposes of Canadian Human Rights Act, s. 15(1)(c) — Difference between wording of English, French versions of s. 15(1)(c) — Shared meaning of two versions requiring that age of retirement in issue be normal, customary, standard within relevant industry sector — Existence of binding rule mandating retirement at particular age not required.

These were applications for judicial review of the Canadian Human Rights Tribunal's dismissal of age-based discrimination complaints filed by the applicants Vilven and Kelly (applicants). Both pilots with Air Canada, they were forced to retire from their positions when they turned 60 years of age, in accordance with the mandatory retirement provisions of the collective agreement in force between their union and the airline. There was no issue as to the applicants' capacity to fly safely; the only reason for the termination of their employment was the application of the mandatory retirement provisions. Paragraph 15(1)(*c*) of the *Canadian Human Rights Act* provides that it is not a discriminatory practice if an individual's employment is terminated "because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual". The Tribunal found that 60 was the "normal age of retirement" for positions similar to those occupied by the applicants at the time of their retirement, as contemplated by paragraph 15(1)(*c*), and consequently, that the termination of their employment did not amount to a discriminatory practice within the meaning of the Act.

The Tribunal also concluded that, although paragraph 15(1)(*c*) of the Act deprived the applicants of the opportunity to challenge the mandatory retirement policy, the loss of this opportunity did not violate their dignity or fail to recognize them as full and equal members of society, and therefore did not violate subsection 15(1) of the *Canadian Charter of Rights and Freedoms* (Charter).

The applicants and the Canadian Human Rights Commission each brought applications for judicial review challenging the Tribunal's finding that 60 was the normal age of retirement for positions similar to those occupied the applicants. The applicants also challenged the constitutionality of paragraph 15(1)(*c*) of the Act.

The issues raised by the applications were: (1) whether the Tribunal erred in defining the "normal age of retirement" by mischaracterizing the essential features of the applicants' positions or by choosing an inappropriate comparator group; (2) whether a binding rule is required for there to be a "normal age of retirement" for the purposes of paragraph 15(1)(*c*) of the Act; (3) whether there was a "normal age of retirement" for pilots occupying positions similar to those occupied by the applicants at the time of their forced retirement; and (4) whether paragraph 15(1)(*c*) violates subsection 15(1) of the Charter.

Held, the applications in T-1674-07 and T-1678-07 should be allowed; the application in T-1680-07 should be dismissed.

(1) The onus was on Air Canada and Air Canada Pilots Association (ACPA) to establish that the applicants were retired in accordance with the normal age of retirement for similar positions. In assessing whether a position is "similar" to that occupied by a complainant in order to identify the "normal age of retirement" for the purposes of paragraph 15(1)(*c*), the focus should be on the objective duties and functional responsibilities of the position in question rather than on the subjective perceptions of the position such as status or prestige. The Tribunal erred in its identification of the essential features of the complainants' positions, which led it to err in its choice of comparator group, i.e. "pilots who fly with regularly scheduled, international flights … with major international airlines." As well, by ignoring the situation of other Canadian pilots and comparing Air Canada pilots to pilots flying for legacy carriers in other countries, the Tribunal compared the situation of individuals who enjoy the protection of the Act to those who do not. This was unreasonable. In light of the essential features of the applicants' positions, the appropriate comparator group should have been "pilots working for Canadian airlines who fly aircraft of varying sizes and types, transporting passengers to both domestic and international destinations, through Canadian and foreign airspace".

(2) There is a difference between the wording of the English and French versions of paragraph 15(1)(*c*). While the English version speaks of a "normal" age of retirement in force for a certain type of position, the French version refers to "*la règle de l'âge de la retraite en vigueur*". It appears that the use of the French word "*règle*" does not necessarily refer to a formal, rigid, binding rule. The English word "normal" does not, in its ordinary sense, contemplate a binding rule. In order to establish the defence provided by paragraph 15(1)(*c*) of the Act,

the shared meaning of the English and French versions requires that the age of retirement in issue be normal, customary or standard within the relevant industry sector. The existence of a binding rule mandating retirement at a particular age is not required. Requiring so would be contrary to the intent of Parliament in enacting this provision.

(3) Given that paragraph 15(1)(*c*) refers to the normal age of retirement for "employees working in positions similar" to that occupied by a complainant, the determination of this age requires a statistical analysis of the total number count of relevant positions. At the time the applicants were forced to leave their positions at Air Canada, several Canadian airlines allowed their pilots to fly until they were 65. Nevertheless, 56.13% of Canadian airline pilots retired by the time they reached the age of 60. Despite errors in the Tribunal's analysis, its conclusion that 60 was the normal age of retirement for employees in positions similar to those occupied by the applicants prior to their forced retirement fell within the range of possible acceptable outcomes. As the complainants were forced to retire at this age, in accordance with the mandatory retirement provisions of the collective agreement, this did not amount to a discriminatory practice within the meaning of paragraph 15(1)(*c*) of the Act.

That being said, the fact that almost all of the 56.13% of the Canadian airline pilots who are required to retire by age 60 fly for Air Canada did raise a concern with the airline's ability, as the dominant industry player, to skew the analysis with its own mandatory retirement policy. While this was indeed a troubling question, it was indicative of a more fundamental problem with paragraph 15(1)(*c*) of the Act, which allows for discrimination to occur, as long as it is pervasive within an industry. The remedy to this problem was under section 15 of the Charter.

(4) The legislative objective underlying paragraph 15(1)(*c*) of the Act is to protect a long-standing employment regime, which includes pensions, job security, wages and benefits. It is clear that, at the time of its enactment, the provision was intended to create an exception to the quasi-constitutional rights otherwise provided by the Act, so as to allow for the negotiation of mandatory retirement arrangements between employers and employees, particularly through the bargaining process.

In this case, the relevant comparison to be made for the purpose of the Charter, s. 15 analysis was between older workers who exceed the normal age of retirement for their type of position, and younger workers occupying similar positions who have not reached this age. The effect of paragraph 15(1)(*c*) of the Act is to deny workers over the "normal age of retirement" the equal protection and benefit of the Act. This is clearly a distinction based upon an enumerated ground.

The claimants were disadvantaged by this distinction as they were forced to leave positions they loved merely because they had reached the age of 60, without regard to their individual abilities, skills or capacities. This weighed in favour of a finding that paragraph 15(1)(*c*) of the Act has the effect of perpetuating a group disadvantage, suggesting a violation of subsection 15(1) of the Charter.

Paragraph 15(1)(*c*) draws a distinction between those who may claim the protection of the Act and those who may not, based upon the normal age of retirement for similar positions. Individuals who are involuntarily retired after reaching that age are thus deprived of protection from age discrimination, regardless of their own individual needs, circumstances or capacities. Moreover, paragraph 15(1)(*c*) takes no account of the needs, circumstances or capacities of older workers as a group. As there is no correspondence between the impugned law and the actual needs, circumstances and capacities of the disadvantaged group, this further favoured a finding that the provision violates the Charter.

Paragraph 15(1)(*c*) of the Act has no ameliorative purpose or effects that accord with subsection 15(1) of the Charter's purpose to not only prevent discrimination, but to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society. As observed by the Supreme Court in *McKinney*, legislation that has as its objective the forcible retirement of older workers in order to make way for younger workers would be in itself discriminatory. Furthermore, there is evidence suggesting that the practice of mandatory retirement has an adverse differential effect on individuals who enter the workforce later in life, namely women and immigrants. Legislation that would permit the continuation of an employment practice that can have such an adverse differential effect cannot be said to have an ameliorative purpose.

Finally, the interest at stake herein was the claimants' ability to continue to work in the career of their choice. This interest could not be overstated as employment plays a crucial role in the dignity and self-worth of an individual.

For these reasons, paragraph 15(1)(*c*) of the Act was found to deny older workers such as the applicants the equal protection of the law and, as such, perpetuate the group disadvantage and prejudice faced by older workers in this country. It promotes the perception that older workers such as the applicants are less worthy and less deserving of the equal protection of the law than are younger workers who lose their jobs for age-related reasons at an age below the normal age of retirement for a particular type of position. Moreover, the provision can only serve to perpetuate the stereotypical view that older workers are less capable or deserving of recognition or value as human beings or as members of Canadian society. As a consequence, paragraph 15(1)(*c*) of the Act violates subsection 15(1) of the Charter.

Because of its conclusion in relation to subsection 15(1), the Tribunal did not turn its mind to whether paragraph 15(1)(*c*) could be justified under section 1 of the Charter. The matter was thus remitted to the Tribunal to determine whether paragraph 15(1)(*c*) of the Act could be so justified.

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APPLICATIONS for judicial review of the Canadian Human Rights Tribunal's dismissal (2007 CHRT 36) of age-based discrimination complaints filed by applicants Vilven and Kelly on the basis that 60 was the normal age of retirement for the purpose of paragraph 15(1)(*c*) of the *Canadian Human Rights Act*, and that this provision did not violate subsection 15(1) of the Charter. Applications allowed in T-1674-07 and T-1678-07; application dismissed in T-1680-07.

APPEARANCES

Raymond D. Hall and *David Baker* for applicants (respondents in T-1680-07) George Vilven and Robert Neil Kelly.

Daniel Poulin and *Sulini Sarugaser* for respondent (applicant in T-1680-07) Canadian Human Rights Commission.

Maryse Tremblay and *Jennifer Black* for respondent Air Canada.

Bruce Laughton, Q.C. for respondent Air Canada Pilots Association.

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Heenan Blaikie LLP, Montréal, for respondent Air Canada.

Laughton & Company, Vancouver, for respondent Air Canada Pilots Association.

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The following are the reasons for judgment and judgment rendered in English by

MACTAVISH J.:

I. Introduction

[1] Paragraph 15(1)(*c*) of the *Canadian Human Rights Act* (the Act or CHRA) is an unusual provision to find in human rights legislation, in that it allows for employers to discriminate against their employees on the basis of age, as long as that discrimination is pervasive within a particular industry.

[2] George Vilven and Robert Kelly were each forced to retire from their positions as pilots with Air Canada when they turned 60 years of age, in accordance with the mandatory retirement provisions of the collective agreement in force between their union and the airline.

[3] Human rights complaints filed by Messrs. Vilven and Kelly were dismissed by the Canadian Human Rights Tribunal [2007 CHRT 36], which found that [at paragraph 7] 60 was the "normal age of retirement" for positions similar to those that they occupied at the time of their retirement, as contemplated by paragraph 15(1)(*c*) of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6. As a result, the termination of their employment did not amount to a discriminatory practice within the meaning of the Act.

[4] The Tribunal also found that paragraph 15(1)(*c*) of the *Canadian Human Rights Act* did not violate subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44].

[5] Mr. Vilven, Mr. Kelly, and the Canadian Human Rights Commission have each brought applications for judicial review with respect to the Tribunal's decision. All three applications challenge the Tribunal's finding that 60 was the normal age of retirement for positions similar to those occupied by Messrs. Vilven and Kelly at the time of their retirement from Air Canada. Messrs. Vilven and Kelly have each also challenged the constitutionality of paragraph 15(1)(*c*) of the *Canadian Human Rights Act* in their applications, while the Commission has not.

[6] The three applications for judicial review were heard together, and these reasons pertain to all three cases, with the proviso that the Court's Charter analysis does not apply in relation to the Commission's application for judicial review (file T-1680-07).

[7] It should also be noted at the outset that while the applicants have raised a number of issues in their various applications for judicial review, what is *not* in issue in this case is any question relating to pilot safety. The parties agree that the fitness of individual pilots to fly is determined not by Air Canada, but by Transport Canada, as part of its pilot licensing regime. If, after an individualized assessment, Transport Canada determines that an individual is no longer fit to fly, then that individual will not receive a pilot's licence.

[8] For the reasons that follow, I find that while the Tribunal made errors in relation to its "normal age of retirement" analysis, its conclusion that 60 was the normal age of retirement for pilots in positions similar to those occupied by Messrs. Vilven and Kelly was reasonable. Consequently, the Canadian Human Rights Commission's application for judicial review will be dismissed.

[9] However, the Tribunal erred in its analysis of the constitutionality of paragraph 15(1)(*c*) of the *Canadian Human Rights Act*. The statutory provision violates subsection 15(1) of the Charter, as it denies the equal protection and equal benefit of the law to workers over the normal age of retirement for similar positions. In so doing, paragraph 15(1)(*c*) has the effect of perpetuating the group disadvantage and prejudice faced by older workers by promoting the perception that such individuals are less worthy and less deserving of the protection of the law.

[10] As a consequence, Messrs. Vilven and Kelly's applications for judicial review will be allowed, the decision of the Canadian Human Rights Tribunal will be set aside, insofar as it relates to the Charter issue, and the matter will be remitted to the Tribunal for further consideration in accordance with these reasons.

II. <u>Background to the complaints</u>

(i) Mandatory retirement at Air Canada

[11] Mandatory retirement for pilots at Air Canada began as a company policy. Since 1957, the Air Canada pension plan has stipulated that 60 is the compulsory age of retirement for pilots. As of the early 1980s, provisions mandating retirement at age 60 have been included as part of the collective agreement in force between Air Canada and its pilots' union. Since 1995, Air Canada pilots have been represented by the Air Canada Pilots Association (ACPA).

[12] Shortly before the Tribunal hearing regarding Messrs. Vilven and Kelly's human rights complaints was to begin, ACPA held a referendum on the mandatory retirement issue, with 75% of its members voting in favour of retaining mandatory retirement for Air Canada pilots.

(ii) George Vilven's complaint

[13] George Vilven was hired as a pilot in training by Air Canada in May of 1986. Shortly thereafter, he qualified as a second officer on Boeing 727 aircraft, and began flying from a base in Winnipeg. As a result of his seniority, Mr. Vilven was subsequently able to bid for a position as a first officer on Boeing 727 aircraft. After receiving the necessary training, Mr. Vilven qualified as a first officer in January of 1990.

[14] Over the ensuing years, Mr. Vilven relocated to Toronto, and was later able to use his seniority to transfer his base from Toronto to Vancouver. He was also able to bid on a succession of higher status and higher paying positions as a first officer on larger and larger aircraft. In his last position with Air Canada, Mr. Vilven was flying as a first officer on Airbus 340 aircraft.

[15] Mr. Vilven turned 60 on August 30, 2003. In accordance with the mandatory retirement provisions of the collective agreement, Mr. Vilven was required to retire on the first day of the month following his 60th birthday—namely September 1, 2003.

[16] There is no suggestion that there were any job performance problems or medical fitness issues with respect to Mr. Vilven. Indeed, it is common ground that the sole reason for the termination of his employment with Air Canada was the application of the mandatory retirement provisions of the collective agreement in effect between Air Canada and ACPA.

[17] Based upon his years of service with Air Canada, together with his pre-employment military service, Mr. Vilven received pension benefits of $6 094.04 per month until he turned 65, and will receive $5 534.33 per month from age 65 until his death.

[18] After leaving his employment with Air Canada, Mr. Vilven was able to continue his career in aviation. He flew with Flair Airlines from April of 2005 until May of 2006, when he ceased flying in order to prepare for his hearing before the Canadian Human Rights Tribunal. At the time of the Tribunal hearing, Mr. Vilven continued to hold a valid Canadian Air Transport Pilot's Licence.

(iii) Robert Neil Kelly's complaint

[19] Robert Neil Kelly was hired by Air Canada as a DC-8 second officer in September of 1972. Using his seniority, he was able to qualify as a Captain in 1992, flying as the pilot-in-command of various types of aircraft. At the time of his retirement from Air Canada, Mr. Kelly was flying as the captain and pilot-in-command of an Airbus 340.

[20] The term "pilot-in-command" should not be confused with that of "captain". Pilot positions at Air Canada include captains, first officers and relief pilots. The "International Standards on Personnel Licensing" promulgated by the International Civil Aviation Organization (ICAO), the United Nations organization charged with fostering civil aviation safety, requires that one pilot on each flight be designated as the pilot-in-command of the flight: see the International Civil Aviation Organization, International Standards and Recommended Practices, *Annex 1 to the Convention on International Civil Aviation*: *Personnel Licensing* (Montréal: ICAO, 2006). Although the captain of an aircraft will ordinarily be the pilot-in-command, this is not necessarily the case.

[21] Mr. Kelly turned 60 on April 30, 2005. In accordance with the mandatory retirement provisions of the collective agreement, Mr. Kelly was forced to retire from Air Canada on May 1, 2005. As was the case with Mr. Vilven, there was no issue as to Mr. Kelly's capacity to fly safely, and the parties agree that the only reason for the termination of Mr. Kelly's employment with Air Canada was the application of the mandatory retirement provisions found in the governing collective agreement.

[22] In accordance with the pension option that he selected, Mr. Kelly will receive $10 233.96 in pension benefits each month until he turns 65, and $9 477.56 per month thereafter until his death.

[23] Like Mr. Vilven, Mr. Kelly was able to continue flying after leaving Air Canada. He initially worked on contract as a first officer with Skyservice Airlines, flying Boeing 757s and 767s. At the time of the Tribunal hearing, Mr. Kelly continued to hold a valid Canadian Air Transport Pilot's Licence, and was working on contract with Skyservice as a captain and pilot-in-command, flying routes, including international routes, on Boeing 757s.

III. <u>The human rights complaints</u>

[24] Mr. Vilven filed his complaint against Air Canada with the Canadian Human Rights Commission in August of 2004. He asserted that in forcing him to retire at age 60, Air Canada violated sections 7 and 10 [as am. by S.C. 1998, c. 9, s. 13(E)] of the *Canadian Human Rights Act*. A copy of the relevant statutory provisions is attached as an appendix to these reasons.

[25] In contrast, Mr. Kelly's human rights complaint was brought against both Air Canada and ACPA, and was filed with the Commission on March 31, 2006. His complaint alleged discrimination on the basis of age, contrary to the provisions of sections 7, 9 [as am. *idem*, s. 12] and 10 of the Act.

[26] Both complaints were referred to the Canadian Human Rights Tribunal by the Commission, and the two cases were heard together at a single hearing.

[27] In the course of the parties' oral submissions, I was advised that there are some 58 additional human rights complaints brought by former Air Canada pilots now pending before the Tribunal. The hearings into these complaints are evidently on hold, pending receipt of the Court's decision in this matter.

IV. <u>The proceedings before the Canadian Human Rights Tribunal</u>

[28] The hearing into Messrs. Vilven and Kelly's complaints was held over some 11 days, before a three-person panel of the Canadian Human Rights Tribunal. The two complaints were joined, and ACPA was granted "interested party" status before the Tribunal in relation to Mr. Vilven's complaint. The Tribunal also granted interested party status to the "Fly Past 60 Coalition", a group of current and former Air Canada pilots who are united in their goal of eliminating the mandatory retirement age at Air Canada.

[29] In advance of the Tribunal hearing, the Fly Past 60 Coalition filed a notice of constitutional question, challenging the constitutionality of paragraph 15(1)(*c*) of the *Canadian Human Rights Act* on the basis that it violated subsection 15(1) of the Charter. Paragraph 15(1)(*c*) of the Act provides that it is not a discriminatory practice if an individual's employment is terminated "because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual."

[30] As was noted earlier, the Canadian Human Rights Tribunal dismissed Mr. Vilven's and Mr. Kelly's complaints, finding that age 60 was the normal age of retirement for persons working in positions similar to those of the complainants at the operative time. The Tribunal also found that paragraph 15(1)(*c*) of the *Canadian Human Rights Act* did not contravene subsection 15(1) of the Charter.

[31] In concluding that age 60 was the normal age of retirement for persons working in positions similar to those of Messrs. Vilven and Kelly, the Tribunal started by observing that Canada has no maximum licensing age for airline pilots. To be licensed, pilots must successfully pass a medical examination approved by Transport Canada. Pilots under the age of 40 must undergo a medical examination once a year, whereas pilots over 40 must undergo a medical examination twice each year.

[32] The Tribunal then considered where the burden of proof lay in relation to paragraph 15(1)(*c*) of the Act. That is, the Tribunal asked itself whether it was up to complainants to demonstrate that they had not reached the normal age of retirement for positions of the type that they had occupied, or whether it was up to Air Canada and ACPA to show that 60 was indeed the normal age of retirement for the purposes of the statutory provision. The Tribunal concluded that the onus lay on Air Canada and ACPA to show that 60 was the normal age of retirement for the purposes of paragraph 15(1)(*c*) of the Act.

[33] In coming to this conclusion, the Tribunal had regard to the decision in *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd. et al.*, [1985] 2 S.C.R. 536, where the Supreme Court of Canada held that the burden was on a complainant to establish a *prima facie* case of discrimination.

[34] According to the Supreme Court, a *prima facie* case of discrimination is one that covers the allegations made, and which, if believed, is complete and sufficient for a decision in favour of the complainant, in the absence of a reasonable answer from the respondent. Once a *prima facie* case of discrimination has been established by a complainant, the burden then shifts to the respondent to provide a reasonable explanation for the conduct in issue.

[35] As the Tribunal noted, it is the respondent that will ordinarily be in possession of the necessary information to respond to the *prima facie* case. Indeed, in this case, Mr. Vilven testified as to the significant difficulties he had encountered in trying to assemble information with respect to retirement ages and mandatory retirement policies at other airlines in Canada and around the world. In contrast, with some effort, Air Canada was able to obtain a considerable amount of data with respect to the retirement policies and retirement ages for airlines around the world.

[36] Having regard to the remedial nature of the legislation, the Tribunal was satisfied that the goals of the *Canadian Human Rights Act* were best attained by placing the onus on employers to demonstrate that their employees were retired in accordance with the normal age of retirement for similar positions.

[37] Given that there was no question but that the employment of Messrs. Vilven and Kelly had been terminated because they had reached 60 years of age, the Tribunal was satisfied that a *prima facie* case of discrimination contrary to the provisions of section 7 of the *Canadian Human Rights Act* had been established against Air Canada in each case.

[38] The Tribunal was also satisfied that a *prima facie* case of discrimination contrary to paragraph 10(*b*) of the *Canadian Human Rights Act* had been made out as against Air Canada and ACPA. This provision makes it a discriminatory practice for an employer or employee organization to enter into an agreement that deprives an individual of an employment opportunity on a prohibited ground. In light of the mandatory retirement provisions of the Air Canada/ACPA collective agreement, the Tribunal found that there had been a *prima facie* breach of this statutory provision as well.

[39] The Tribunal further found that ACPA had agreed to the inclusion of the mandatory retirement provision in the collective agreement. Given that section 9 of the Act makes it a discriminatory practice for an employee organization to act in a way that would deprive an individual of an employment opportunity, the Tribunal concluded that a *prima facie* case against the union had also been established in relation to the section 9 complaint asserted in Mr. Kelly's case.

[40] As a consequence, the Tribunal held that the burden shifted to Air Canada and ACPA to demonstrate that 60 was indeed the normal age of retirement for pilots in similar positions.

[41] In this regard, the Tribunal observed that the term "normal age of retirement" in paragraph 15(1)(*c*) is identified in relation to "employees working in positions similar to the position of the individual" who filed the complaint. This led the Tribunal to ask itself two questions: firstly, "What is the proper comparator group to identify the positions that are similar to that occupied by the complainants?" and secondly, "What is the normal age of retirement?".

[42] In relation to the first question, the Tribunal rejected ACPA's submission that it should limit its consideration to individuals occupying positions with airlines within Canadian federal jurisdiction. The Tribunal noted that using Canadian airline pilots as the proper comparator group would result in Air Canada setting the industrial norm, because of its dominance in Canada's airline industry. This in turn would allow Air Canada to effectively determine the application of paragraph 15(1)(*c*) of the Act as it relates to the airline industry in this country.

[43] In the Tribunal's view, in choosing the appropriate comparator group, the proper approach was to identify the essential features of the positions in question. In this regard, the Tribunal was of the view that no differentiation should be made between pilots working as captains, and those working as

first officers. While noting that captains have ultimate control over the aircraft, in the Tribunal's view, the two positions were otherwise very similar.

[44] Based upon the evidence of Messrs. Vilven and Kelly, the Tribunal determined [at paragraph 55] that the appropriate comparator group was "pilots who fly with regularly scheduled, international flights with … major international airlines."

[45] Insofar as the determination of the normal age of retirement was concerned, the Tribunal had regard to the wording of both the English and French versions of paragraph 15(1)(*c*), which provide that:

15. (1) It is not a discriminatory practice if	**15.** (1) Ne constituent pas des actes discriminatoires :
…	[…]
(*c*) an individual's employment is terminated because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual.	*c*) le fait de mettre fin à l'emploi d'une personne en appliquant la règle de l'âge de la retraite en vigueur pour ce genre d'emploi.

[46] The Tribunal observed that one could use either a normative or an empirical approach in determining the normal age of retirement for similar positions within a given industry. In this regard, the Tribunal found that the French version of paragraph 15(1)(*c*) suggested the use of a normative approach, in light of the reference to "the application of a rule in force for this type of job" (the Tribunal's translation [at paragraph 56]). According to the Tribunal, this normative approach asks one to search for the existence of a rule governing the maximum age of retirement in the airline industry.

[47] The Tribunal found just such a rule in the International Standards on Personnel Licensing prescribed by ICAO. Under the ICAO standards in effect at the time of the retirements of Messrs. Vilven and Kelly, contracting states (including Canada) were not to permit anyone to act as pilots-in-command of aircraft engaged in international air transport operations if the individual had reached his or her 60th birthday. ICAO also recommended, but did not require, that individuals not be permitted to co-pilot aircraft engaged in international air transport operations, if the individual was over the age of 60.

[48] Although not relevant to these complaints, it bears noting that since the time of Messrs. Vilven and Kelly's retirement, these standards have been amended to allow pilots to continue to fly in international airspace as pilots-in-command until age 65. The ICAO recommendations with respect to co-pilots now also refer to 65 as the relevant age.

[49] In the Tribunal's view, the ICAO standards qualified as a rule or standard within the meaning of paragraph 15(1)(*c*), as they governed the same community of major international carriers that the Tribunal had chosen as comparators to determine "positions similar" to those of Messrs. Vilven and Kelly. In this regard, the Tribunal did not distinguish between the mandatory rule governing pilots-in-charge, and the recommended practice with respect to co-pilots.

[50] The Tribunal also considered what the result would be if the empirical approach were used to determine the normal age of retirement. In this regard, the Tribunal examined the statistical evidence with respect to retirement ages for commercial airline pilots, both in Canada and around the world. The Tribunal concluded [at paragraph 60] that no Canadian airline other than Air Canada would qualify as a "major international carrier". As a consequence, the statistical evidence with respect to retirement ages at these airlines could not be considered in determining what the normal age of retirement was for positions similar to those of Messrs. Vilven and Kelly.

[51] The Tribunal found that complete data was available for 10 major international airlines, collectively employing some 25 308 pilots. During the 2003–2005 period, 80% of pilots working for these airlines were required to retire at age 60 or younger. This led the Tribunal to conclude that 60 was the retirement age for the majority of positions similar to those of Messrs. Vilven and Kelly, and was thus the "normal age of retirement" for the purposes of paragraph 15(1)(*c*) of the *Canadian Human Rights Act*.

[52] As a result, the Tribunal found that Air Canada's mandatory retirement policy did not amount to a discriminatory practice within the meaning of the Act.

[53] The Tribunal then turned to consider whether paragraph 15(1)(*c*) of the *Canadian Human Rights Act* violated subsection 15(1) of the Charter, which provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on … age".

[54] The Tribunal started its analysis with a consideration of the Supreme Court of Canada's decisions in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 and *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451. The Tribunal noted that in *McKinney*, the Supreme Court had determined that a statutory provision very similar to paragraph 15(1)(*c*) of the *Canadian Human Rights Act*, namely paragraph 9(*a*) of the Ontario *Human Rights Code, 1981* [S.O. 1981, c. 53], violated subsection 15(1) of the Charter, as it deprived individuals of a benefit under the Code on the basis of an enumerated ground.

[55] The Tribunal went on to observe that at the time that *McKinney* was decided, considerations regarding the nature and scope of rights under subsection 15(1) were dealt with under section 1 of the Charter. Citing the Supreme Court's intervening decisions in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 and *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, the Tribunal found that the law regarding the analysis of discrimination claims under subsection 15(1) of the Charter had evolved since *McKinney* was decided.

[56] After reviewing this jurisprudence, the Tribunal identified the question to be answered in determining whether paragraph 15(1)(*c*) of the *Canadian Human Rights Act* violated subsection 15(1) of the Charter as being "whether, as a result of the age-based distinction in s. 15(1)(c) of the *CHRA*, the complainants' dignity was affronted or they experienced negative stereotyping relating to their age" [at paragraph 89].

[57] The Tribunal concluded that although paragraph 15(1)(*c*) of the Act deprived Messrs. Vilven and Kelly of the opportunity to challenge the mandatory retirement policy in their workplace, the loss of this opportunity did not violate their dignity, or fail to recognize them as full and equal members of society. As a consequence, the Charter challenge was also dismissed.

V. <u>Issues</u>

[58] These applications for judicial review raise the following issues:

1. Did the Tribunal err in defining the "normal age of retirement" for employees working in positions similar to those occupied by Messrs. Vilven and Kelly by:

    a. Mischaracterizing the essential features of their positions? and

    b. Choosing an inappropriate comparator group?

2. Is a binding rule required for there to be a "normal age of retirement" for the purposes of paragraph 15(1)(*c*) of the *Canadian Human Rights Act* ?

3. Was there a "normal age of retirement" for pilots occupying positions similar to those occupied by Messrs. Vilven and Kelly at the time that they were forced to retire from Air Canada? If so, what was it?

4. Did the Tribunal err in concluding that paragraph 15(1)(*c*) does not violate subsection 15(1) of the Charter?

[59] Before turning to consider each of these questions, however, the Court must first identify the appropriate standard of review to be applied in relation to each of the issues.

VI. Standard of review

[60] The parties are in agreement as to the standards of review to be applied to every issue in this case, save one.

[61] Most of the issues relating to the application of paragraph 15(1)(*c*) of the *Canadian Human Rights Act* involve the application of the provisions of paragraph 15(1)(*c*) to the facts of this case. With this in mind, I agree with the parties that deference is owed to these aspects of the Tribunal's decision, and that each of these issues should be reviewed against the standard of reasonableness.

[62] Insofar as the Tribunal's finding that paragraph 15(1)(*c*) of the *Canadian Human Rights Act* does not violate subsection 15(1) of the Charter is concerned, the parties all accept that this aspect of the Tribunal's decision is to be reviewed against the standard of correctness. I agree. Charter questions must be decided consistently and correctly: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraphs 58 and 163.

[63] Where the parties disagree is in relation to the standard of review to be applied to the question of whether a binding rule is required for there to be a "normal age of retirement" for the purposes of paragraph 15(1)(*c*) of the *Canadian Human Rights Act*. The answer to this question involves the interpretation of the statutory provision, and the potential need to reconcile the French and English versions of the legislation.

[64] Messrs. Vilven and Kelly submit that as a question of statutory interpretation is involved, the Tribunal's conclusions should be reviewed against the standard of correctness. In contrast, the Canadian Human Rights Commission, Air Canada and ACPA all submit that as it is the Tribunal's enabling statute that is at issue in this case, the Tribunal's interpretation of the statutory provision should be reviewed against the reasonableness standard.

[65] The Tribunal did not make any effort to reconcile the French and English versions of paragraph 15(1)(*c*) in this case, nor did it identify precisely what was required in order to establish the existence of a "normal age of retirement", whether it be a binding rule or merely an industry custom or practice. Instead, the Tribunal examined the evidence using both the normative approach which Mr. Vilven and Mr. Kelly say is required by the French version of paragraph 15(1)(*c*), and the empirical approach arguably required by the English version.

[66] As will be explained below, I agree with the Commission, Air Canada and ACPA that, to the extent that the Tribunal's reasons could be read to interpret paragraph 15(1)(*c*) of the Act as requiring that there be a binding rule in place in a given industry mandating retirement at a specified age in order for the defence contemplated by the provision to be available to an employer, the Tribunal's interpretation should be entitled to deference.

[67] Citing earlier decisions such as *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157 and *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, the Supreme Court observed at paragraph 54 of *Dunsmuir* that "[d]eference will usually

result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity".

[68] The Supreme Court went on to observe that regard must be had to the nature of the question of law at issue in a given case, in determining whether any deference is owed to the decision maker. Where the question of law is of "central importance to the legal system … and outside the … specialized area of expertise" of the Tribunal in question, the correctness standard will always apply. However, a question of law that does not rise to this level may be compatible with a reasonableness standard: see *Dunsmuir*, at paragraph 55. See also *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at paragraph 25.

[69] In determining whether the reasonableness standard should apply to a question of law in a particular case, the Supreme Court held that regard should be had to whether the statute contains a privative clause. As the Court observed, a privative clause is "a statutory direction from Parliament or a legislature indicating the need for deference": *Dunsmuir*, at paragraph 55.

[70] The reviewing court should also consider whether there exists "[a] discrete and special administrative regime in which the decision maker has special expertise": *Dunsmuir*, at paragraph 55.

[71] The *Canadian Human Rights Act* does not contain a privative clause, nor does it provide for a statutory right of appeal. It does, however, create a discrete and specialized administrative regime to deal with complaints of discrimination at the federal level. In addition, the Canadian Human Rights Tribunal—the body entrusted by Parliament with the adjudication of such complaints—is an expert tribunal: CHRA, at subsection 48.1(2) [as enacted by R.S.C., 1985 (1st Supp.), c. 31, s. 65; S.C. 1998, c. 9, s. 27]. Moreover, the Tribunal is one specifically empowered to decide questions of law: CHRA, at subsection 50(2) [as am. *idem*].

[72] The question of law at issue in this case is not one of "central importance to the legal system … and outside the … specialized area of expertise" of the Canadian Human Rights Tribunal. Rather, it relates to the proper interpretation of the Tribunal's enabling legislation, and involves a question that is directly within the Tribunal's own area of expertise.

[73] In my view, these factors, taken together, point to a standard of reasonableness. As the Supreme Court observed at paragraph 56 of *Dunsmuir*, "There is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated."

[74] In reviewing a decision against the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, as well as whether the decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law: see *Dunsmuir*, at paragraph 47.

VII. <u>Did the Tribunal err in defining the "normal age of retirement" for employees working in positions similar to those occupied by Messrs. Vilven and Kelly?</u>

[75] In order to put the issues raised by the parties in relation to the normal age of retirement question into context, it is helpful to start by identifying the purpose of the *Canadian Human Rights Act*, and by reviewing the principles established by the jurisprudence governing the interpretation of human rights legislation.

(i) The *Canadian Human Rights Act*

[76] The *Canadian Human Rights Act* is quasi-constitutional legislation, which has been enacted to give effect to the fundamental Canadian value of equality, a value which has been described as lying

at the very heart of a free and democratic society: see *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at page 615.

[77] As identified in section 2 [as am. by S.C. 1998, c. 9, s. 9] of the Act, the purpose of the legislation is to ensure that individuals have an equal opportunity to make for themselves the life that they are able and wish to have, without being hindered by discriminatory practices based upon considerations such as race, sex and age, amongst others.

[78] Human rights legislation has been described as "the final refuge of the disadvantaged and the disenfranchised": see *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321, at page 339. As such, the Supreme Court of Canada has repeatedly warned of the dangers of strict or legalistic approaches which would restrict or defeat the purpose of such a quasi-constitutional document: see *Mossop*, at page 612.

[79] Indeed, the Supreme Court has observed on numerous occasions that human rights legislation is to be given a large, purposive and liberal interpretation in a manner consistent with its overarching goals, so as to ensure that the remedial goals of the legislation are best achieved: see, for example, *Mossop*, at page 611. See also *Insurance Corporation of British Columbia v. Heerspink et al.*, [1982] 2 S.C.R. 145; *O'Malley*, previously cited; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114.

[80] This means that ambiguous language must be interpreted in a way that best reflects the remedial goals of the statute. It follows that a strict grammatical analysis may be subordinated to the remedial purposes of the law: see *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45, [2008] 2 S.C.R. 604, at paragraph 67.

[81] That is, "it is inappropriate to rely solely on a strictly grammatical analysis, particularly with respect to the interpretation of legislation which is constitutional or quasi-constitutional in nature": *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, 2000 SCC 27, [2000] 1 S.C.R. 665, at paragraph 30 (citing *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571, and *O'Malley*).

[82] This interpretive approach does not, however, permit interpretations which are inconsistent with the wording of the legislation: see *Potash Corporation*, at paragraph 19.

[83] Finally, while human rights legislation is generally to be broadly interpreted, this is not so with respect to the defences provided for in the human rights statute in question, which are to be interpreted narrowly: see *Brossard (Town) v. Quebec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279.

(ii) Where the onus lies in relation to paragraph 15(1)(*c*) of the CHRA

[84] No issue has been taken by either Air Canada or ACPA with respect to the Tribunal's conclusion that the onus was on Air Canada and ACPA to establish that Messrs. Vilven and Kelly were retired in accordance with the normal age of retirement for similar positions.

[85] I agree that once a complainant has established a *prima facie* case of discrimination on the basis of a proscribed ground such as age, the burden shifts to the responding parties to bring themselves within one of the exemptions identified in section 15 of the *Canadian Human Rights Act*, such that there exists a *bona fide* justification for the action taken: see *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Maksteel Québec Inc.*, 2003 SCC 68, [2003] 3 S.C.R. 228.

[86] Indeed, as the Supreme Court of Canada has observed, limits on rights conferred by human rights legislation must be justified by those seeking to impose them: see *Potash Corporation*, at paragraph 83, *per* Chief Justice McLachlin.

(iii) The characterization of Messrs. Vilven and Kelly's positions and the choice of comparator group

[87] In order to determine whether there existed a "normal age of retirement" within the meaning of paragraph 15(1)(*c*) of the Act at the time that Messrs. Vilven and Kelly were compelled to retire from Air Canada, the Tribunal had to identify which positions were similar to those that they occupied. This required the Tribunal to first identify the essential features of the complainants' own positions.

[88] In this latter regard, the Tribunal was of the view that no differentiation should be made between captains' positions and those of first officers. While noting that captains have ultimate control over the aircraft, in the Tribunal's view, the positions were otherwise very similar.

[89] Based upon the evidence of Messrs. Vilven and Kelly, the Tribunal found that the prestige and status that came with working for a major international airline was an essential feature of the positions that they held. The Tribunal [at paragraph 53] also identified flying "on regularly scheduled international flights on wide-bodied aircraft, to many international destinations, with a major international airline" as essential features of their positions. The Tribunal defined a "major international airline" as one that "is often the dominant carrier in the country, employing a significant number of pilots and where regularly scheduled international flights make up a significant portion of its operations."

[90] With this understanding of the essential features of Messrs. Vilven and Kelly's positions, the Tribunal [at paragraph 55] then went on to identify the appropriate comparator group of "positions similar" as "pilots who fly with regularly scheduled, international flights with … major international airlines."

[91] The applicants say that the Tribunal's characterization of the essential features of the complainants' positions was unreasonable for several reasons.

[92] Firstly, Messrs. Vilven and Kelly say that focusing on their own personal circumstances as individuals flying on international routes, rather than on their positions as members of their bargaining unit, would lead to perverse consequences. Contrary to the principle that all members of a bargaining unit should be treated equally, the result of the Tribunal's characterization of the complainants' positions would lead to some, but not all, of the members of Messrs. Vilven and Kelly's bargaining unit being subject to mandatory retirement.

[93] Messrs. Vilven and Kelly also submit that the comparator group chosen by the Tribunal was unduly narrow, as it includes only positions that were *identical* to their pilot positions at Air Canada, and did not include positions that were "similar" to their own positions. Moreover, the comparator group chosen by the Tribunal does not reflect the norm for Air Canada pilots, most of whom are engaged in flying narrow-bodied aircraft on domestic and transborder routes.

[94] According to Messrs. Vilven and Kelly, the Tribunal's choice of comparator group could lead to Air Canada pilots adjusting their positions and "shopping their comparator group" in the months immediately preceding their retirement. That is, rather than seeking more highly paid flights on larger aircraft flying international routes, as would ordinarily be the case, pilots nearing 60 could use their seniority to bid on smaller aircraft flying domestic and transborder routes, so as to avoid the comparator group identified by the Tribunal.

[95] All of the applicants say that the Tribunal's choice of such a narrow comparator group was also unreasonable as it includes only pilots working for airlines outside Canada, while ignoring the

situation of pilots working in Canada, including those transporting passengers for regional carriers, charter and discount airlines, amongst others. Subject to the comments below, Messrs. Vilven and Kelly submit that the comparator group should properly be "Canadian pilots holding airline transport licenses".

[96] The applicants contend that the Tribunal should have asked itself whether, in enacting paragraph 15(1)(*c*) of the *Canadian Human Rights Act*, Parliament intended that the rights of Canadian citizens be determined by reference to the forced retirement of individuals in other countries, countries which may not offer the same level of protection against age discrimination as does Canada, and not at all by reference to the normal age of retirement for airline pilots in this country.

[97] The applicants further submit that even if the comparator group should properly be "Canadian pilots holding airline transport licenses", it would still be inappropriate to use statistical information with respect to retirement ages for Canadian airline pilots. This is because Air Canada plays such a dominant role within the Canadian airline industry. The high proportion of Canadian pilots flying for Air Canada means that the company would effectively set the industry norm.

[98] In these circumstances, the applicants submit that there is no appropriate comparator group in this case. As a consequence, there can be no "normal age of retirement" for airline pilots, with the result that the defence under paragraph 15(1)(*c*) of the *Canadian Human Rights Act* should not be available to the respondents.

[99] Air Canada argues that the Tribunal's characterization of the essential elements of Messrs. Vilven and Kelly's positions was a finding of fact made by the Tribunal based upon their own evidence, and was not unreasonable. The evidence established that there were significant differences between flying for Air Canada, and flying for regional carriers such as Jazz. The evidence also indicated that pilot positions with Air Canada were acknowledged to be the most prestigious, highly paid and highly sought-after pilot positions in Canada.

[100] Air Canada further submits that the Tribunal did not limit its consideration to the positions actually held by Messrs. Vilven and Kelly immediately prior to their retirement. According to Air Canada, the applicants' argument about the potential for "shopping the comparator group" is predicated upon the erroneous assumption that pilot positions at Air Canada can be divided into those that fly internationally and those that do not. In fact, 86% of Air Canada flights are either to an international destination, or pass through foreign (primarily American) airspace, en route to a Canadian destination. Between 20 and 25% of the remaining 14% of Air Canada flights have an American airport as an alternate airport where planes are to land if, for example, weather precludes landing at the regularly scheduled Canadian airport.

[101] As a result, only 10.5% of Air Canada's "domestic" flights are truly domestic, and less than 5% of Air Canada's overall operations involve flying on purely Canadian routes. According to Air Canada, it was therefore reasonable for the Tribunal to have concluded that an essential feature of the comparator group positions was that they involved international flying—a determination that is significant in light of the ICAO standards dealing with pilot age.

[102] Air Canada also points out that nothing in the *Canadian Human Rights Act* specifically requires that the comparator group used for the purposes of paragraph 15(1)(*c*) be solely made up of Canadian workers.

[103] Air Canada further contends that even though pilots for other Canadian airlines fly to international destinations, they nevertheless do not occupy "positions similar" to those that were occupied by Messrs. Vilven and Kelly. According to Air Canada, they do not fly "regular international flights", as such flights are not substantively part of their airlines' mandates, but are rather simply part of the airlines' schedules.

[104] Although ACPA took the position before the Tribunal that the proper comparison should be made to pilots flying for other Canadian air carriers, before this Court, ACPA argues that the entire discussion regarding the appropriate comparator group is academic. Whether the comparator group is made up of pilots flying for international airlines, or those flying for Canadian airlines, the fact is that either way, the majority of commercial airline pilots retire at age 60.

[105] Moreover, ACPA says that there is no danger in using the figures for the retirement ages of Canadian pilots to set the industry norm, even though, as the dominant industry player, Air Canada will effectively set that norm. This is because the mandatory retirement age for pilots at Air Canada became part of the collective agreement through the collective bargaining process, and was the result of negotiations between a very strong union and the company.

[106] While recognizing that considerable deference is owed to the Tribunal's findings in this regard, I am nevertheless of the view that the Tribunal erred in its identification of the essential features of Messrs. Vilven and Kelly's positions. This then led the Tribunal to err in its choice of comparator group for the purposes of its analysis in relation to paragraph 15(1)(*c*) of the Act.

[107] Insofar as the Tribunal's identification of the essential features of Messrs. Vilven and Kelly's positions is concerned, it was, in my view, unreasonable for the Tribunal to focus on the status and prestige associated with pilot positions at Air Canada as an essential feature of those positions, rather than examining the actual functional requirements of the positions themselves.

[108] In the human rights context, when one is assessing whether an individual is qualified for a particular position, or is fit to perform the duties of that position, the focus should be 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.

[109] In the same vein, in assessing whether a position is "similar" to that occupied by a complainant in order to identify a "normal age of retirement" for the purposes of paragraph 15(1)(*c*), the focus should be on the objective duties and functional responsibilities of the position in question, rather than on subjective perceptions of the position such as its "status" or "prestige", and whether or not the airline in question is a "legacy carrier".

[110] That is, while status and prestige may be part of the reason why individuals may want to fly for Air Canada, they do not form part of what Air Canada pilots actually do.

[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.

[112] The error in the identification of the essential features of Messrs. Vilven and Kelly's positions then led the Tribunal to err in its identification of the appropriate comparator group. In light of the essential features of Messrs. Vilven and Kelly's positions, the appropriate comparator group should have been pilots working for Canadian airlines who fly aircraft of varying sizes and types, transporting passengers to both domestic and international destinations, through Canadian and foreign airspace.

[113] The evidence before the Tribunal demonstrated that, as of the date of the agreed statement of facts, there were five principal airlines in Canada (apart from Air Canada) that were engaged in transporting passengers to domestic and international destinations. These were Jazz, Air Transat, CanJet, Skyservice and WestJet. (It should be noted that Jazz was a subsidiary of Air Canada at the time of the termination of Mr. Vilven's employment in 2003, but not at the time that Mr. Kelly retired in 2005.)

[114] The fact that other Canadian airlines transport passengers to international destinations is illustrated by the evidence relating to Mr. Kelly. According to the agreed statement of facts, Mr. Kelly continued flying after leaving Air Canada, working on contract as both a Captain and pilot-in-command, and as a first officer, with Skyservice Airlines. In these positions, Mr. Kelly flew Boeing 757s and 767s on routes which included charter flights to international destinations. Counsel for Air Canada also acknowledged at the hearing before this Court that Jazz flew to destinations in the United States.

[115] I am also satisfied that it was an error in principle for the Tribunal to look at retirement requirements for pilots from other countries in assessing whether age 60 was the "normal age of retirement" for the purposes of paragraph 15(1)(*c*) of the *Canadian Human Rights Act*.

[116] In this regard, I note that consideration of foreign comparators was specifically rejected by the Tribunal in *Campbell v. Air Canada* (1981), 2 C.H.R.R. D/602 (C.H.R.T.), an early case involving Air Canada flight attendants and paragraph 14(*c*) [as am. by S.C. 1980-81-82-83, c. 143, s. 7] of the *Canadian Human Rights Act* [S.C. 1976-77, c. 33], the predecessor to what is now paragraph 15(1)(*c*) of the Act.

[117] In rejecting Air Canada's argument that one should look world-wide for comparable positions for the purposes of paragraph 14(*c*) of the Act, the Tribunal in *Campbell* observed that there is a social context that is inherent in the statute. The Act prescribes a measure by which an exception to what would otherwise be a discriminatory practice can be evaluated. Given that the *Canadian Human Rights Act* is a Canadian statute, the Tribunal was of the view that the measure should be a Canadian measure.

[118] It is true that the Federal Court of Appeal had regard to the ICAO standards, as well as the retirement rules in force for airline pilots in the United States, in the *Stevenson* decision [*Stevenson v. Canadian Human Rights Comm.*, [1984] 2 F.C. 691]. That case involved a challenge to the provisions of then paragraph 14(*c*) of the *Canadian Human Rights Act* under the *Canadian Bill of Rights*, R.S.C., 1985, Appendix III. However, the Court only looked to the U.S. situation after first finding that age 60 was the normal age of retirement invariably applied at Air Canada *and at many other Canadian airlines*. As will be discussed further on in these reasons, this is no longer the case.

[119] Citing the evidence of Professor Jean-François Gaudreault-Desbiens, Air Canada's expert witness in the field of comparative law, the airline says that the countries that are home to many of the foreign legacy carriers in the Tribunal's comparator group have legal systems that offer human rights protection to their citizens that are comparable to that afforded to Canadian pilots under the *Canadian Human Rights Act*. As a consequence, there was nothing inappropriate in the Tribunal having compared the situation of Air Canada pilots to those flying for foreign legacy carriers, in ascertaining whether there is a normal age of retirement for such pilots.

[120] While this may be true in relation to some of the countries in question, it does not appear to be the case for all of them. For example, the available information for Royal Dutch Airlines (KLM) indicates that at the time of Messrs. Vilven and Kelly's retirement from Air Canada, pilots flying for that airline were obliged to retire from full-time employment at age 56. The source of this mandatory retirement age is identified as the pilots' collective agreement.

[121] There is no indication in the survey information that was before the Tribunal that there was a legislative regime in place in Holland at the relevant time that would limit or prohibit mandatory retirement for these pilots before they were 60.

[122] Similarly, pilots flying for Finnair were required to retire at age 58, in accordance with the provisions of the applicable collective agreement. Again, there is nothing in the evidence that would suggest that pilots in Finland were protected by comparable domestic anti-age discrimination legislation at the time that Messrs. Vilven and Kelly were compelled to retire from Air Canada.

[123] Finally, although the survey information that was before the Tribunal suggests that the "legal retirement age" for pilots flying for Cathay Pacific Airways was 60 at the relevant time, this evidence also indicates that Cathay Pacific pilots had to retire at age 55, unless their contracts of employment were extended by the airline. Whether or not this occured in a given case appears to be a discretionary decision on the part of the airline. There is no suggestion in the evidence that pilots have any legal entitlement to employment after age 55.

[124] As was noted earlier, the *Canadian Human Rights Act* was enacted to give effect to the fundamental Canadian value of equality—a value which the Supreme Court of Canada has described as lying at the very heart of our free and democratic society. By ignoring the situation of other Canadian pilots, and by comparing Air Canada pilots to pilots flying for legacy carriers in other countries, the Tribunal compared the situation of individuals who enjoy the protection of the Act to those who do not. This was, in my view, unreasonable.

[125] To summarize my findings to this point: the essence of what Air Canada pilots do can be described as "flying aircraft of varying sizes and types, transporting passengers to both domestic and international destinations, through Canadian and foreign airspace". There are many Canadian pilots working in similar positions, including those working for other Canadian airlines. These pilots form the comparator group for the purposes of paragraph 15(1)(*c*) of the *Canadian Human Rights Act*.

[126] In determining what the normal age of retirement is for the comparator group, it is next necessary to decide whether paragraph 15(1)(*c*) requires that there be a binding rule mandating retirement at a given age in order for the defence to be available.

(iv) Is a binding rule required for there to be a "normal age of retirement"?

[127] The Tribunal recognized in its reasons that there is a difference between the English and French versions of paragraph 15(1)(*c*). According to the Tribunal, one could use either a normative approach to determining the normal age of retirement in a given industry, based upon the French version of the legislation, or an empirical approach, based upon the English version.

[128] Likely because the issue was not argued before it, the Tribunal did not attempt to reconcile the two versions of the legislation, or to find their shared meaning, which, the applicants now say, amounts to an error of law. Instead, the Tribunal considered the issue from both a normative and an empirical approach, coming to the conclusion that 60 was the normal age of retirement for pilots in positions similar to those of Messrs. Vilven and Kelly, whichever approach was used.

[129] While Air Canada initially objected to the issue of the need to reconcile the English and French versions of paragraph 15(1)(*c*) being raised for the first time before this Court, the airline subsequently acknowledged that the issue involves a question of law, that the record relating to the issue is complete, and that it has not been prejudiced in any way by having the issue raised for the first time on judicial review. As a consequence, I will deal with the applicants' argument.

[130] Although I agree with Messrs. Vilven and Kelly that the Tribunal erred in finding that there was a rule governing the maximum age of retirement in the airline industry, I am not persuaded that proof of the existence of such a rule was in fact required before the defence under paragraph 15(1)(*c*) could be established.

[131] The Tribunal held that the ICAO standard in effect at the time of the retirements of Messrs. Vilven and Kelly qualified as a "rule" governing the age of retirement in the airline industry, as it governed the same community of international carriers that the Tribunal had chosen as comparators to determine "positions similar" to those of Messrs. Vilven and Kelly. This finding is problematic from a couple of perspectives.

[132] Firstly, as Air Canada has now conceded, the mandatory ICAO standard for pilot-in-command flying in international airspace did not even apply to Mr. Vilven, who was working as a first officer at the time that he was forced to retire, and thus would not ordinarily have been designated as the pilot-in-command of aircraft. As a "co-pilot", Mr. Vilven would only have been subject to ICAO's maximum age *recommendation*.

[133] Secondly, the ICAO standard in effect at the time that Messrs. Vilven and Kelly were forced to retire from Air Canada did not "require retirement at age 60" for pilots-in-command, as the Tribunal stated at paragraph 58 of its decision. The mandatory standard simply stipulated that pilots could not act as pilots-in-command of aircraft engaged in international commercial air transport operations if the individual had attained 60 years of age. Nothing in the ICAO standard necessarily precluded pilots over the age of 60 from acting as co-pilots on such flights.

[134] As was explained earlier, although the "pilot-in-command" of an aircraft would usually be the captain, this is not necessarily so. As a consequence, Mr. Kelly would not have been caught by the mandatory ICAO standard if, for example, his first officer was designated as the pilot-in-command on his flights, or if he had used his seniority to bid for a position as a first officer, rather than as a captain.

[135] That said, I am not persuaded that proof of the existence of an industry rule is required in order for there to be a "normal age of retirement" for the purposes of paragraph 15(1)(*c*) of the Act.

[136] As the Tribunal recognized, there is a difference between the wording of the English version of paragraph 15(1)(*c*) of the *Canadian Human Rights Act*, and that contained in the French version of the same provision. The applicants say that the shared meaning of the French and English versions of the provision requires that there be a binding rule in place mandating mandatory retirement at a given age before the defence under paragraph 15(1)(*c*) will be available to an employer.

[137] Given that no such binding rule exists in this case, the applicants argue that the Tribunal's decision was unreasonable.

[138] The English version of the legislation states that it is not a discriminatory practice if an individual's employment is terminated because that individual has reached "the normal age of retirement for employees working in positions similar to the position of that individual". In contrast, the French version of paragraph 15(1)(*c*) provides that it is not a discriminatory practice if an individual's employment is terminated "*en appliquant <u>la règle</u> de l'âge de la retraite en vigueur pour ce genre d'emploi*" (emphasis added).

[139] According to the applicants, the French version of the legislation is perfectly clear, requiring that there be a "*règle*" or "rule" in effect for similar positions before the defence provided for in paragraph 15(1)(*c*) of the Act can be made out. In contrast, the English version of the same provision is ambiguous, referring as it does to the "normal age of retirement". The applicants say that if "normal" is understood to mean "usual", or "the statistical norm", this then leads to a conflict with the French version of the legislation.

[140] The applicants submit that the French version of the provision is narrower than the English version. Given that paragraph 15(1)(*c*) creates an exception to the rights provided for in the *Canadian Human Rights Act*, the narrower version of the legislation should be preferred.

[141] Air Canada and ACPA say that the reconciliation of the two versions of the Act is not difficult when regard is had to the broader context of the legislation, and, in particular, to subsection 9(2) of the Act, which provides that:

9. (1) …

(2) Notwithstanding subsection (1), it is not a discriminatory practice for an employee organization to exclude, expel or suspend an individual from membership in the organization because that individual has reached the normal age of retirement for individuals working in positions similar to the position of that individual. [Emphasis added.]

[142] The respondents submit that the language in the concluding portion of subsection 9(2) in the English version of the Act is identical to that contained in the English version of paragraph 15(1)(*c*), whereas the French versions of the two provisions differ.

[143] As a consequence, the respondents argue that in three of the four places in the Act where reference is made to the retirement age for individuals working in positions similar to that of a complainant, the term "normal" is used. This, they say, demonstrates that there is a shared meaning between the English and French versions of both subsection 9(2) and paragraph 15(1)(*c*), which gives the words their most obvious, ordinary meaning and accords with the context and purpose of the enactment in which they occur.

[144] Thus, the respondents say that all that is required is for the Tribunal to determine the usual or customary age of retirement for a particular group of individuals, and that a binding rule mandating retirement at a specified age is not necessary for a defence under paragraph 15(1)(*c*) of the Act to succeed.

[145] Finally, the respondents point to comments made by the Minister of Justice and by the Assistant Deputy Minister of Justice for Policy and Planning prior to the enactment of the *Canadian Human Rights Act* as evidence of the fact that Parliament did not intend that there would have to be a binding rule in place before the defence under paragraph 15(1)(*c*) of the Act could be available to respondents.

[146] When addressing a question of statutory interpretation, 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: see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paragraph 21, and see Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis Canada, 2008), at page 1.

[147] Both the French and the English versions of federal legislation have equal authenticity, and neither is to be preferred over the other: see *Official Languages Act*, R.S.C., 1985 (4th Supp.), c. 31, section 13 and *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at page 774.

[148] Where the English and French versions of legislation do not say the same thing, a meaning that is common to both ought to be adopted: see *Sullivan on the Construction of Statutes*, at page 100. That is, an interpretation reconciling the two versions is to be favoured, because it is assumed that this better reflects the work of a rational legislature: see Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3rd ed. (Scarborough, Ont.: Carswell, 2000), at pages 323–324 and 349.

[149] Where a shared meaning has been identified, it may nonetheless be tested against other indicators to ensure that it is the meaning intended by Parliament. The shared meaning may also be rejected if there is another interpretation that is for some reason preferable: see *Sullivan on the Construction of Statutes*, at pages 100–101.

[150] In this case, the English version of paragraph 15(1)(*c*) speaks of the "normal" age of retirement in force for a certain type of position. "Normal" is defined by the *Concise Oxford Dictionary of Current English*, 9th ed. (Della Thompson, ed., Oxford: Clarendon Press, 1995) as "conforming to a standard; regular, usual, typical". Similarly, the *Random House Webster's Unabridged Dictionary*, 2nd ed. (New York: Random House, 2001) defines "normal" as "conforming to the standard or the common type; usual, not abnormal; regular; natural."

[151] In contrast, the French version of the provision refers to "*la règle* de l'âge de la retraite en vigueur" (emphasis added). "*Règle*" is defined in *Le Nouveau Petit Robert : dictionnaire alphabétique et analogique de la langue française*, Josette Rey-Debove & Alain Rey, ed., Paris: Dictionnaires Le Robert, 1993, as "Ce qui est imposé ou adopté comme ligne directrice de conduite → coutume, habitude, usage. Formule qui indique ce qui doit être fait dans un cas déterminé → convention, institution." "*Règle*" is also defined as "*loi, norme, précepte, prescription, principe*".

[152] Thus it appears that the use of the word "*règle*" in the French version of paragraph 15(1)(*c*) does not necessarily refer to a formal, rigid, binding rule as the applicants suggest. As the dictionary definition cited above indicates, while a "*règle*" may amount to a binding law, it may also refer to a norm, usage, custom or standard. On the other hand, the word "normal" may relate to a standard, or a regular, usual or typical practice, but does not, in its ordinary sense, contemplate a binding rule.

[153] In order to establish the defence contemplated by paragraph 15(1)(*c*) of the Act, the shared meaning of the English and French versions of the provision requires that the age of retirement in issue must be normal, customary or standard within the relevant industry sector. The existence of a binding rule mandating retirement at a particular age is not required.

[154] In light of the foregoing analysis, to the extent that the Tribunal's reasons may be read as requiring that there be a binding rule in place mandating retirement at a fixed age in order for there to be a "normal age of retirement" for the purposes of paragraph 15(1)(*c*) of the *Canadian Human Rights Act*, the Tribunal's decision was unreasonable.

[155] I note that my interpretation of paragraph 15(1)(*c*) is consistent with the jurisprudence: see, for example, *McAllister v. Maritime Employers Association* (1999), 172 F.T.R. 161 (F.C.T.D.); *Prior v. Canadian National Railway Company* (1983), 4 C.H.R.R. D/268 (C.H.R.T.); *Campbell* and *Stevenson*, both previously cited.

[156] In *McAllister*, this Court relied on dictionary definitions to interpret the phrase "normal age of retirement" as it is used in paragraph 15(1)(*c*) to mean "'standard, a type; what is expected or regarded as normal; customary behaviour, appearance' (in this case: to guide and regulate the retirement age in the industry)": at paragraph 69.

[157] In coming to the conclusion that a binding rule is not required for the defence under paragraph 15(1)(*c*) of the Act to be available to an employer, I have given careful consideration to the applicants' argument that the narrower French version of the legislation is to be preferred, given that the provision creates an exception to the rights protected by the *Canadian Human Rights Act*, and as such should be narrowly construed.

[158] While it is true that defences under the Act are to be narrowly construed, the words of the Act must still be given their ordinary meaning, and cannot be interpreted in a manner that is inconsistent with the wording of the legislation: see *Potash Corporation*, at paragraph 19. Reading the English version of paragraph 15(1)(*c*) as requiring the existence of a binding rule before a "normal age of retirement" can be established, would, in my view, do violence to the ordinary meaning of the language contained in the paragraph. Moreover, it would be contrary to the intent of Parliament in enacting this provision.

[159] In this regard, I refer to the comments of Minister of Justice Ron Basford, and Assistant Deputy Minister Strayer, who explained that the intent of the provision was to leave the question of a mandatory retirement age in the private sector to be negotiated between employers and employees.

[160] Minister Basford testified as follows [in *Campbell*, at paragraph 5482]:

> … I would like to point out that the determination of retirement age in the federal public sector is a matter of legislation or regulatory policy. In the private sector this is a matter which has traditionally been left to be determined between employers and employees.

[161] Similarly, Assistant Deputy Minister Strayer testified that [in *Campbell*, at paragraph 5482]:

> What clause 14(c) [now paragraph 15(1)(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.

[162] Clearly, at the time that the *Canadian Human Rights Act* was enacted, it was not contemplated that the defence under paragraph 15(1)(*c*) of the Act would only be available where there was a binding rule in a given industry mandating retirement at a particular age.

[163] The next question, then, is whether there was a normal, customary or standard age of retirement for Canadian pilots flying aircraft of varying sizes and types, transporting passengers to both domestic and international destinations, through Canadian and foreign airspace.

(v) Was there a "normal age of retirement" for Canadian airline pilots?

[164] As was noted earlier in these reasons, in addition to utilizing a normative approach to the "normal age of retirement" issue, the Tribunal also used an empirical approach in determining that 60 was the normal age of retirement for airline pilots.

[165] The Tribunal considered the statistical evidence presented at the hearing with respect to retirement ages for commercial airline pilots, both in Canada and around the world. Because the Tribunal concluded that no Canadian airline apart from Air Canada would qualify as a "major international carrier", information regarding these airlines was not used to identify the normal age of retirement for positions similar to those of Messrs. Vilven and Kelly.

[166] The Tribunal found that complete data was available for less than half of the major international airlines that were included in the survey. The 10 major international airlines for which complete data was available collectively employed some 25 308 pilots. During the 2003–2005 period, 80% of these pilots were required to retire at age 60 or younger. This led the Tribunal to conclude that 60 was the retirement age for the majority of positions similar to those of Messrs. Vilven and Kelly, and was thus the "normal age of retirement" for the purposes of paragraph 15(1)(*c*) of the *Canadian Human Rights Act*. As a consequence, the Tribunal found that Air Canada's mandatory retirement policy did not amount to a discriminatory practice within the meaning of the Act.

[167] As the Federal Court of Appeal observed in the *Stevenson* case, previously cited, the identification of the "normal age of retirement" for the purposes of paragraph 15(1)(*c*) presents its problems: see paragraph 11. However, the approach taken by human rights tribunals has generally been based upon a number count of similar positions: see for example, *Campbell* and *Prior*, both previously cited.

[168] In *Campbell*, the Tribunal found 60 to be the normal age of retirement where approximately 81% of Canadian flight attendants were required to retire by that age. In *Prior*, the fact that 60% of Canadian freight checkers were subject to retirement at age 65 was deemed sufficient for a finding that 65 was the "normal age of retirement" for such positions. A similar approach has been taken by labour arbitrators: see *CKY-TV v. Communications, Energy and Paperworkers Union of Canada (Local 816) (Kenny Grievance)* (2008), 175 L.A.C. (4th) 29.

[169] Given that paragraph 15(1)(*c*) refers to the normal age of retirement for "employees working in positions similar" to that occupied by a complainant, I agree with the Tribunal that the determination of the normal age of retirement requires a statistical analysis of the total number count

of relevant positions. As the Tribunal observed in *Campbell*, it would be unreasonable for a very small airline to be weighted on an equal footing with a large airline such as Air Canada in determining the industry norm: see paragraph 5481.

[170] However, as was explained earlier, I am of the view that the Tribunal erred in its identification of the "positions similar" to those occupied by Messrs. Vilven and Kelly. It is pilots working for Canadian airlines flying aircraft of various sizes to domestic and international destinations, through Canadian and foreign airspace, that form the proper comparator group.

[171] I also agree with the Tribunal's observation that there are problems associated with using Canadian data for comparison purposes. Citing the Tribunal decision in *Campbell*, the Tribunal noted that because of Air Canada's dominant position within the Canadian airline industry, a comparison of pilot positions within Canada would result in Air Canada setting the industry norm. This would allow Air Canada to effectively determine the "normal age of retirement" for the purposes of paragraph 15(1)(*c*) of the Act.

[172] What the Tribunal did not mention was that the Tribunal in *Campbell* nevertheless went on to use the available Canadian data, noting that its concern with respect to the effect of Air Canada's industry dominance was somewhat tempered by the fact that the mandatory retirement age had been negotiated between Air Canada and Mr. Campbell's union. ACPA argues that this is also the case here, and that the retirement age in issue in this case was arrived at through negotiation between Air Canada and a very strong union.

[173] The statistical information before the Tribunal with respect to airline pilots working for both Air Canada and other Canadian airlines flying aircraft of various sizes to domestic and international destinations, through Canadian and foreign airspace, reveals that at the time that Messrs. Vilven and Kelly were forced to leave their positions at Air Canada, several Canadian airlines allowed their pilots to fly until they were 65, and one had no mandatory retirement policy whatsoever. Nevertheless, 56.13% of Canadian airline pilots retired by the time they reached the age of 60.

[174] Therefore, despite the errors identified above, the Tribunal's conclusion that 60 was the normal age of retirement for employees in positions similar to those occupied by Messrs. Vilven and Kelly prior to their forced retirements from Air Canada was one that fell within the range of possible acceptable outcomes which are defensible in light of the facts and the law.

(vi) Conclusion with respect to the availability of the "normal age of retirement" defence

[175] Given that 60 was the normal age of retirement for employees in positions similar to those occupied by Messrs. Vilven and Kelly, the fact that they were forced to retire at 60 in accordance with the mandatory retirement provisions of the collective agreement in effect between Air Canada and ACPA did not amount to a discriminatory practice within the meaning of paragraph 15(1)(*c*) of the *Canadian Human Rights Act*.

[176] Before turning to consider the Tribunal's decision with respect to whether paragraph 15(1)(*c*) of the *Canadian Human Rights Act* violates subsection 15(1) of the Charter, two further comments should be made.

[177] The first relates to the significance of the ICAO standards regarding pilot age. Although I have found that the ICAO standards did not amount to a binding rule for the purpose of the analysis under paragraph 15(1)(*c*) of the *Canadian Human Rights Act*, the standards are not irrelevant to Messrs. Vilven and Kelly's human rights complaints.

[178] That is, the inability to have a pilot-in-command who is over 60 (now 65) on a flight leaving Canadian airspace will undoubtedly cause logistical difficulties for Air Canada in scheduling pilots, having regard to the significant amount of transborder flying carried out by the airline. Whether these

difficulties can be accommodated by Air Canada, or rise to the level of undue hardship, are issues that the Tribunal may ultimately have to address.

[179] The second comment relates to the concern with respect to Air Canada's ability, as the dominant industry player, to skew the analysis with its own mandatory retirement policy. Indeed, it is noteworthy that almost all of the 56.13% of Canadian airline pilots who are required to retire by age 60 fly for Air Canada.

[180] The arbitrator in the *CKY-TV* decision put it well when he asked "[w]hy should the Employer gain assistance from its own organizational practices in defending against a human rights challenge?": at paragraph 133.

[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 paragraph 133. However, as the arbitrator also noted, if the process is flawed, the remedy is under the Charter: see paragraph 134.

[182] The Tribunal itself observed in its 1983 decision in *Prior* that paragraph 15(1)(*c*) "is a rather curious provision in human rights legislation", going so far as to suggest that the provision would not survive a challenge under section 15 of the Charter, which had not yet come into force: see paragraphs 11456–11460.

[183] This then leaves the question of whether paragraph 15(1)(*c*) of the *Canadian Human Rights Act* does in fact violate subsection 15(1) of the Charter.

VIII. Does paragraph 15(1)(*c*) of the CHRA violate subsection 15(1) of the Charter?

[184] Prior to the hearing of these applications, a notice of constitutional question was served by Messrs. Vilven and Kelly on the federal and provincial attorneys general, pursuant to the provisions of section 57 [as am. by S.C. 1990, c. 8, s. 19; 2002, c. 8, s. 54] of the *Federal Courts Act* [R.S.C., 1985, c. F-7, s. 1 (as am. *idem*, s. 14)]. The notice advises that these applicants are challenging the constitutional validity of paragraph 15(1)(*c*) of the *Canadian Human Rights Act* on the basis that it violates subsection 15(1) of the Charter. Messrs. Vilven and Kelly further assert that this violation is not saved by operation of section 1 of the Charter.

[185] Subsection 15(1) of the Charter provides that:

> **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[186] In essence, Messrs. Vilven and Kelly argue that paragraph 15(1)(*c*) of the *Canadian Human Rights Act* denies them the equal benefit and equal protection of the law. It does so by permitting their employer to compel them to retire at a fixed age, without any regard to their individual abilities, skills and capacities, as long as that age is the normal age of retirement for positions similar to those that they occupied prior to their retirement.

[187] At the outset of the hearing, the parties confirmed that the Attorney General of Canada was indeed aware of these applications, but had elected not to participate at this stage in the proceedings.

[188] It should also be noted that the Canadian Human Rights Commission made only brief submissions in relation to the Charter issue. The Commission was of the view that it was constrained as to the position that it could take in relation to this issue, as it was its own enabling legislation that was under challenge in this proceeding.

[189] Before turning to discuss the Tribunal's treatment of the Charter issue, and in order to put that discussion into context, it is helpful to start by reviewing some of the early Supreme Court of Canada jurisprudence in relation to section 15 of the Charter, especially as it relates to the issue of mandatory retirement.

(i) Early Supreme Court of Canada jurisprudence regarding mandatory retirement

[190] The Supreme Court of Canada's 1989 decision in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, "set the template" for the Court's approach to claims under section 15 of the Charter: see *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at paragraph 14.

[191] In *Andrews*, the Supreme Court first articulated its commitment to the principle of substantive, rather than formal, equality. "Formal equality" requires that everyone, regardless of their individual circumstances, be treated in an identical fashion.

[192] In contrast, "substantive equality" recognizes that in some circumstances it is necessary to treat different individuals differently, in order that true equality may be realized. In this regard, "substantive equality" is based upon the concept that "[t]he promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration": *Andrews*, at page 171, *per* McIntyre J.

[193] As William Black and Lynn Smith explained in "The Equality Rights", in Gérald-A. Beaudoin and Errol Mendes, eds., *Canadian Charter of Rights and Freedoms*, 4th ed. (Markham, Ont.: LexisNexis Butterworths, 2005), at page 969:

> The term "substantive equality" indicates that one must take account of the outcomes of a challenged law or activity and of the social and economic context in which a claim of inequality arises. Assessing that context requires looking beyond the law that is being challenged and identifying external conditions of inequality that affect those outcomes. Substantive equality requires attention to the "harm" caused by unequal treatment.

[194] The majority in *Andrews* defined "discrimination" in the following terms (at page 174):

> … a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

[195] The *Andrews* approach to section 15 of the Charter was utilized by the Supreme Court in a series of cases in the early 1990s dealing with the issue of mandatory retirement: see *McKinney* and *Harrison*, both previously cited, *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483 and *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103.

[196] *McKinney* and *Harrison* are of particular relevance to this proceeding, as these decisions dealt not only with mandatory retirement imposed under the provisions of collective agreements, but also with the constitutionality of limiting provisions in human rights legislation, in light of section 15 of the Charter.

[197] The decisions in *McKinney* and *Harrison* ultimately turned on the Supreme Court's determination that universities did not form part of government, and as such were beyond the reach of the Charter. Nevertheless, the Court went on in each case to address provisions in the Ontario and British Columbia [*Human Rights Act*, S.B.C. 1984, c. 22] human rights codes that limited the protection afforded by the legislation to those less than 65 years of age.

[198] In this regard, the Supreme Court was unanimous in concluding that legislation denying human rights protection to those over 65 violated subsection 15(1) of the Charter, as it denied individuals equal protection under the law, based upon their age.

[199] However, after reviewing issues such as the place of mandatory retirement within society, demographics within the workplace, and the fact that mandatory retirement policies are typically negotiated through the collective bargaining process, the majority of the Supreme Court concluded that the legislative provisions in question would have been saved under section 1 of the Charter.

(ii) The decision in *Law v. Canada*

[200] In 1999, the Supreme Court of Canada rendered its decision in *Law v. Canada*, previously cited. As the Supreme Court subsequently observed in *Gosselin*, the central lesson of *Law* was the need for a contextual inquiry in order to establish whether a statutory distinction conflicts with the purpose of subsection 15(1) of the Charter, such that "a reasonable person in circumstances similar to those of the claimant would find that the legislation which imposes differential treatment has the effect of demeaning his or her dignity": see *Gosselin*, previously cited, at paragraph 25.

[201] That is, the Supreme Court held in *Law* that in order to establish a violation of subsection 15(1) of the Charter, a claimant must establish, on the civil standard of proof, that the law in question imposes differential treatment as between the claimant and others, either in purpose or in effect. The claimant must further demonstrate that this differential treatment is based on one or more enumerated or analogous grounds. Finally, the claimant must show that the impugned law has a purpose or effect that is discriminatory in the sense that it denies human dignity on one of the enumerated or analogous grounds.

[202] In this regard, the Supreme Court observed that a distinction made on an enumerated or analogous ground will violate the claimant's human dignity if it reflects or promotes the view that the individuals affected are less deserving of concern, respect, and consideration than others.

[203] In addressing the final component of the *Law* test, the Supreme Court identified four "contextual factors" to assist in determining whether a distinction contained in an impugned law, when viewed from the perspective of a reasonable person in the claimant's circumstances, impairs his or her human dignity. These factors include [at pages 501–502]:

(A) [Any p]re-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue[;]

…

(B) The correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others[;]

…

(C) The ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society[;] and

…

(D) The nature and scope of the interest affected by the impugned law.

(iii) The Tribunal's decision on the Charter issue

[204] Before the Tribunal, Messrs. Vilven and Kelly argued that there was no material difference between the provisions in the Ontario and British Columbia human rights codes at issue in *McKinney*

and *Harrison*, and paragraph 15(1)(*c*) of the *Canadian Human Rights Act*. As such, they asserted that the decisions in *McKinney* and *Harrison* were binding on the Tribunal, and it necessarily followed that paragraph 15(1)(*c*) of the CHRA also breached subsection 15(1) of the Charter.

[205] As was noted earlier in these reasons, the Tribunal did not accept this argument, noting that since *McKinney* and *Harrison* had been decided, the law regarding the approach to be taken to claims under subsection 15(1) of the Charter had evolved. In this regard, the Tribunal made specific reference to the decisions of the Supreme Court of Canada in *Law* and *Gosselin*, both previously cited.

[206] The Tribunal noted that in *Law*, the Supreme Court held that the purpose of subsection 15(1) of the Charter is "to assure that human dignity is not harmed by arbitrary distinctions created by the law or government action", and further that "the overriding concern with protecting and promoting human dignity infuses all elements of the discrimination analysis": Tribunal decision, at paragraphs 81–82, quoting from *Law*, at paragraph 54.

[207] The Tribunal [at paragraph 89] then identified the issue before it as being "whether, as a result of the age-based distinction in s. 15(1)(c) of the *CHRA*, the complainants' dignity was affronted or they experienced negative stereotyping relating to their age."

[208] After considering the issue, the Tribunal concluded that, although paragraph 15(1)(*c*) of the Act deprived Messrs. Vilven and Kelly of the ability to challenge Air Canada's mandatory retirement policy, the loss of this opportunity did not violate their dignity, or fail to recognize them as full and equal members of society.

[209] In coming to this conclusion, the Tribunal asked itself firstly, whether paragraph 15(1)(*c*) of the Act drew a distinction between Messrs. Vilven and Kelly and others on the basis of their personal characteristics; secondly, whether they were subject to differential treatment on an enumerated or analogous ground; and thirdly, whether the differential treatment imposed a burden on them which reflected or reinforced a negative disadvantage or stereotype, or had a negative effect on their dignity or self-worth.

[210] The Tribunal identified this third question as being central to its decision.

[211] As to whether paragraph 15(1)(*c*) of the Act drew a distinction between Messrs. Vilven and Kelly and others on the basis of their personal characteristics, the Tribunal concluded that although it was clear that airline pilots, as pilots, did not constitute a group which suffered from negative stereotyping or pre-existing disadvantage, the more appropriate focus of the Tribunal's analysis was [at paragraph 92] "whether the complainants, as members of the group of older workers whose employment has been forcibly terminated, are subject to pre-existing disadvantage or negative stereotyping."

[212] In this regard, the Tribunal found that the disadvantages suffered by older workers have been noted in the case law, noting that in *McKinney*, the Supreme Court observed that "[b]arring specific skills, it is generally known that persons over 45 have more difficulty finding work than others. They do not have the flexibility of the young, a disadvantage often accentuated by the fact that the latter are frequently more recently trained in the more modern skills": at page 299.

[213] The Tribunal then went on to find that there was no indication that Messrs. Vilven and Kelly had themselves experienced these age-related disadvantages or negative stereotyping. The evidence before the Tribunal [at paragraph 95] established that both "were fully up-to-date in the latest technology and skills required to fly some of the most sophisticated aircraft in a major international airline." Moreover, both Mr. Vilven and Mr. Kelly had been able to obtain new employment as pilots with other airlines that did not have mandatory retirement policies.

[214] Insofar as the effect of paragraph 15(1)(*c*) of the *Canadian Human Rights Act* on the dignity of Messrs. Vilven and Kelly was concerned, the Tribunal found that the purpose of the provision was to strike a balance between the need for protection against age discrimination, and the desirability of those in the workplace being able to bargain for and organize their own terms of employment.

[215] The Tribunal further observed that paragraph 15(1)(*c*) does not mandate mandatory retirement; rather, it is permissive, allowing parties such as Air Canada and ACPA to negotiate contracts that include a mandatory retirement provision.

[216] The Tribunal noted that mandatory retirement policies are usually in place in situations where the employees have considerable bargaining power, most commonly through trade union representation. In this regard, the Tribunal observed that the overwhelming majority of mandatory retirement policies are found in unionized workplaces.

[217] In this case, ACPA and Air Canada agreed to retirement at age 60 in exchange for a rich compensation package, including a pension plan that put Air Canada pilots in an elite group of pensioners. Based upon the testimony of an Air Canada witness, the Tribunal observed [at paragraph 100] that employees, including Air Canada pilots, are not faced with the indignity of retiring because they have been found to be incapable of performing the requirements of their position or because of failing health. Instead, "retirement at age 60 for pilots is the fully understood and anticipated conclusion of a prestigious and financially rewarding career."

[218] The Tribunal further noted that Messrs. Vilven and Kelly had each been aware of Air Canada's mandatory retirement policy when they commenced their employment with the airline, and had benefited from it throughout their careers, by being able to progress through the ranks at Air Canada at a more rapid pace as a consequence of their increasing seniority. Having reaped the benefit of Air Canada's mandatory retirement policy throughout their careers, the Tribunal held that it should not be perceived as unfair to require Messrs. Vilven and Kelly to ultimately bear the burden of that policy.

[219] The Tribunal concluded that although paragraph 15(1)(*c*) of the Act deprived Messrs. Vilven and Kelly of the opportunity to challenge the mandatory retirement policy in their workplace, the loss of this opportunity did not violate their dignity, or fail to recognize them as full and equal members of society. As a consequence, the Charter challenge was dismissed.

[220] That said, the Tribunal also accepted that when Messrs. Vilven and Kelly reached age 60 and had to retire from Air Canada, each experienced a blow to his self-esteem. Both complainants had testified that they missed the prestige and exciting work that they had as Air Canada pilots. Mr. Kelly had also testified to missing the friendships that he had formed at Air Canada.

[221] The Tribunal also found that the termination of one's employment will have a profound impact on the self-worth and dignity of an individual (citing the *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at page 368). However, the Tribunal held that the assessment of the impact of the termination of their employment on the dignity of Messrs. Vilven and Kelly had to be viewed in the broader context of the entirety of their careers.

[222] In this regard, the Tribunal noted that the Supreme Court of Canada has repeatedly cautioned against assessing the impact of age distinctions on human dignity based solely on isolated moments in time: citing *Law*, at paragraph 102; *Gosselin*, at paragraph 32, and *McKinney*, at pages 296–298.

[223] Referring to the evidence of Professor Hugh Carmichael, the labour economist who testified on behalf of Air Canada, the Tribunal observed [at paragraph 105] that age distinctions are viewed differently by most people than distinctions based on grounds such as gender and race. Because we all will become older, "young workers generally do not resent the fact that an older employee

working beside them is paid more than them as long as they believe that they will be treated the same when they reach a similar stage in their career."

[224] The Tribunal [at paragraph 105] thus held that age-based distinctions will be seen as fair, and will not offend human dignity, as "we can all expect to reap the benefits and bear the burden of the distinctions at some point in our lives."

[225] Having regard to the totality of Messrs. Vilven and Kelly's careers at Air Canada, the Tribunal concluded [at paragraph 109] that denying them the right to challenge Air Canada's mandatory retirement policy because of the operation of paragraph 15(1)(*c*) of the *Canadian Human Rights Act* does not communicate the message that they "are not valued as members of society, nor does it necessarily marginalize them." According to the Tribunal, "[i]t simply reflects the view that it is not unfair to require the complainants to assume their final responsibility as Air Canada pilots. This message cannot reasonably be viewed as an affront to their dignity."

[226] As a result, the Tribunal concluded that Messrs. Vilven and Kelly's right to equality under subsection 15(1) of the Charter had not been violated by virtue of paragraph 15(1)(*c*) of the CHRA.

[227] Between the time that the Tribunal rendered its decision and the hearing of this application, the Supreme Court of Canada released its decision in *Kapp*, previously cited, which re-examines the approach to be taken in relation to claims under subsection 15(1) of the Charter. Before turning to consider whether the Tribunal was correct in its analysis of the section 15 Charter issue, it is therefore first necessary to have regard to what the Supreme Court had to say in *Kapp*.

(iv) The Supreme Court's decision in *Kapp*

[228] As a consequence of the Supreme Court's decision in *Law* and its progeny, a concern developed with respect to the increasing complexity of the analytical framework to be applied in relation to claims under section 15 of the Charter. Indeed, there was much academic criticism with respect to the role of "human dignity" as the core interest protected by section 15: see, for example, Donna Greschner, "Does Law Advance the Cause of Equality?" (2001), 27 *Queen's L.J.* 299; R. James Fyfe, "Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada" (2007), 70 *Sask. L. Rev*. 1.

[229] Questions also emerged as to the continuing significance of the Supreme Court's decision in *Andrews*, in light of the intervening jurisprudence: see Lynn Smith, "Development of Equality Rights: Contribution of the Right Honourable Antonio Lamer" (paper presented at the CIAJ Annual Conference, Reasonable Accommodation and the Role of the State: A Democratic Challenge, 25–26 September 2008) (unpublished), at page 5.

[230] Although the primary focus of *Kapp* is on subsection 15(2) of the Charter, the decision is nevertheless significant in that it also reflects an attempt on the part of the Supreme Court to address the concerns identified above, and to clarify the current state of the law as it relates to claims under subsection 15(1) of the Charter.

[231] In this regard, the Court observed that subsection 15(1) of the Charter is aimed at preventing discriminatory distinctions that impact adversely on members of groups identified by reference to the grounds enumerated in section 15 or analogous grounds: *Kapp*, at paragraph 16.

[232] That is, the focus of subsection 15(1) of the Charter is on "*preventing* governments from making distinctions based on the enumerated or analogous grounds that: have the effect of perpetuating group disadvantage and prejudice; or impose disadvantage on the basis of stereotyping": *Kapp*, at paragraph 25 (emphasis in the original).

[233] Tracing the evolution of the section 15 jurisprudence, the Supreme Court noted that the "template" in *Andrews*, as subsequently developed in cases such as *Law*, established what was in essence a two-part test for establishing claims of discrimination under subsection 15(1) of the Charter. The Court identified the two parts of the test as firstly, whether the law creates a distinction based on an enumerated or analogous ground and secondly, whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping. Although these criteria were divided into three steps in *Law*, *Kapp* confirms that the test remains substantially the same: *Kapp*, at paragraph 17.

[234] Insofar as the significance of the *Law* decision was concerned, the Supreme Court noted in *Kapp* that *Law* suggested that "discrimination should be defined in terms of the impact of the law or program on the 'human dignity' of members of the claimant group": *Kapp*, at paragraph 19. This determination was to be made on the basis of the four contextual factors identified by the Court.

[235] However, the Court also recognized in *Kapp* that difficulties have arisen in using human dignity as a legal test. In this regard, the Court observed that although human dignity is an essential value underlying the subsection 15(1) equality guarantee, "human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be": *Kapp*, at paragraph 22 (emphasis in the original).

[236] The Supreme Court also acknowledged that the decision in *Law* had additionally been the subject of criticism for the way that it "allowed the formalism of some of the Court's post-*Andrews* jurisprudence to resurface in the form of an artificial comparator analysis focussed on treating likes alike": *Kapp*, at paragraph 22.

[237] The Supreme Court then observed that the analysis in a given case "more usefully focusses on the factors that identify impact amounting to discrimination." The four contextual factors identified by the Supreme Court in *Law* "are based on and relate to the identification in *Andrews* of perpetuation of disadvantage and stereotyping as the primary indicators of discrimination": *Kapp*, at paragraph 23.

[238] The Court then went on to hold that "*Law* does not impose a new and distinctive test for discrimination, but rather affirms the approach to substantive equality under s. 15 set out in *Andrews* and developed in numerous subsequent decisions": *Kapp*, at paragraph 24.

[239] Thus, the factors identified in *Law* are not to be read literally "as if they were legislative dispositions, but as a way of focussing on the central concern of s. 15 identified in *Andrews*—combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping": *Kapp*, at paragraph 24.

[240] Since *Kapp*, the Supreme Court of Canada has reminded us of the importance of looking beyond the impugned legislation in a section 15 Charter analysis, and of the need to examine the larger social, political and legal context of the legislative distinction in a substantive equality analysis: see *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222, at paragraphs 193–194.

[241] With this understanding of the relevant jurisprudence, I turn now to examine whether the Tribunal was correct in concluding that paragraph 15(1)(*c*) of the *Canadian Human Rights Act* does not violate subsection 15(1) of the Charter.

(v) Analysis

[242] In approaching the Charter question, it must be kept in mind from the outset that what is in issue at this point is *not* the mandatory retirement provisions of the Air Canada collective agreement.

Rather, it is the permissive provision in paragraph 15(1)(*c*) of the *Canadian Human Rights Act* which provides that it is not a discriminatory practice if an individual is required to retire at the normal age of retirement for positions similar to that occupied by the claimant.

(a) The purpose of paragraph 15(1)(*c*) of the CHRA

[243] The Tribunal described the purpose of paragraph 15(1)(*c*) of the *Canadian Human Rights Act* as being "to strike a balance between the need for protection against age discrimination and the desirability of those in the workplace to bargain for and organize their own terms of employment": at paragraph 98.

[244] The Tribunal's description of the purpose of the provision is accurate, as far as it goes. A more fulsome description of the purpose of the impugned legislation was provided by the arbitrator in the *CKY-TV* case, cited earlier. In this regard, the arbitrator observed [at paragraph 210] that the legislative objective underlying paragraph 15(1)(*c*) of the Act "was to protect a longstanding employment regime."

[245] Referring to the comments of Minister Basford cited earlier in these reasons, the arbitrator noted that the Minister had made reference to the "'many complex social and economic factors' involved in mandatory retirement", leading the arbitrator to conclude that "[t]he government's stated preference was to continue the traditional approach whereby the issue in the private sector was addressed between employers and employees": *CKY-TV*, at paragraph 210.

[246] The arbitrator further held that the objective of paragraph 15(1)(*c*) of the Act was to allow for the continuation of a socially desirable employment regime, which included pensions, job security, wages and benefits. This was to be achieved by allowing mandatory retirement "if the age matched the predominant age for the position": *CKY-TV*, at paragraph 211.

[247] It is clear from the statements made by Minister Basford and Assistant Deputy Minister Strayer at the time that the *Canadian Human Rights Act* was enacted that paragraph 15(1)(*c*) of the Act was intended to create an exception to the quasi-constitutional rights otherwise provided by the Act, so as to allow for the negotiation of mandatory retirement arrangements between employers and employees, particularly through the collective bargaining process.

[248] In determining whether paragraph 15(1)(*c*) of the Act violates subsection 15(1) of the Charter, it is necessary to examine the issue in light of the tests articulated in *Andrews* and *Law*, taking into account the comments of the Supreme Court of Canada in *Kapp*.

(b) Does paragraph 15(1)(*c*) of the CHRA create a distinction based on an enumerated ground?

[249] The first stage of the inquiry is to ask whether paragraph 15(1)(*c*) of the *Canadian Human Rights Act* creates a distinction based upon an enumerated or analogous ground. As reformulated in *Law*, the Court must ask itself whether the impugned law imposes differential treatment between the claimant and others, in purpose or effect, and whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment.

[250] In approaching a section 15 claim, the Supreme Court in *Law* teaches that the determination of the appropriate comparator, and the evaluation of the contextual factors which determine whether the impugned legislation has the effect of demeaning a claimant's dignity must be conducted from the perspective of the claimant. However, the focus of the discrimination inquiry is both subjective and objective.

[251] That is, the inquiry is subjective "in so far as the right to equal treatment is an individual right, asserted by a specific claimant with particular traits and circumstances". The inquiry is objective "in so far as it is possible to determine whether the individual claimant's equality rights

have been infringed only by considering the larger context of the legislation in question, and society's past and present treatment of the claimant and of other persons or groups with similar characteristics or circumstances": *Law*, at paragraph 59.

[252] The Tribunal found that, although paragraph 15(1)(*c*) of the *Canadian Human Rights Act* was worded differently than the provision of the Ontario *Human Rights Code, 1981* at issue in *McKinney*, the two provisions were comparable as both exempt mandatory retirement policies from conduct that would otherwise amount to *prima facie* age discrimination. As I understand the Tribunal's reasons, the Tribunal accepted that paragraph 15(1)(*c*) of the *Canadian Human Rights Act* makes an age-based distinction, which deprived Messrs. Vilven and Kelly of the ability to challenge Air Canada's mandatory retirement policy.

[253] Neither Air Canada nor ACPA have challenged this finding. Indeed, ACPA acknowledged in its oral submissions that there was no material difference between paragraph 15(1)(*c*) of the CHRA and the provision of the Ontario *Human Rights Code, 1981* at issue in *McKinney*. As a consequence, I will deal only briefly with this issue.

[254] Equality is inherently a comparative concept. As a consequence, in order to determine whether there has been a breach of subsection 15(1) of the Charter, it is necessary to first identify specific personal characteristics or circumstances of the claimant, and compare the treatment of that individual to the treatment accorded to a relevant comparator. This comparison will assist in determining whether the claimant has experienced differential treatment, which is the first step in determining whether there has been a violation of subsection 15(1) of the Charter: see *Law*, at paragraph 24.

[255] Insofar as the choice of comparator is concerned, the Supreme Court stated in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 S.C.R. 657, that the comparator group (at paragraph 53):

> ... should mirror the characteristics of the claimant or claimant group relevant to the benefit or advantage sought, except for the personal characteristic related to the enumerated or analogous ground raised as the basis for the discrimination …. The comparator must align with both the benefit and the "universe of people potentially entitled" to it and the alleged ground of discrimination ....

[256] In *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65, [2004] 3 S.C.R. 357, the Court reiterated that the appropriate comparator group will be the one which mirrors the characteristics of the claimant or claimant group relevant to the benefit or advantage sought, with the exception "that the statutory definition includes a personal characteristic that is offensive to the *Charter* or omits a personal characteristic in a way that is offensive to the *Charter*": at paragraph 23.

[257] The relevant comparison in this case is to be made between older workers such as Messrs. Vilven and Kelly, who exceed the normal age of retirement for their type of position, and younger workers occupying similar positions who have not yet reached the normal age of retirement: see *Stevenson*, previously cited, at paragraph 24, where the Federal Court of Appeal described the distinction drawn by the predecessor to paragraph 15(1)(*c*) of the Act as being "between persons who have reached the normal age of retirement and younger employees in the same class who have not reached that age."

[258] Unlike the provision of the Ontario *Human Rights Code, 1981* at issue in *McKinney*, paragraph 15(1)(*c*) of the *Canadian Human Rights Act* does not stipulate a specific age beyond which the protection of the Act will not be available. Rather the reference is to the "normal age of retirement" as the relevant demarcation point.

[259] Thus, in *McKinney*, workers under age 65 could claim the protection of the Code in relation to claims of age discrimination, whereas those over 65 could not. In this case, the differential

treatment is as between workers under the "normal age of retirement" for positions similar, and those over that "normal age of retirement".

[260] That is, the effect of paragraph 15(1)(*c*) of the *Canadian Human Rights Act* is to deny workers over the "normal age of retirement" the equal protection and equal benefit of the Act. Paragraph 15(1)(*c*) allows these individuals' employment to be terminated solely because of their age, regardless of their individual circumstances, career aspirations, needs, abilities or merits. In contrast, individuals who are below the normal age of retirement who lose their jobs for reasons relating to their age will have recourse under the Act. This is clearly a distinction based upon an enumerated ground.

[261] The next question, then, is whether the age-related distinction contained in paragraph 15(1)(*c*) of the *Canadian Human Rights Act* creates a disadvantage by perpetuating prejudice or stereotyping.

(c) Does the age-related distinction contained in paragraph 15(1)(*c*) of the CHRA create a disadvantage by perpetuating prejudice or stereotyping?

[262] As the Supreme Court observed in *Kapp*, *Andrews* teaches that the question to be asked at this stage in the inquiry is "[d]oes the distinction create a disadvantage by perpetuating prejudice or stereotyping?": *Kapp*, at paragraph 17.

[263] As was explained earlier, in *Law*, the Court reformulated this question to require a court to examine whether the distinction in issue was discriminatory, in the sense of perpetuating or promoting the view that the claimant was less capable or worthy of recognition or value as a human being or as a member of Canadian society. To this end, courts were directed to focus on whether an impugned law negatively affected a claimant's "human dignity". To assist in this analysis, four contextual factors were identified as "points of reference".

[264] *Kapp* teaches that the four *Law* factors should not be read literally as if they were a legislative test. Instead, they should be understood as a way to focus on the central concern of subsection 15(1) of the Charter: namely combating discrimination defined in terms of perpetuating disadvantage and stereotyping. That is, the focus is on preventing governments from making distinctions based on the enumerated or analogous grounds that have the effect of perpetuating group disadvantage and prejudice, or that impose disadvantage on the basis of stereotyping.

(i) Pre-existing disadvantage suffered by the individual or group

[265] In applying the above jurisprudence to the facts of this case, the first of the contextual factors to be considered is whether the group to which the claimants belong suffers from a pre-existing disadvantage, vulnerability, stereotyping or prejudice.

[266] Citing *Gosselin*, at paragraph 31, Air Canada points out that age-based distinctions are a common way of ordering our society, and do not automatically evoke pre-existing disadvantage suggesting discrimination and marginalization in the way that other enumerated or analogous grounds may. It bears noting, however, that these comments were made by the Supreme Court in the context of a statutory age-based distinction that had an adverse differential effect in relation to *younger* individuals.

[267] Indeed, the Court went on in *Gosselin* to observe that age-based section 15 claims typically relate to discrimination against older people "who are presumed to lack abilities that they may in fact possess": at paragraph 32.

[268] Moreover, as the Supreme Court observed in *Law*, "the most prevalent reason that a given legislative provision may be found to infringe s. 15(1) is that it reflects and reinforces existing inaccurate understandings of the merits, capabilities and worth of a particular person or group within

Canadian society, resulting in further stigmatization of that person or the members of the group or otherwise in their unfair treatment": at paragraph 64.

[269] Similarly, in *Gosselin*, Chief Justice McLachlin stated that "a law that imposes restrictions or denies benefits on account of presumed or unjustly attributed characteristics is likely to deny essential human worth and to be discriminatory": at paragraph 37.

[270] The Tribunal found that Messrs. Vilven and Kelly were members of a group which it identified as "older workers". Supreme Court of Canada jurisprudence has repeatedly recognized the pre-existing disadvantages and stereotyping suffered by this group.

[271] By way of example, in addition to the comments of the Supreme Court in *Gosselin* and *Law* quoted above, the Court in *McKinney* also made reference to "the stereotype of older persons as unproductive, inefficient, and lacking in competence." Justice Wilson went on in *McKinney* to observe that by denying protection to older workers, the Ontario *Human Rights Code, 1981* had the effect of "reinforcing the stereotype that older employees are no longer useful members of the labour force and their services may therefore be freely and arbitrarily dispensed with": both quotations from page 413, Wilson J. dissenting, but not on this point.

[272] As a consequence, it is clear that older workers, as a group, suffer from a pre-existing disadvantage, vulnerability, stereotyping or prejudice.

[273] The Tribunal [at paragraph 92] had already found that although airline pilots, as pilots, did not constitute a group which suffered from negative stereotyping or pre-existing disadvantage, the more appropriate question was "whether the complainants, as members of the group of older workers whose employment has been forcibly terminated, are subject to pre-existing disadvantage or negative stereotyping."

[274] The Tribunal [at paragraph 95] accepted that this was the case, but then went on to find that there was "no indication" that either Mr. Vilven or Mr. Kelly personally experienced these age-related disadvantages or stereotypes. Not only were they kept fully up-to-date in the latest skills and technology required to fly some of the most sophisticated aircraft for a major airline, in addition, after the termination of their employment by Air Canada, they were able to secure alternate employment with other Canadian airlines that did not have mandatory retirement policies.

[275] Two observations may be made in relation to this aspect of the Tribunal's decision.

[276] Firstly, to the extent that the focus of this stage of the analysis is on *the group* to which the claimants belong, for the reasons given above it is clear that older workers suffer from a pre-existing disadvantage, vulnerability, stereotyping or prejudice. Indeed, the Tribunal found that this was the case.

[277] Secondly, it is true that Messrs. Vilven and Kelly's training may have been kept up-to-date while they were at Air Canada, and that they may indeed have been able to obtain alternate employment as pilots after being forced by the airline to retire (albeit with less favourable working conditions and compensation). However, one must not lose sight of the fact that even though there was no concern with respect to either of their individual abilities, skills or capacities, they were nonetheless disadvantaged by being forced to leave positions that they clearly loved, merely because they had reached the age of 60.

[278] As a consequence, I am satisfied that this consideration weighs in favour of a finding that paragraph 15(1)(*c*) of the *Canadian Human Rights Act* has the effect of perpetuating a group disadvantage, suggesting that the provision violates subsection 15(1) of the Charter.

(ii) The degree of correspondence between the impugned law and the actual needs, circumstances, and capacities of the individual or group

[279] As the Supreme Court observed in *Kapp*, this factor relates to the issue of stereotyping: see paragraph 23.

[280] The Supreme Court further noted in *Law* that both *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 and *Andrews* make the point that "legislation which takes into account the actual needs, capacity, or circumstances of the claimant and others with similar traits in a manner that respects their value as human beings and members of Canadian society will be less likely to have a negative effect on human dignity": see *Law*, at paragraph 70.

[281] Paragraph 15(1)(*c*) draws a distinction between those who may claim the protection of the *Canadian Human Rights Act* and those who may not, based upon the normal age of retirement for similar positions. Individuals who are involuntarily retired after reaching the normal age of retirement for positions similar are thus deprived of protection from age discrimination, regardless of their own individual needs, circumstances, or capacities. Indeed, there is no suggestion in this case that either Mr. Vilven or Mr. Kelly was not fully qualified or capable of continuing to work safely as a pilot for Air Canada.

[282] Moreover, paragraph 15(1)(*c*) of the Act takes no account of the needs, circumstances or capacities of older workers, as a group. As there is no correspondence between the impugned law and the actual needs, circumstances, and capacities of the disadvantaged group, this contextual factor also favours a finding that paragraph 15(1)(*c*) of the *Canadian Human Rights Act* violates subsection 15(1) of the Charter.

(iii) Does the law have an ameliorative purpose or effect?

[283] The purpose of subsection 15(1) of the Charter is "not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society": *Eaton*, cited previously, at paragraph 66.

[284] To this end, the Supreme Court observed in *Law* that legislation that has an ameliorative purpose, or effects that accord with the purpose of subsection 15(1) of the Charter, "will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation": *Law*, at paragraph 72.

[285] The purpose of paragraph 15(1)(*c*) of the *Canadian Human Rights Act* was discussed earlier in these reasons. ACPA has not suggested that the provision has any ameliorative purpose.

[286] To the extent that Air Canada has argued that the provision has the effect of freeing up positions for younger workers as older workers are forced to retire, there has been no suggestion that "younger workers" constitute a disadvantaged group who are being targeted by the legislation.

[287] Moreover, as the Supreme Court observed in *McKinney*, legislation that has as its objective the forcible retirement of older workers in order to make way for younger workers would be in itself discriminatory "since it assumes that the continued employment of some individuals is less important to those individuals, and of less value to society at large, than is the employment of other individuals, solely on the basis of age": at page 303.

[288] Furthermore, there is evidence to suggest that the practice of mandatory retirement has an adverse differential effect on individuals who enter the workforce later in life. This is because of the inability of these individuals to accrue sufficient pension benefits over the course of their careers, and

the resultant financial challenges that such people face when forced to retire. Professor Carmichael himself acknowledged in his evidence that this group will be predominantly made up of women, who spend the early part of their careers out of the workplace while raising children, and immigrants who come to Canada later in life.

[289] A similar observation was made by Justice L'Heureux-Dubé in her dissenting opinion in *Dickason*, where she noted that not only do women often interrupt their careers to raise families, they are particularly hard hit by mandatory retirement because they tend to have lower paying jobs which are less likely to offer pension coverage: see page 1191. (See also *McKinney*, at page 415, for similar observations by Justice Wilson, dissenting, but not on this point.)

[290] I am mindful of the fact that the issue before the Court in this case is not the constitutionality of Air Canada's mandatory retirement policy, but rather the constitutionality of the provision in the *Canadian Human Rights Act* that permits the practice of mandatory retirement in certain specified circumstances. That said, legislation that would permit the continuation of an employment practice that can have an adverse differential effect on women and immigrants can hardly be said to have an ameliorative purpose.

(iv) The nature and scope of the interest affected

[291] The final contextual factor identified in *Law* for use in determining whether a claimant's dignity has been violated is the nature and scope of the interest affected by the impugned legislation.

[292] The Supreme Court explained this factor in *Law* by reference to the comments of Justice L'Heureux-Dubé in *Egan v. Canada*, [1995] 2 S.C.R. 513, where she observed that "[i]f all other things are equal, the more severe and localized the … consequences on the affected group, the more likely that the distinction responsible for these consequences is discriminatory within the meaning of s. 15 of the *Charter*": *Egan*, at paragraph 63, cited in *Law*, at paragraph 74.

[293] In the case of Messrs. Vilven and Kelly, the interest at stake is the ability to continue to work in the career of their choice. The importance of this interest cannot be overstated. Indeed, Canadian jurisprudence is replete with references to the crucial role that employment plays in the dignity and self-worth of the individual.

[294] By way of example, in *Reference Re Public Service Employee Relations Act (Alta.)*, the Supreme Court of Canada stated that (at page 368):

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

[295] Although this quotation comes from Chief Justice Dickson's dissenting judgment, similar sentiments regarding the central role that employment plays in the dignity and self-worth of the individual have been expressed in many other judgments of the Supreme Court, and of other Canadian courts: see, for example, *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, [2008] 1 S.C.R. 661; *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381; *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 S.C.R. 504, at paragraph 104; *Lavoie v. Canada*, 2002 SCC 23, [2002] 1 S.C.R. 769, at paragraph 45; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016; *Wallace v. United Grain Growers Ltd*., [1997] 3 S.C.R. 701; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at page 1002; *McKinney*, at page 278; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at page 1054; *Wilson v. British Columbia (Medical Services Commission)* (1988), 53 D.L.R. (4th) 171 (B.C.C.A.); *Assn. of Justices of the Peace of Ontario v. Ontario (Attorney General)* (2008), 92 O.R. (3d) 16 (Ont. S.C.J.), at paragraphs 113–120.

[296] In *Lavoie*, Justice Bastarache described work as "a fundamental aspect of a person's life": at paragraph 45. *Martin* describes work and employment as being crucially important as elements of essential human dignity under subsection 15(1) of the Charter: at paragraph 104. Indeed, in *Wallace*, the Supreme Court went so far as to describe work as one of the "defining features" of peoples' lives: at paragraph 94.

[297] The implications of being forced to retire against one's will have also been discussed in the jurisprudence. In this regard, Justice L'Heureux-Dubé observed in her dissenting judgment in *Dickason* that (at page 1192):

> Given the central importance that our society accords to career as a way of defining an individual's status and self-worth, it is hardly surprising that being dismissed without cause on account of one's age is extremely traumatic.

[298] After reviewing the evidence with respect to the effects that mandatory retirement can have on workers, Justice L'Heureux-Dubé went on in *Dickason* to observe that the shock of mandatory retirement, together with the loss of earning power and productive work "often leads to physical and emotional deterioration and premature death": at page 1193.

[299] Similarly, in *McKinney*, the majority decision observed that "[i]n a work-oriented society, work is inextricably tied to the individual's self-identity and self-worth": at page 300. With this in mind, Justice LaForest went on in *McKinney* to draw a similar link between mandatory retirement and the loss of an individual's self-worth, identity and emotional well-being.

[300] That is, after recognizing the intrinsic importance of work to the individual, Justice LaForest held that "[m]andatory retirement takes this away, on the basis of a personal characteristic attributed to an individual solely because of his association with a group": *McKinney*, at page 278.

[301] It once again bears repeating that what is in issue in this case is not Air Canada's mandatory retirement policy, but rather the provision of the *Canadian Human Rights Act* that denies individuals such as Messrs. Vilven and Kelly the ability to challenge the company's mandatory retirement policy.

[302] That said, the comments of the Supreme Court with respect to the impact of mandatory retirement on the self-esteem and dignity of individuals are directly relevant to the nature and scope of the interest adversely affected by paragraph 15(1)(*c*) of the *Canadian Human Rights Act*.

(v) Other observations

[303] The Tribunal framed the Charter issue before it in the following terms [at paragraph 89]: "whether, as a result of the age-based distinction in s. 15(1)(c) of the *CHRA*, the complainants' dignity was affronted or they experienced negative stereotyping relating to their age."

[304] Much of the Tribunal's ensuing Charter analysis is taken up with a discussion of Messrs. Vilven and Kelly's dignity. As was noted earlier, the Tribunal did not have the benefit of the Supreme Court's reasons in *Kapp* at the time that it rendered its decision in this matter. As a consequence, its focus on Messrs. Vilven and Kelly's dignity, and its use of dignity as a litmus test with respect to subsection 15(1) of the Charter is understandable. Nevertheless, the Tribunal's focus on the dignity issue serves as an example of the very problem that the Supreme Court identified in *Kapp*.

[305] That is, the Tribunal's determination that having regard to all of the surrounding circumstances, it could not reasonably be said that Messrs. Vilven and Kelly's dignity was adversely affected by the fact that they were denied the opportunity to challenge Air Canada's actions by virtue of paragraph 15(1)(*c*) of the *Canadian Human Rights Act* was necessarily a subjective one, relating to what is essentially an abstract notion: see *Kapp*, at paragraph 22.

[306] In coming to the conclusion that Messrs. Vilven and Kelly's dignity was not negatively affected by their inability to challenge their mandatory retirement by Air Canada under the provisions of the *Canadian Human Rights Act*, the Tribunal found that the effect of mandatory retirement on Messrs. Vilven and Kelly could not be viewed at an isolated point in time. Rather, regard had to be given to the impact of mandatory retirement over the "life cycle" of the applicants' careers with the airline.

[307] In this regard, the Tribunal considered the fact that Messrs. Vilven and Kelly were aware of the mandatory retirement policy when they commenced their employment with Air Canada, and that they had benefited from the policy through the course of their careers. According to the Tribunal, it was not unreasonable to expect them to have to bear the burden of the policy at the end of their careers. There are several problems with the Tribunal's finding in this regard.

[308] First of all, it is not the impact of Air Canada's mandatory retirement policy on Messrs. Vilven and Kelly that is in issue in this case, but rather the effect of paragraph 15(1)(*c*) of the *Canadian Human Rights Act*.

[309] The Tribunal's conclusion that paragraph 15(1)(*c*) of the Act did not have a negative impact on Messrs. Vilven and Kelly's dignity was largely based upon its assessment of the specific mandatory retirement policy at Air Canada, and the role that mandatory retirement played in the entirety of their careers with the airline. I agree with the arbitrator in *CKY-TV* that in this regard the Tribunal "slipped" to some extent "from a constitutional review of legislation into an assessment of Air Canada's particular policy as applied to its pilots": at paragraph 188.

[310] Furthermore, it appears that similar "life cycle" arguments were advanced in *McKinney*, a case that involved another group of well-educated and well-paid individuals who were able to advance in their careers through seniority and who were entitled to substantial pension benefits as a result of their employment. Nevertheless, the Supreme Court of Canada had no difficulty in finding that the legislative provision in issue in that case deprived the claimants of the equal protection of the law on the basis of an enumerated ground. This in turn conveyed the message that the claimants were less deserving of concern, respect and consideration, thus violating subsection 15(1) of the Charter: see paragraph 76.

[311] It is also difficult to reconcile the Tribunal's recognition that Messrs. Vilven and Kelly each suffered a blow to their self-esteem when they were forced to retire from Air Canada with its conclusion that denying them the right accorded to others to challenge their forced retirement under the provisions of the *Canadian Human Rights Act* did not have a negative impact on their dignity.

[312] That is, after being forced to leave the jobs that they loved, Messrs. Vilven and Kelly were told that, unlike other Canadians, they did not enjoy the protection of the *Canadian Human Rights Act* because 60 was the normal age of retirement for their type of positions. Unlike other Canadians facing age-based workplace discrimination, Messrs. Vilven and Kelly were not afforded "an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have … without being hindered in or prevented from doing so by discriminatory practices based on … age": see *Canadian Human Rights Act*, section 2.

[313] To add insult to injury, as the dominant player in the Canadian airline industry, it was Air Canada's own mandatory retirement policy that effectively set the industry norm and deprived Messrs. Vilven and Kelly of the equal benefit of the law. In other words, paragraph 15(1)(*c*) of the Act allowed Air Canada's own discriminatory conduct to provide the company with a defence to Messrs. Vilven and Kelly's human rights complaints.

[314] ACPA argues that paragraph 15(1)(*c*) was intended to allow for a negotiated age of retirement, and that no negative stereotyping results if an entire industry is regulated in that fashion. In this regard, I note that in *McKinney*, Justice LaForest accepted that 65 was the normal age of retirement for university professors in Canada, yet he still found that denying the equal protection of

the law to university professors over that age violated subsection 15(1) of the Charter as it perpetuated the stereotypical assumption that older workers were less valued members of society.

[315] Moreover, the assertion that employers should be allowed to terminate an individual's employment, solely because of the employee's age, as long as many other employees performing similar jobs are experiencing similar treatment contradicts the guarantee of equality embodied in subsection 15(1) of the Charter, that "all persons enjoy equal recognition at law as human beings … equally capable and equally deserving of concern, respect and consideration": *Law*, at paragraph 88, as discussed at paragraph 174 of *CKY-TV*.

[316] Indeed, the Supreme Court of Canada has specifically rejected the proposition that pervasive discrimination may preclude a finding that subsection 15(1) of the Charter has been breached. In *R. v. Turpin*, [1989] 1 S.C.R. 1296, the Court held that the fact that departures from the principles enshrined in subsection 15(1) of the Charter may have been widely condoned in the past is no answer to a claim that the equality provisions of the Charter have been breached. In this regard, the Supreme Court stated that the fact that the consequences of such an approach "would be novel and disturbing is not, in my respectful view, an acceptable approach to the interpretation of Charter provisions": at page 1328.

[317] All of this having been said, there are any number of arguments that have been advanced in favour of mandatory retirement as an employment practice, primarily supported in this case by the evidence of Professor Carmichael. (It should be noted that contrary arguments were advanced by Professor Kesselman. Professor Kesselman holds a PhD in economics, and is a Professor in the Graduate Public Policy Program at Simon Fraser University.)

[318] Amongst other arguments, Professor Carmichael and the respondents point out that mandatory retirement policies exist primarily in organized workplaces. Mandatory retirement ages are negotiated through the collective bargaining process, as part of a complex, integrated lifetime contractual arrangement that will usually include deferred compensation in the form of pension benefits. Mandatory retirement policies allow for stability in pension schemes. Moreover, such policies spare older workers the pain of having their jobs terminated because of age-related deterioration in their performance, allowing them instead to leave the workplace with their dignity intact.

[319] The respondents further argue that mandatory retirement allows both the employer and the employee to plan for the employee's retirement. They contend that mandatory retirement is also integral to the seniority system, which will ultimately benefit all employees, including those who will eventually be retired in accordance with the retirement policy. Compelling the retirement of employees at a fixed age also allows for "new blood" to enter the workplace, renewing the workforce and creating opportunities for younger workers.

[320] Indeed, the respondents point out that the Supreme Court of Canada observed in the majority decision in *McKinney* that mandatory retirement "has become part of the very fabric of the organization of the labour market in this country": at page 295.

[321] The respondents' arguments raise what was described in *McKinney* as a complex socio-economic problem—one that "involves the basic and interconnected rules of the workplace throughout the whole of our society": at page 302.

[322] Whatever the merits may be of the arguments advanced by the respondents to justify the statutory provision allowing for the continuation of mandatory retirement in certain circumstances, the question arises as to where it is that these arguments should be considered. That is, do they form part of the section 15 analysis, or should they more properly be taken into account at the section 1 stage of the inquiry?

[323] In *McKinney*, arguments of the type advanced by the respondents in this case to justify a similar statutory provision were all addressed by the Supreme Court in the context of its section 1 analysis.

[324] It is true that since *Law*, the line between the section 15 analysis, and that required by section 1 of the Charter is not always clear: see William Black and Lynn Smith, "The Equality Rights", previously cited, at page 959. Indeed, a review of the jurisprudence from the Supreme Court of Canada since *Law* reveals that Justices of the Supreme Court of Canada have not always agreed as to whether certain factors should be considered as part of the section 15 analysis, or are more properly dealt with at the section 1 stage: see, for example, *Gosselin*, previously cited.

[325] I have considered the respondents' "life cycle" argument in assessing the impact that paragraph 15(1)(*c*) had on Messrs. Vilven and Kelly's self-worth. I also recognize that there has been an evolution in the section 15 Charter jurisprudence since the days of *McKinney*. Nevertheless, I am of the view that the other arguments advanced by the respondents in this case to justify the perpetuation of mandatory retirement policies through paragraph 15(1)(*c*) of the *Canadian Human Rights Act* are ones that should be addressed in considering whether the statutory provision can be justified as a reasonable limitation in a free and democratic society.

[326] This view is borne out by an examination of recent jurisprudence. By way of example, in the *Assn. of Justices of the Peace of Ontario* case cited earlier, it was argued that justices of the peace did not suffer a loss of dignity when they were forced to retire at the age of 70, because they had enjoyed security of tenure until that point. Their forced retirement did not, it was argued, reflect on them as individuals, but rather served to preserve judicial independence.

[327] The trial Judge held that this argument related to the object of the legislation in issue, and not whether it was discriminatory. As a consequence, he was of the view that the argument should properly be taken into account as a justification for the statutory provision in question under section 1 of the Charter, as opposed to "the negation of the limit from the outset": *Assn. of Justices of the Peace of Ontario*, at paragraphs 109–110. The same may be said of the respondents' arguments in this case.

[328] Section 1 allows for the limitation of the rights guaranteed under section 15 of the Charter where such limitations are "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The section 1 test originally articulated by the Supreme Court of Canada in *The Queen v. Oakes*, [1986] 1 S.C.R. 103 requires that consideration be given to whether the objective of the law is "pressing and substantial". In addition, the party invoking section 1 must demonstrate that the means chosen are reasonable and demonstrably justified. This involves an assessment of proportionality.

[329] There are three components to the proportionality test. Firstly, "the measures adopted must be carefully designed to achieve the objective in question", and "must not be arbitrary, unfair or based on irrational considerations." Rather they must "[be] rationally connected to the objective." Secondly, the measures "should impair 'as little as possible' the right or freedom in question". Finally, "there must be a proportionality between the <u>effects</u> of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of 'sufficient importance'": *Oakes*, at page 139.

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

[331] Thus, the arguments advanced by the respondents including the context in which paragraph 15(1)(*c*) of the *Canadian Human Rights Act* operates, the importance of collective bargaining as a

constitutionally protected right, the need for certainty in pension plans, the link between age and declining health, as well as the arguments relating to the balancing of competing interests and matters of social policy, would all have to be taken into account by the Tribunal in determining whether the statutory provision is saved by section 1 of the Charter.

[332] At the same time, the Tribunal would also have to have regard to matters such as evolving societal attitudes with respect to age discrimination, including the fact that a number of Canadian provinces have now outlawed mandatory retirement, in determining whether there is still a pressing and substantial legislative objective behind the legislation: see also the discussion regarding issues such as this in *Assn. of Justices of the Peace of Ontario*, previously cited, at paragraphs 33 to 45, and in *Greater Vancouver Regional District Employees' Union v. Greater Vancouver Regional District*, 2001 BCCA 435, 206 D.L.R. (4th) 220, at paragraph 127.

[333] The evidence provided by Dr. Kesselman as to the negative effects of mandatory retirement, and the limited fallout that has resulted from the abolition of mandatory retirement in a number of jurisdictions would also have to be addressed in relation to the section 1 issue. So too would other considerations, such as the extent to which improvements in fitness testing have obviated the need for across-the-board safety-related retirement rules.

(d) Conclusion with respect to the subsection 15(1) Charter issue

[334] The effect of the Supreme Court of Canada's decisions in *Andrews*, *Law* and *Kapp* is that to succeed in a claim under subsection 15(1) of the Charter, it will not be enough for a claimant to show that he or she is not receiving equal treatment before and under the law, or that the law has a differential impact on him or her in the protection or benefits accorded by the law in question.

[335] A claimant must also be able to show that the legislative impact of the law is discriminatory. Two questions must be addressed in determining whether the impact of a law is discriminatory: first, does the law create a distinction based on an enumerated or analogous ground; and second, does the distinction create a disadvantage by perpetuating prejudice or stereotyping: see *Ermineskin Indian Band and Nation*, previously cited, at paragraph 188.

[336] Regard must be had to the "particular traits and circumstances" of the individual claimant, as well as to "the larger context of the legislation in question, and society's past and present treatment of the claimant and of other persons or groups with similar characteristics or circumstances": *Law*, at paragraph 59.

[337] Paragraph 15(1)(*c*) of the *Canadian Human Rights Act* denies older workers such as Messrs. Vilven and Kelly the equal protection of the law that has been described by the Supreme Court of Canada as "the final refuge of the disadvantaged and the disenfranchised": *Zurich Insurance Co.*, previously cited, at page 339.

[338] In so doing, paragraph 15(1)(*c*) of the Act has the effect of perpetuating the group disadvantage and prejudice faced by older workers in this country. Viewed both objectively, and from the subjective perspective of Messrs. Vilven and Kelly, the statutory provision promotes the perception that older workers such as Messrs. Vilven and Kelly are less worthy and less deserving of the equal protection of the law than are younger workers who lose their jobs for age-related reasons at an age below the normal age of retirement for a particular type of position.

[339] Moreover, the statutory provision can only serve to perpetuate the stereotypical view that older workers are less capable, or are less deserving of recognition or value as human beings or as members of Canadian society. As a consequence, I find that paragraph 15(1)(*c*) of the *Canadian Human Rights Act* violates subsection 15(1) of the Charter.

IX. Disposition

[340] Because of its conclusion in relation to the subsection 15(1) issue, the Tribunal did not turn its mind to whether paragraph 15(1)(*c*) of the *Canadian Human Rights Act* could be justified under section 1 of the Charter. Accordingly, the subsection 15(1) aspect of the Tribunal's decision is set aside, and the matter is remitted to the Tribunal to determine on the basis of the existing record whether paragraph 15(1)(*c*) of the Act can be demonstrably justified as a reasonable limit in a free and democratic society.

[341] In the event that the Tribunal determines that paragraph 15(1)(*c*) of the Act is not saved under section 1 of the Charter, the Tribunal will then have to address the merits of Messrs. Vilven and Kelly's human rights complaints, including Air Canada's contention that requiring that all of its pilots be younger than 60 amounts to a *bona fide* occupational requirement within the meaning of section 15 of the *Canadian Human Rights Act*.

X. Costs

[342] I see no reason why costs should not follow the events insofar as Messrs. Vilven and Kelly are concerned. Given that they were represented by the same counsel, and that their applications were heard together, they are entitled to a single set of costs on the ordinary scale, payable jointly and severally by the respondents. Having regard to the complexity of the issues involved, Messrs. Vilven and Kelly are entitled to the costs of second counsel.

[343] The Commission was unsuccessful in relation to the issues raised in its application for judicial review with respect to paragraph 15(1)(*c*) of the *Canadian Human Rights Act*, and was not involved in the Charter issue on which Messrs. Vilven and Kelly's application ultimately succeeded. Having regard to all of the circumstances, including the public interest mandate of the Canadian Human Rights Commission, I make no order of costs with respect to the Commission.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. Paragraph 15(1)(*c*) of the *Canadian Human Rights Act* violates subsection 15(1) of the *Canadian Charter of Rights and Freedoms*;

2. The applications for judicial review of Messrs. Vilven and Kelly are allowed. Their human rights complaints are remitted to the same panel of the Tribunal, if available, for the determination of the remaining outstanding issues in accordance with these reasons, on the basis of the existing record;

3. Messrs. Vilven and Kelly are entitled to a single set of costs with respect to their applications for judicial review, including the costs of second counsel, to be calculated at the middle of Column III of the table to Tariff B of the *Federal Courts Rules* [SOR/98-106, r. 1 (as am. by SOR/2004-283, s. 2)]; and

4. The application for judicial review of the Canadian Human Rights Commission is dismissed, without costs.

APPENDIX

Relevant provisions of the *Canadian Human Rights Act*

2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin,

colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

…

7. It is a discriminatory practice, directly or indirectly,

(*a*) to refuse to employ or continue to employ any individual, or

(*b*) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

…

9. (1) It is a discriminatory practice for an employee organization on a prohibited ground of discrimination

(*a*) to exclude an individual from full membership in the organization;

(*b*) to expel or suspend a member of the organization; or

(*c*) to limit, segregate, classify or otherwise act in relation to an individual in a way that would deprive the individual of employment opportunities, or limit employment opportunities or otherwise adversely affect the status of the individual, where the individual is a member of the organization or where any of the obligations of the organization pursuant to a collective agreement relate to the individual.

(2) Notwithstanding subsection (1), it is not a discriminatory practice for an employee organization to exclude, expel or suspend an individual from membership in the organization because that individual has reached the normal age of retirement for individuals working in positions similar to the position of that individual.

…

10. It is a discriminatory practice for an employer, employee organization or employer organization

(*a*) to establish or pursue a policy or practice, or

(*b*) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,

that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

…

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;

…

(*c*) an individual's employment is terminated because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual;

…

(2) For any practice mentioned in paragraph (1)(*a*) to be considered to be based on a *bona fide* occupational requirement and for any practice mentioned in paragraph (1)(*g*) to be considered to have a *bona fide* justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

…

(8) This section applies in respect of a practice regardless of whether it results in direct discrimination or adverse effect discrimination.