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Date: January 27, 2014

Dockets: T-1428-11
T-1453-11
T-1463-11
T-971-12
T-979-12

Citation: 2014 FC 83

Ottawa, Ontario, January 27, 2014

PRESENT: The Honourable Mr. Justice Annis

Docket: T-1428-11

BETWEEN:

ROBERT ADAMSON, ROBERT DAVID ANTHONY, JACOB BAKKER, DONALD BARNES, MICHAEL BINGHAM, DOUG BOYES, KENNETH BUCHHOLZ, DANIEL BURROWS, DAVID G. CAMERON, WAYNE CASWILL, GEORGE COCKBURN, BERT COPPING, GARY DELF, JAMES E. DENOVAN, MAURICE DURRANT (ESTATE OF), COLM EGAN, ELDON ELLIOTT, LEON EVANS, ROBERT FORD, LARRY FORSETH, GRANT FOSTER, GUY GLAHN, KENWOOD GREEN, JONATHAN HARDWICKE-BROWN, TERRY HARTVIGSEN, JAMES HAWKINS, GEORGE HERMAN, JAMES RICHARD HEWSON, BROCK HIGHAM, LARRY HUMPHRIES, GEORGE DONALD IDDON, PETER JARMAN, NEIL CHARLES KEATING, GEORGE KIRBYSON, ROBIN LAMB, STEPHEN LAMBERT, LES LAVOIE, HARRY G. LESLIE, ROBERT LOWES, GEORGE LUCAS, DONALD MADEC, DON MALONEY,

MICHAEL MARYNOWSKI, BRIAN MCDONALD, PETER MCHARDY, GLENN RONALD MCRAE, JAMES MILLARD, BRIAN MILSOM, HOWARD MINAKER, GEORGE MORGAN, GREG MUTCHLER, HAL OSENJAK, STEN PALBOM, MICHAEL PEARSON, DAVID POWELL-WILLIAMS, PAUL PRENTICE, MICHAEL REID, PATRICK RIESCHI, STEVEN ROSS, GARY SCOTT, PHILLIP SHAW, ANDREW SHERET, MICHAEL SHULIST, DONALD SMITH, OWEN STEWART, RAY THWAITES, DALE TRUEMAN, ANDRE VERSCHELDEN, DOUGLAS ZEBEDEE

Applicants

and

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

Respondents

Docket: T-1453-11

AND BETWEEN:

AIR CANADA

Applicant

and

ROBERT ADAMSON, ROBERT DAVID ANTHONY, JACOB BAKKER, DONALD BARNES, MICHAEL BINGHAM, DOUG BOYES, KENNETH BUCHHOLZ, DANIEL BURROWS, DAVID G. CAMERON, WAYNE CASWILL, GEORGE COCKBURN, BERT COPPING, GARY DELF, JAMES E. DENOVAN, MAURICE DURRANT, COLM EGAN, ELDON ELLIOTT, LEON EVANS, ROBERT FORD, LARRY FORSETH, GRANT FOSTER, GUY GLAHN,

KENWOOD GREEN, JONATHAN HARDWICKE-BROWN, TERRY HARTVIGSEN, JAMES HAWKINS, GEORGE HERMAN, JAMES RICHARD HEWSON, BROCK HIGHAM, LARRY HUMPHRIES, GEORGE DONALD IDDON, PETER JARMAN, NEIL CHARLES KEATING, GEORGE KIRBYSON, ROBIN LAMB, STEPHEN LAMBERT, LES LAVOIE, HARRY G. LESLIE, ROBERT LOWES, GEORGE LUCAS, DONALD MADEC, DON MALONEY, MICHAEL MARYNOWSKI, BRIAN MCDONALD, PETER MCHARDY, GLENN RONALD MCRAE, JAMES MILLARD, BRIAN MILSOM, HOWARD MINAKER, GEORGE MORGAN, GREG MUTCHLER, HAL OSENJAK, STEN PALBOM, DONALD PAXTON, MICHAEL PEARSON, DAVID POWELL-WILLIAMS, PAUL PRENTICE, MICHAEL REID, PATRICK RIESCHI, STEVEN ROSS, GARY SCOTT, PHILLIP SHAW, ANDREW SHERET, MICHAEL SHULIST, DONALD SMITH, OWEN STEWART, RAY THWAITES, DALE TRUEMAN, ANDRE VERSCHELDEN, AND DOUGLAS ZEBEDEE, CANADIAN HUMAN RIGHTS COMMISSION, AIR CANADA PILOT ASSOCIATION

Respondents

Docket: T-1463-11

AND BETWEEN:

AIR CANADA PILOTS ASSOCIATION

Applicant

and

ROBERT ADAMSON, ROBERT DAVID ANTHONY, JACOB BAKKER, DONALD BARNES, MICHAEL BINGHAM, DOUG BOYES, KENNETH BUCHHOLZ, DANIEL BURROWS, DAVID G. CAMERON, WAYNE CASWILL, GEORGE COCKBURN, BERT COPPING, GARY DELF, JAMES E. DENOVAN, MAURICE DURRANT, COLM EGAN, ELDON ELLIOTT, LEON EVANS, ROBERT FORD, LARRY FORSETH, GRANT FOSTER, GUY GLAHN,

KENWOOD GREEN, JONATHAN HARDWICKE-BROWN, TERRY HARTVIGSEN, JAMES HAWKINS, GEORGE HERMAN, JAMES RICHARD HEWSON, BROCK HIGHAM, LARRY HUMPHRIES, GEORGE DONALD IDDON, PETER JARMAN, NEIL CHARLES KEATING, GEORGE KIRBYSON, ROBIN LAMB, STEPHEN LAMBERT, LES LAVOIE, HARRY G. LESLIE, ROBERT LOWES, GEORGE LUCAS, DONALD MADEC, DON MALONEY, MICHAEL MARYNOWSKI, BRIAN MCDONALD, PETER MCHARDY, GLENN RONALD MCRAE, JAMES MILLARD, BRIAN MILSOM, HOWARD MINAKER, GEORGE MORGAN, GREG MUTCHLER, HAL OSENJAK, STEN PALBOM, DONALD PAXTON, MICHAEL PEARSON, DAVID POWELL-WILLIAMS, PAUL PRENTICE, MICHAEL REID, PATRICK RIESCHI, STEVEN ROSS, GARY SCOTT, PHILLIP SHAW, ANDREW SHERET, MICHAEL SHULIST, DONALD SMITH, OWEN STEWART, RAY THWAITES, DALE TRUEMAN, ANDRE VERSCHELDEN, DOUGLAS ZEBEDEE, AND CANADIAN HUMAN RIGHTS COMMISSION AND AIR CANADA

Respondents

Docket: T-971-12

AND BETWEEN:

AIR CANADA

Applicant

and

ROBERT ADAMSON, ROBERT DAVID ANTHONY, JACOB BAKKER, DONALD BARNES, MICHAEL BINGHAM, DOUG BOYES, KENNETH BUCHHOLZ, DANIEL BURROWS,

DAVID G. CAMERON, WAYNE CASWILL, GEORGE COCKBURN, BERT COPPING, GARY DELF, JAMES E. DENOVAN, MAURICE DURRANT, COLM EGAN, ELDON ELLIOTT, LEON EVANS, ROBERT FORD, LARRY FORSETH, GRANT FOSTER, GUY GLAHN, KENWOOD GREEN, JONATHAN HARDWICKE-BROWN, TERRY HARTVIGSEN, JAMES HAWKINS, GEORGE HERMAN, JAMES RICHARD HEWSON, BROCK HIGHAM, LARRY HUMPHRIES, GEORGE DONALD IDDON, PETER JARMAN, NEIL CHARLES KEATING, GEORGE KIRBYSON, ROBIN LAMB, STEPHEN LAMBERT, LES LAVOIE, HARRY G. LESLIE, ROBERT LOWES, GEORGE LUCAS, DONALD MADEC, DON MALONEY, MICHAEL MARYNOWSKI, BRIAN MCDONALD, PETER MCHARDY, GLENN RONALD MCRAE, JAMES MILLARD, BRIAN MILSOM, HOWARD MINAKER, GEORGE MORGAN, GREG MUTCHLER, HAL OSENJAK, STEN PALBOM, DONALD PAXTON, MICHAEL PEARSON, DAVID POWELL-WILLIAMS, PAUL PRENTICE, MICHAEL REID, PATRICK RIESCHI, STEVEN ROSS, GARY SCOTT, PHILLIP SHAW, ANDREW SHERET, MICHAEL SHULIST, DONALD SMITH, OWEN STEWART, RAY THWAITES, DALE TRUEMAN, ANDRE VERSCHELDEN, DOUGLAS ZEBEDEE, AND CANADIAN HUMAN RIGHTS COMMISSION AND AIR CANADA PILOTS ASSOCIATION

Respondents

Docket: T-979-12

AND BETWEEN:

AIR CANADA PILOTS ASSOCIATION

Applicant

and

ROBERT ADAMSON, ROBERT DAVID ANTHONY, JACOB BAKKER,

DONALD BARNES, MICHAEL BINGHAM, DOUG BOYES, KENNETH BUCHHOLZ, DANIEL BURROWS, DAVID G. CAMERON, WAYNE CASWILL, GEORGE COCKBURN, BERT COPPING, GARY DELF, JAMES E. DENOVAN, MAURICE DURRANT, COLM EGAN, ELDON ELLIOTT, LEON EVANS, ROBERT FORD, LARRY FORSETH, GRANT FOSTER, GUY GLAHN, KENWOOD GREEN, JONATHAN HARDWICKE-BROWN, TERRY HARTVIGSEN, JAMES HAWKINS, GEORGE HERMAN, JAMES RICHARD HEWSON, BROCK HIGHAM, LARRY HUMPHRIES, GEORGE DONALD IDDON, PETER JARMAN, NEIL CHARLES KEATING, GEORGE KIRBYSON, ROBIN LAMB, STEPHEN LAMBERT, LES LAVOIE, HARRY G. LESLIE, ROBERT LOWES, GEORGE LUCAS, DONALD MADEC, DON MALONEY, MICHAEL MARYNOWSKI, BRIAN MCDONALD, PETER MCHARDY, GLENN RONALD MCRAE, JAMES MILLARD, BRIAN MILSOM, HOWARD MINAKER, GEORGE MORGAN, GREG MUTCHLER, HAL OSENJAK, STEN PALBOM, DONALD PAXTON, MICHAEL PEARSON, DAVID POWELL-WILLIAMS, PAUL PRENTICE, MICHAEL REID, PATRICK RIESCHI, STEVEN ROSS, GARY SCOTT, PHILLIP SHAW, ANDREW SHERET, MICHAEL SHULIST, DONALD SMITH, OWEN STEWART, RAY THWAITES, DALE TRUEMAN, ANDRE VERSCHELDEN, DOUGLAS ZEBEDEE AND CANADIAN HUMAN RIGHTS COMMISSION AND AIR CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

APPLICATIONS for judicial review of the Canadian Human Rights Tribunal's dismissal on August 10, 2011 (2011 CHRT 11) of age-based discrimination complaints filed by seventy complainants on the basis that the contested mandatory age of retirement did not amount to a discriminatory measure pursuant to section 15(1)(*c*) of the *Canadian Human Rights Act*. Applications allowed in T-1428-11 and T-1463-11; application dismissed in T-1453-11. Applications T-971-12 and T-979-12 are dismissed.

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I. INTRODUCTION

[1] This is a judicial review of a decision of the Canadian Human Rights Tribunal (CHRT or "the Tribunal"), 2011 CHRT 11. The complainants initiated a complaint pursuant to the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA or the *Act*] against Air Canada and the Air Canada Pilots Association [ACPA] (together "the respondents"), claiming an alleged discriminatory practice relating to age with respect to the mandatory retirement rule in their collective agreement. A judicial review was also sought of a related further decision of the Tribunal, 2012 CHRT 9, concerning an amended remedy pending an appeal to the Federal Court of Appeal; this has been dismissed.

[2] The complainants are a group of individual applicants gathered into the "Fly Past 60 Coalition". They are past members of ACPA employed by Air Canada, an organization which employs over 2,800 pilots in total. Other similar cases of retired pilots may be waiting to be heard after this matter is disposed of.

[3] The complainants allege that Air Canada and ACPA contravened sections 7 and 10 of the CHRA by requiring them to retire as each reached the age of 60 at various dates between 2005 and 2009, regardless of merit or ability to continue flying, none of which is denied.

[4] Air Canada pilots are the best paid in Canada, with generous benefits and excellent working conditions, particularly as pilots gain seniority. The benefits include a lucrative defined benefit pension awaiting them upon retirement, along with good job prospects to fly for other airlines after retiring on account of their training and experience. Accordingly, this case should be circumscribed

to its facts of a mandatory retirement provision [MRP] in an area of scarce good jobs with relatively little financial hardship on retirement.

[5] Since 1957, the Air Canada pension plan has stipulated that 60 is the compulsory age of retirement for pilots. As of the early 1980's, provisions mandating retirement at age 60 were included as part of the collective agreement in force between Air Canada and its pilots' union. Since 1995, ACPA has been the union representing Air Canada pilots. Under the terms of the collective agreement and pension plan between Air Canada and ACPA, Air Canada pilots are required to retire on the first day of the month following their 60th birthday.

[6] A relevant constraint is that Canada adheres to International Civil Aviation Organization (ICAO) standards. Until March 2006, ICAO set a maximum age of 60 for a pilot in command and recommended, but did not require, that a co-pilot on an international flight not fly past his or her 60th birthday. In March 2006, coming into force in November 2006, ICAO set 65 as the maximum age for pilots and set as the standard that if one pilot was over 60, the other must be under 60.

[7] In 2011 CHRT 11, the Tribunal made an initial finding of *prima facie* discrimination, which was never in dispute due to legacy proceedings which will be described below, and the fact that the respondents did not contest it.

[8] The Tribunal also rejected the *Bona Fide* Occupational Requirement (BFOR) defences of Air Canada and ACPA. Ultimately, however, the allegations of a discriminatory practice were not

upheld because the Tribunal concluded that 60 was the "normal age of retirement" in the Canadian passenger airline industry, thereby denying liability pursuant to section 15(1)(*c*) of the *Act*.

[9] All three parties filed judicial review applications seeking to set aside that aspect of the Tribunal's decision which was not in their favour. The complainants challenged the finding on normal age of retirement (Court file T-1428-11) while Air Canada and ACPA sought to set aside the Tribunal's decision rejecting their BFOR defences (T-1453-11 and T-1463-11 respectively).

[10] The Canadian Human Rights Commission (Commission) also applied for judicial review (T-1456-11, now discontinued), seeking a determination of the constitutionality of section 15(1)(*c*). The Commission discontinued this application when the CHRT agreed to consider the question.

[11] On April 18, 2012, the Tribunal issued 2012 CHRT 9, finding that section 15(1)(*c*) violated the guarantee of equality in section 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Charter*]. This reversed the previous outcome of the complaint, as Air Canada and ACPA no longer had a valid defence to the *prima facie* discrimination. Air Canada applied for judicial review of this new decision (T-971-12), as did ACPA (T-979-12).

[12] However, shortly afterwards, on July 17, 2012, in *Air Canada Pilots Association v Kelly*, 2012 FCA 209 ["*Kelly* FCA"], the Federal Court of Appeal, considering a previous series of Tribunal and Federal Court decisions on the Air Canada mandatory retirement age of 60, upheld the constitutionality of section 15(1)(*c*). Leave to appeal was denied by the Supreme Court in [2013]

SCCA No 395 (QL). The Tribunal's decision in 2012 CHRT 9 is therefore no longer valid, and Court files T-971-12 and T-979-12 are dismissed.

[13] In the reasons that follow, I allow the application of the complainants, setting aside the Tribunal's decision on the normal age of retirement of pilots at age 60. Conversely, I dismiss Air Canada's application to set aside the Tribunal's decision rejecting its BFOR defence. Most significantly however, I allow ACPA's application to set aside the Tribunal's decision dismissing its BFOR defence and I send the matter back for redetermination by the same panel.

[14] I say significantly because my decision is based on an important distinction in the facts from those in the many similar cases that have preceded this one. In the present case, ACPA based its hardship argument on new evidence demonstrating an adverse differential financial impact affecting its younger members in the event of the elimination of the age 60 rule in the collective agreement. The Tribunal nevertheless dismissed ACPA's application, finding that ACPA's evidence on hardship presented a "close call".

[15] In this regard, I conclude that the Tribunal failed to properly justify its decision in a transparent fashion. By that I mean the Tribunal omitted to consider important aspects of the evidence that demonstrated a significant adverse financial impact on younger pilots. Most importantly, it mischaracterized the impact of extending the pilots' careers as a matter of delaying retirement, without considering ACPA's submission that the pilots would be working an additional three years to achieve the net total revenues situation portrayed at age 63. In the case of the younger

pilots, this would mean working for highly reduced effective rates of pay or even for free during those three years.

[16] However, it was not a straightforward matter to set aside the Tribunal's decision concerning ACPA's application and simply send it back for reconsideration on the hardship issue. Before dismissing the hardship claims, the Tribunal had already concluded that ACPA's application would fail, because as a union, it did not meet the requirements of steps one and two of the test in *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (BCGSEU) (Meiorin Grievance)*, [1999] 3 SCR 3, [1999] SCJ No 46 (QL) [*Meiorin*] at para 54. The Tribunal's hardship analysis was carried out as a matter of "prudence", most likely to demonstrate to ACPA that its application was dismissed on substantive grounds.

[17] Accordingly, setting aside the Tribunal's ruling on ACPA's BFOR defence required surmounting a number of preliminary obstacles and reconsidering previous jurisprudence touching on these issues. For this purpose, I first concluded that in accordance with the Supreme Court decision in *Central Okanagan School District v Renaud*, [1992] 2 SCR 970, [1992] SCJ No 75 (QL) [*Renaud*], the *Meiorin* test could be modified to avoid imposing absolute liability on ACPA. The *Meiorin* BFOR test was therefore amended to reflect ACPA's joint liability with Air Canada. I also added a fourth step to the *Meiorin* test, as appeared to be the Supreme Court's direction in *Renaud*, requiring weighing the importance of preventing the discriminatory practice in allowing a defence of hardship.

[18] As an adjunct to the proscription in *Renaud* against imposing absolute liability, and for other reasons, I also respectfully disagreed with this Court's previous decision in *Vilven v Air Canada*, 2009 FC 367, [*Vilven*] that held that the categories of hardship should be confined to those expressly enumerated in section 15(2) of the CHRA, being factors of safety, health and costs.

[19] In addition, although this issue was not raised by the respondents, I concluded that the new evidence on adverse differential impact required a fresh consideration of whether the MRP was substantively discriminatory. This consideration was premised on comments of the Supreme Court in *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, [1999] SCJ No 12 (QL) [*Law*] and *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] SCJ No 12 (QL) [*Withler*] that together allow for a suggestion that the mandatory retirement rule should be seen as serving an ameliorative purpose to provide for the beneficial age-based equal distribution of benefits among ACPA's members, as opposed to serving to perpetuate stereotypes and prejudice.

[20] Where the introduction of adverse differential impact evidence appears capable of affecting conclusions on both discrimination and hardship issues, it does not make sense in a redetermination to consider only one of the issues, and not the other.

[21] In a similar vein, I queried whether in the 21st century it remains realistic to argue that there exist widespread attitudinal stereotypes and prejudice that disadvantage older workers in the workplaces. Accordingly, my direction to the Tribunal includes instructions permitting the introduction of evidence with the view to reconsider past judicial notice conclusions of the Supreme Court, principally from *McKinney v University of Guelph*, [1990] 3 SCR 229, [1990] SCJ No 122

(QL) [*McKinney*], relied on in *Vilven* to support the Tribunal's finding that the retirement rule perpetuated stereotypes and prejudice against older workers.

[22] This direction is based on the comments of LeBel J. in *Québec (AG) v A*, 2013 SCC 5, [2013] SCJ No 5 (QL) [*Québec v A*] at para 154 that "the court can take judicial notice of certain facts or matters but must be careful not to use judicial notice to recognize social phenomena that may not truly exist."

[23] My reasons in support of the foregoing rulings and directions follow below.

II. JUDICIAL HISTORY

[24] In order to provide context for these issues, it is necessary to understand the lengthy procedures which have preceded the present review hearing. The numerous tribunal and court rulings result from different issues being decided at different steps in the judicial history, giving rise to further additional issues as decisions of the Tribunal were set aside and new issues set out for consideration. Unfortunately, this pattern of overturning the Tribunal's decision and sending the matter back for redetermination on different issues does not end with this case.

[25] Several aspects of the case currently before me are legacy issues from a previous series of challenges to Air Canada's mandatory retirement provision, those being the *Vilven* and *Kelly* cases described in the following sections.

A. *Vilven v Air Canada*, 2007 CHRT 36 [*Vilven Tribunal #1*]

[26] Two issues were decided by the Tribunal in this matter. First, it concluded that the normal age of retirement of airline pilots in comparator airlines was age 60. This finding resulted in a dismissal of the complaints on the basis that the MRP in the collective agreement was saved by section 15(1)(*c*) of the CHRA, which provides that it is not a discriminatory practice if termination results "because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual". Second, the Tribunal determined that para 15(1)(*c*) did not infringe section 15(1) of the *Charter*. Both decisions were overturned by the Federal Court.

[27] The basic facts were similar to those in the present case. Two retired pilots, George Vilven and Robert Neil Kelly, complained of age discrimination to the CHRC in 2007. Mr. Vilven had been employed from May 26, 1986 until the day after he turned 60 on August 30, 2003; Mr. Kelly had been employed from September 11, 1972 until the day after he turned 60 on April 30, 2005.

[28] Mr. Vilven had risen to the position of First Officer on an A340 aircraft based in Vancouver, after which he chose not to become a pilot in command but instead used his seniority to remain on that aircraft type and in Vancouver near his family. Upon retiring from Air Canada, he was entitled to a pension of $6,094.04 per month until the age of 65 and $5,534.33 thereafter. He pursued his flying career with a smaller airline. Mr. Kelly had risen to the position of pilot in command on an A340. He was entitled to a pension of $10,233.96 per month until the age of 65

and $9,477.56 thereafter. He too pursued his flying career with smaller airlines after leaving Air Canada.

[29] The complainants established a *prima facie* case of discrimination against Air Canada under sections 7 (refusing to continue to employ an individual on the basis of age, a prohibited ground of discrimination) and 9 (depriving individuals of employment opportunities on a prohibited ground) of the CHRA. A similar finding was made against ACPA under section 10(*b*) (an employee organization entering into an agreement that deprives individuals of employment opportunities on a prohibited ground).

[30] The Tribunal determined that the proper comparator group by which to establish the normal age of retirement in the airline industry was "pilots who fly with regularly scheduled international flights with a major international airline." The parties produced a joint statement of facts listing 22 major international comparator airlines of which only six were Canadian. For those major international airlines for which complete data was available, 80% of pilot positions had required mandatory retirement at age 60 or younger in 2003, and the Tribunal concluded that this remained the case in 2005. Thus, age 60 was held to be the mandatory age of retirement for the majority of positions similar to those of the complainants.

[31] The Tribunal further found that section 15(1)(*c*) of the CHRA did not contravene section 15(1) of the *Charter*. In doing so, it applied *Law*, in which the Supreme Court had stated that the overriding concern was to protect and promote human dignity. It concluded that to continue an arrangement which constituted *prima facie* age discrimination based on a justification of section

15(1)(*c*) of the CHRA did not have a negative impact on the complainants' dignity, in the context of a system which was designed to allocate/spread the responsibilities and benefits of being an Air Canada pilot over different stages in pilots' careers.

[32] Because of its finding on the section 15 *Charter* issue, the Tribunal did not have to decide whether section 15(1)(*c*) of the CHRA could be justified under section 1 of the *Charter*, nor whether the mandatory retirement policy was a BFOR under sections 15(1)(*a*) and 15(2) of the CHRA.

B. *Vilven v Air Canada*, 2009 FC 367 [*Vilven*]

[33] Messrs. Vilven and Kelly applied for judicial review of the Tribunal's two decisions referred to above. With respect to the normal age of retirement issue, Justice Mactavish rejected the Tribunal's test for determining the comparator airlines. She concluded that it erred by focusing on the subjective perceptions of pilot positions such as status or prestige, when the characteristics of comparator airlines should have been based on the objective duties and functional responsibilities of the position in question, that is "what pilots actually do".

[34] Rather than setting aside the decision, however, since the factual foundation was based upon the Agreed Statement of Facts describing the major international airlines, she concluded that the five Canadian airlines on that list should constitute the comparator airlines for the purpose of determining normal age of retirement. On the basis of those airlines, as well as Air Canada, the Court upheld the Tribunal's decision that 60 was the normal age of retirement for

individuals employed in positions similar to those occupied by Messrs. Vilven and Kelly prior to their retirement.

[35] A series of decisions on the constitutionality of section 15(1)(*c*) followed, but ultimately the provision was found not to infringe the *Charter*. Accordingly, Justice Mactavish's decision on the normal age of retirement resulted in the dismissal of the Vilven and Kelly complaints. Its legacy in the present matter relates to the interpretation of her test to determine comparator airlines, which formed the basis of the Tribunal's decision in this matter in favour of Air Canada. Ultimately, I set aside the Tribunal decision for not having properly applied Justice Mactavish's test

[36] Justice Mactavish thereafter reviewed the Tribunal's decision that section 15(1)(*c*) did not infringe the *Charter*. The Tribunal had considered *McKinney*, *Gosselin v Quebec (AG)*, 2002 SCC 84, [2002] 4 SCR 429 [*Gosselin*] and subsequent jurisprudence. It reached the conclusion that the loss of the opportunity to challenge the MRP had not violated the dignity of the complainants nor failed to recognize them as full and equal members of society.

[37] Turning to the constitutional question, Justice Mactavish asked whether section 15(1)(*c*) of the CHRA violated section 15(1) of the *Charter*. She reviewed the Supreme Court jurisprudence on mandatory retirement, including the *Law* case and *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 [*Kapp*], as well as the Tribunal's decision on the issue. She commented that the focus of section 15(1) of the *Charter* was on preventing governments from making distinctions based on enumerated or analogous grounds which had the effect of perpetuating group disadvantages and prejudice or which imposed disadvantages on the basis of stereotyping.

For there to be discrimination, there first had to be a distinction, and then that distinction had to be shown to create a disadvantage. She took note of the Supreme Court's recognition that "human dignity," as an abstract and subjective notion, posed difficulties as a test, and that the perpetuation of disadvantage or stereotyping was a preferable test.

[38] She noted that the objective of section 15(1)(*c*) of the CHRA had previously been described as allowing for the continuation of a socially desirable employment regime, which included pensions, job security, wages, and benefits. It was intended to create an exception to the quasi-constitutional rights otherwise provided by the *Act*.

[39] Examining section 15(1)(*c*), she found that by exempting mandatory retirement from conduct which would otherwise amount to *prima facie* age discrimination, it created a distinction based on an enumerated ground. She noted that the relevant comparison was between older workers having exceeded the normal age of retirement for their positions and younger workers in similar positions who had not yet reached that age. The effect of the provision was to deny the older workers the equal protection and benefit of the CHRA.

[40] She then considered whether this distinction created a disadvantage by perpetuating prejudice or stereotyping. Air Canada had argued, citing *Gosselin*, that age-based distinctions are a common way of ordering our society and do not automatically evoke a pre-existing disadvantage. Justice Mactavish commented that this was based on comments made by the Supreme Court in a case involving a statutory age-based distinction that had an adverse

differential effect on younger individuals, and that age-based section 15 claims were typically brought by older people, who were presumed to lack abilities which they might in fact possess.

[41] The Tribunal found that Messrs. Vilven and Kelly were members of a group identified as older workers, a group the Supreme Court had repeatedly recognized as suffering from pre-existing disadvantages and stereotyping. In addition to its comments in *Gosselin* and *Law*, the Supreme Court referred in *McKinney* to "the stereotype of older persons as unproductive, inefficient, and lacking in competence." By denying the benefit of, in that case, the Ontario provincial *Human Rights Code*, RSO 1990, c H.19, to older workers, the effect was to reinforce "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."

[42] As discussed below, when raising the issue as to whether the differential adverse impact evidence not before Justice Mactavish should give rise to an issue of whether the MRP is discriminatory, I query the validity of a widespread negative stereotype against older workers in our present society.

[43] In the cases of Messrs. Vilven and Kelly, the Tribunal accepted this general proposition, but found that there was no indication that either complainant had personally experienced such age-related disadvantages or stereotypes. Justice Mactavish observed that first, to the extent that the analysis was of the group to which the claimants belonged – older workers – it was clear that there was pre-existing disadvantage, vulnerability, stereotyping, or prejudice. Second, although there was no concern with the individual abilities of Messrs. Vilven and Kelly, they were

nonetheless disadvantaged by being forced to leave positions that they clearly loved, merely because they had reached the age of 60. She was satisfied that this had the effect of perpetuating a group disadvantage, suggesting that the MRP violated section 15(1) of the *Charter*.

[44] She examined whether the provision had an ameliorative purpose or effect which could save it. Air Canada had argued that it had the effect of freeing up positions for younger workers. However, Justice Mactavish found that there had been no suggestion that younger workers constituted a disadvantaged group which was being targeted by the CHRA.

[45] As for whether the MRP is discriminatory as opposed to the constitutionality of section 15(1)(*c*), to the extent that there is overlapping of relevant considerations, I conclude that there is an important distinction between the factual foundation in the matter that was before Justice Mactavish and the current matter. Based on the evidentiary record which was placed before me, I find that the increase in the retirement age to 63 would result in a significant adverse differential impact on younger pilots.

[46] In *Vilven*, Justice Mactavish pointed out that the Supreme Court had stated in *McKinney* that legislation that had as its objective the forcible retirement of older workers in order to make way for younger workers would be in itself discriminatory, since it would assume that the continued employment of some individuals was less important and of less value to society, than the employment of other individuals, based solely on age.

[47] In the case of Messrs. Vilven and Kelly, the interest at stake was the ability to continue to work in the career of their choice. The importance of this could not be overstated, commented Justice Mactavish. She concluded that section 15(1)(*c*) of the *Act* violated section 15(1) of the *Charter*, by denying the equal protection and equal benefit of the law to workers over the normal age of retirement for similar positions.

[48] Consequently, she quashed the Tribunal's decision as it related to the *Charter*, and remitted the matter to the Tribunal for determination of whether section 15(1)(*c*) of the *Act* could be demonstrably justified as a reasonable limit in a free and democratic society under section 1 of the *Charter*.

[49] In the event that the Tribunal determined that section 15(1)(*c*) of the CHRA was not saved under section 1 of the *Charter*, she directed that it address the issue of whether the age 60 retirement rule was a BFOR for Air Canada within the meaning of section 15(1)(*a*) of the CHRA.

C. *Vilven v Air Canada*, 2009 CHRT 24 [*Vilven Tribunal #2*]

[50] As a result of the Federal Court decision in *Vilven*, two further issues were remitted to the Tribunal for determination: whether section 15(1)(*c*) of the CHRA could be justified under section 1 of the *Charter* and whether Air Canada and ACPA had established a BFOR for mandatory pilot retirement at age 60.

[51] In assessing whether section 15(1)(*c*) of the CHRA was saved under section 1 of the *Charter*, the Tribunal applied the test articulated by the Supreme Court in *R v Oakes*, [1986] 1 SCR 103, [1986] SCJ No 7 (QL) [*Oakes*]. It concluded that section 15(1)(*c*) of the CHRA could not be justified under any of the elements of the test.

[52] It was thus necessary for the Tribunal to consider whether Air Canada and ACPA had demonstrated that mandatory retirement at age 60 constituted a BFOR for Air Canada pilots.

[53] In answering this question, the Tribunal applied the *Meiorin* test established by the Supreme Court.

[54] According to the Tribunal, neither Messrs. Vilven and Kelly nor the Commission disputed that the first two components of the *Meiorin* test had been satisfied (that the MRP be rationally connected to the performance of the job and good faith adoption of the provision). This finding was later disputed before the Federal Court. In any event, the Tribunal only considered what it saw as the "real issue": whether Messrs. Vilven and Kelly could be accommodated without causing undue hardship to Air Canada and/or ACPA.

[55] In analyzing undue hardship, the Supreme Court indicated in *Meiorin* that the factors of health, safety, and costs listed at subsection 15(2) of the CHRA were not entrenched unless expressly included or excluded by a statute being considered. Further support for the non-exhaustive nature of this list could be found in *McGill University Health Centre v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 SCR 161, where the Supreme

Court emphasized that the factors which would support a finding of undue hardship were to be applied with flexibility and common sense.

[56] In the case before the Tribunal, Air Canada argued that the ICAO standards caused undue hardship – that it would have imposed major financial burdens and disruption to operations to accommodate captains over the age of 60 under the pre-November 2006 rules, which banned them from flying internationally. The Tribunal considered the submissions as to the hardship resulting from the difficulty of scheduling pilots over 60. After examining the evidence the Tribunal found that Air Canada had not established that the retirement of Air Canada pilots at age 60 caused hardship and dismissed its BFOR defence.

[57] ACPA, in a different situation as a union and not an employer, argued that the hardship from its point of view, as in *Renaud*, was whether there would be prejudice to its members if the accommodation measures were adopted.

[58] ACPA submitted that removal of the MRP would limit the number of positions available to pilots under 60, dilute their seniority, interfere with their ability to plan for retirement in terms of timing and pension, and have a negative effect on morale. It also claimed that the difference in salary which would result from younger pilots being blocked from moving up would be measured in the tens of thousands of dollars. It offered expert opinion evidence to the effect that three to ten percent of pilots could be expected to work longer if allowed to, and that assuming they worked for an average of three extra years each, this would delay promotion for younger pilots by one to four months.

[59] The Tribunal found that a delay in career progression and salary increases for younger employees was not a substantial interference with their rights, and that it was not more important to make way for younger workers than to continue the employment of older workers. In this regard it concluded that "It is not as ACPA stated, that the over 60 pilots would be taking money out of the younger workers' pockets if the age 60 rule was removed." Rather, the younger pilots would take longer to achieve the salary increases that they desired. It also found that "Offset against the delay in career progression would be the fact that the younger pilots would have the freedom - when they reached age 60 - to work as long as they needed or wished to work."

[60] The Tribunal also rejected the proposition that younger pilots would not be able to enjoy the benefits of the seniority system if the older pilots were not forced to retire, as not having been established on the evidence and as being inconsistent with the human rights principle stated in *Renaud*. Insisting that the absolute preservation of a younger pilot's seniority took precedence over the continued employment of older colleagues was a purely age-based and therefore arbitrary judgment about the relative worth to society of the work performed by each age group, and the relative importance to the individual of being employed. It concluded that ACPA had also not established that the retirement of Air Canada pilots at age 60 constituted a BFOR.

D. *Vilven v Air Canada*, 2010 CHRT 27 [*Vilven Tribunal Damages*]

[61] In this decision, the CHRT found that the appropriate way to remedy the discrimination against Messrs. Vilven and Kelly was to order their reinstatement as pilots with Air Canada. This involved "unwinding" the previous pension transactions; the two successful complainants

were to repay the pension payments they had received and remit the pension contributions they would have made.

E. *Air Canada Pilots Association v Kelly*, 2011 FC 120 [*Kelly*]

[62] Air Canada and ACPA both applied for judicial review of *Vilven Tribunal #2*, concluding that section 1 of the *Charter* did not justify section 15(1)(*c*) of the CHRA. Justice Mactavish dismissed their applications, which – until this was reversed by the Court of Appeal - foreclosed any argument regarding the normal age of retirement issue. Ultimately, however, by the Court of Appeal's decision in *Air Canada Pilots' Association v Kelly*, 2012 FCA 209, the complainants' case was dismissed on this issue based upon Justice Mactavish's conclusions in *Vilven* on normal age of retirement.

[63] With respect to the BFOR issue, only Air Canada sought judicial review of the Tribunal's decision. It again argued the hardship imposed by the ICAO standards governing international flights.

[64] As for the scope of the undue hardship factors with regard to accommodation, Justice Mactavish rejected the Tribunal's determination that it could look at factors other than health, safety, and cost. Air Canada had argued that elimination of the MRP would interfere with employee morale, and that this was an eligible factor for consideration.

[65] Justice Mactavish analyzed section 15(2) in light of both the interpretive principle of *expressio unius est exclusio alterius* (to express one thing is to exclude another) and the principle

that defences within human rights statutes should be interpreted narrowly. She concluded that the express inclusion of three specific factors was to be construed as limiting consideration to those three factors.

[66] She also found that as human rights legislation is "the final refuge of the disadvantaged and the disenfranchised" and "the last protection of the most vulnerable members of society" (*Zurich Insurance Co v Ontario (Human Rights Commission)*, [1992] 2 SCR 321, [1992] SCJ No 63 (QL) [*Zurich*] at para 18), only matters of a sufficient gravity as to have a demonstrable impact on the operations of an employer in a way that related to health, safety, or cost should be taken into account as defences. In addition, she imputed knowledge to Parliament of decisions by the Supreme Court which provided unlimited scope to hardship factors as demonstrating the legislative intent to narrow these to the factors expressly referred to in the provision. As I respectfully disagree with this interpretation of section 15(2), these and other considerations will be reviewed below.

[67] Justice Mactavish set aside the Tribunal's decision dismissing Air Canada's BFOR defence. She found that it had failed to address significant evidence on hardship as it pertained to the impact on scheduling of retaining pilots older than the ICAO standards permitted on international flights which meant that this element of its decision lacked the transparency and accountability required of a reasonable decision.

[68] She also found that, contrary to the Tribunal's view, no concession had been made on steps one and two of the *Meiorin* test, and sent that issue back for reconsideration.

F. *Kelly & Vilven v Air Canada & ACPA*, 2011 CHRT 10 [*Kelly Tribunal*]

[69] By the direction of the Federal Court in *Kelly*, the Tribunal was required to consider first whether Air Canada had met the first two steps of the *Meiorin* test and second, whether it had demonstrated hardship for the period after 2006 due to scheduling complications caused by the elimination of the MRP and costs associated with those complications.

[70] The Tribunal noted that the first and second steps of the *Meiorin* test require an assessment of the legitimacy of the standard's general purpose, and the employer's intent in adopting it. This was to ensure that, when viewed both objectively and subjectively, the standard does not have a discriminatory foundation.

[71] The CHRT found that for decades Air Canada had engaged in a legitimate and meaningful bargaining process with the pilots' union that resulted in an enduring collective agreement which enshrined seniority and provided for mandatory retirement at age 60 with a generous pension. As a result, Air Canada had been able to effectively manage the introduction of new pilots to replace a predictable number of retiring pilots. Assessing this situation both subjectively and objectively, the Tribunal concluded on a balance of probabilities that the MRP did not have a discriminatory foundation. In this matter, the complainants in the current proceedings argue that Air Canada did not consider measures that could have been implemented to accommodate the retiring pilots, allowing them to fly without causing undue hardship, an argument I reject as not being feasible in the circumstances.

[72] The Tribunal, in what I would describe as an abridged analysis, also found that Air Canada had proved that it would suffer undue hardship in accommodating the complainants due to the restrictions of the ICAO over/under rule. It concluded that abolishing mandatory retirement would have negative consequences for Air Canada by significantly increasing operational costs and inefficiency in the scheduling of pilots and, to a lesser extent, causing negative ramifications for the pilots' pension plan and the collective bargaining agreement, by affecting the rule of seniority. In this regard, it would appear that the Tribunal ignored the direction in *Kelly* limiting hardship to the factors in section 15(2).

[73] In the matter before me, it should be noted that the Tribunal came to a different conclusion, rejecting Air Canada's BFOR defence. I dismiss Air Canada's application seeking to set aside this later Tribunal decision for the reasons described below.

G. *Adamson v Air Canada*, 2011 CHRT 11 ["*Adamson*" or "this matter"]

[74] This is the matter with which I am seized. A detailed analysis follows below. There are two legacy issues arising out of the previous decisions, but now grounded in new evidence: from *Vilven*, the normal age of retirement defence raised by Air Canada; and from *Kelly*, the BFOR defences raised by Air Canada and ACPA.

H. *Air Canada Pilots Association v Kelly*, 2012 FCA 209 [*Kelly FCA*]

[75] As already mentioned, the Federal Court of Appeal overturned the decision in *Kelly* that rejected Air Canada and ACPA's argument that section 15(1)(*c*) of the CHRA could be justified pursuant to section 1 of the *Charter*. The Court found that this question had been decided by the

Supreme Court in *McKinney* and that both the Tribunal and the Federal Court had erred in concluding that they were not required to follow that precedent. It therefore returned the matter to the Tribunal with the direction to dismiss the complaints.

[76] Upon refusal of leave to appeal, the *Vilven* proceeding was brought to end as ratified in *Vilven v Air Canada*, 2013 FC 368, which dismissed the appeal from the *Kelly Tribunal* decision (2011 CHRT 10), concluding that "the central legal question [was] fully determined by the decision of the Court of Appeal".

III. ISSUES

[77] The issues in this matter are:

a. The appropriate standard of review;

b. With respect to determining the normal age of retirement pursuant to section 15(1)(*c*) of the *Act*, did the Tribunal err in its interpretation of the test applied to determine the comparator airlines which had employees working in positions similar to the positions of Air Canada pilots?

c. Did the Tribunal err in deciding that Air Canada was not entitled to advance a BFOR defence under sections 15(1)(*a*) and 15(2) of the Act?

d. Did the Tribunal err in deciding that ACPA was not entitled to advance a BFOR defence under sections 15(1)(*a*) and 15(2) of the Act, with specific reference to the following issues:

    i. Whether the defence under section 15(1)(*a*) applies to ACPA as an employee organization?

ii. Whether section 15(2) is limited to the hardship factors of health, safety and cost?

iii. Whether ACPA is barred by the CHRA from justifying the rule of retirement at age 60 in the collective agreement by demonstrating hardship in accommodating the change to the rule and if not, whether the Tribunal should apply a modified application of the test in *Meiorin* in relation to the principles in *Renaud*?

iv. Whether the Tribunal erred in its finding that no undue hardship to ACPA would arise from the elimination of compulsory retirement at age 60?

e. Did the Tribunal err in finding that the rule in the collective agreement imposing retirement at age 60 was discriminatory?

IV. ANALYSIS

A. Standard of Review

[78] As the Supreme Court noted at para 54 of *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], the deferential standard of reasonableness will normally be called for where a Tribunal is interpreting its own statute or statutes closely connected to its function. However, there are broader questions of law at play in this matter which are of "central importance to the legal system ... and outside the ... specialized area of expertise", as described in *Dunsmuir* at para 60.

[79] The standard of review is correctness for the legal questions of whether unions are entitled to advance a BFOR defence under section 15(1)(*a*) and the scope of the hardship factors in section 15(2) of the CHRA. Because another judge of the Federal Court has made rulings on aspects of the BFOR and hardship issues, these issues must be reviewed on a correctness standard. The question of the modification of the *Meiorin* test as applied to unions has not previously been decided, nor has the requirement to establish substantive discrimination as an element of the term "discriminatory practice" under the CHRA.

[80] The standard of review for the CHRT's application of the direction from *Vilven* and its application of the comparator group test is reasonableness. Reasonableness is also the standard of review for the CHRT's overall decision in light of the pension evidence available to it. As the Supreme Court explained in *Dunsmuir* at para 47, "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[81] Justification, transparency and intelligibility all share the purpose of providing a reasonable explanation for the basis of a decision, without which it lacks legitimacy.

[82] Something is justified when the components of the explanation line up logically to establish the conclusion. Something is intelligible when the explanation is understandable, such that the justification can be discerned from the reasons. Transparency is really a subset of both justification and intelligibility. A failure of transparency is most often a failure to consider properly a significant

outlier issue or fact that stands in the way of a logical and understandable explanation. The substantial failure to meet any of the three requirements is normally fatal to the decision.

[83] Correctness applies where there is not a range of acceptable answers, but only a single right one. The Supreme Court explained in *Dunsmuir* at para 50 that in such cases a reviewing court "will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the Tribunal's decision was correct."

[84] As well, for this matter it is important to distinguish between reweighing the evidence and not considering factors or conclusions that flow from undisputed facts based on the evidence. Weighing evidence has to do with "believability". It relates to the credibility and reliability of the evidence in proving a probative relevant conclusion of some kind. Weighing of evidence is for the ultimate determination of the trier of fact, and not the trier of law.

[85] However, a court conducting judicial review may interfere if it concludes that a decision maker has mischaracterized or failed to consider a significant factor or conclusion that is logically or patently obvious from undisputed facts. *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3 supports this proposition at para 37 as follows:

> 37 The passages in Baker referring to the "weight" of particular factors (see paras. 68 and 73-75) must be read in this context. It is the Minister who was obliged to give proper weight to the relevant factors and none other. Baker does not authorize courts reviewing decisions on the discretionary end of the spectrum to engage in a new weighing process, but draws on an established line of cases

> concerning the failure of ministerial delegates to consider and weigh implied limitations and/or patently relevant factors: see Anisminic Ltd. v. Foreign Compensation Commission, [1969] 2 A.C. 147 (H.L.); Re Sheehan and Criminal Injuries Compensation Board (1974), 52 D.L.R. (3d) 728 (Ont. C.A.); Maple Lodge Farms Ltd. v. Government of Canada, [1982] 2 S.C.R. 2; Dagg, supra at paras. 111-12, per La Forest J. (dissenting on other grounds).
>
> [Emphasis added]

B. Section 15(1)(*c*): Normal Age of Retirement

[86] Section 15(1)(*c*) has now been repealed. It read as follows when in force:

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;

[87] As described above, the defence based on section 15(1)(*c*) of the CHRA was successfully relied upon in *Vilven* as a defence to the complaints. Although section 15(1)(*c*) has now been repealed, it continues to govern these proceedings as it was in force during the life of the collective agreement and at the time the complaints were initiated. The provision also survived a constitutional challenge when upheld by the Federal Court of Appeal.

[88] The proper characterization of the test developed in *Vilven* ("the *Vilven* test") to determine the comparator pilots was the central issue before the Tribunal in this matter. I am, of course, not bound to apply the *Vilven* test were I to conclude that it would be inappropriate to do so. However, I

agree that *Vilven* described the appropriate test, if correctly characterized, which is what this issue turns on. As I have indicated, I am in agreement with the complainants' characterization of the test and in that guise adopt it as the appropriate test to determine the comparator pilots in this matter.

(1) The *Vilven* Test

[89] The principal purpose of the *Vilven* test was to determine which airlines ("the Comparator Airlines") had positions similar to those of the pilots in Air Canada. The methodology settled upon was described as "statistical", but in reality it was based on very simple mathematics. The pilots of the Comparator Airlines are added to those of Air Canada, the total which serves as the denominator. From this total, the pilots of the airlines with a mandatory retirement age of 60 are added up to constitute the numerator. If the numerator is more than 50% of the denominator, then 60 is the normal age of retirement and the defence under section 15(1)(*c*) applies.

[90] Thus, the case turns on who the Comparator Airlines are. If there are fewer of them, Air Canada wins by its dominance of the industry. If there are many of them, the complainants would appear to succeed because most other airlines use a retirement age of 65, and combined they outweigh Air Canada and the few other airlines which have an age 60 retirement provision.

[91] In her ruling, Justice Mactavish rejected the Tribunal's conclusion that international airlines could be used as the Comparator Airlines. Instead, she substituted a test comprising Canadian airlines possessing a list of attributes that she described in paras 111 and 112, that are relied upon by the respondents, and then again in a slightly different version in para 170. These two reiterations of the list can be interpreted differently. The respondents rely upon the first version, at paras 111-112,

while the complainants rely upon the second version, at para 170, and they also interpret them differently. The two versions are as follows:

In the first description;

> [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]… 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.
>
> [Emphasis added]

Versus the second description;

> [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 and types to domestic and international destinations through Canadian and foreign airspace that form the proper comparator group.

[92] All of the above formulations of the *Vilven* test contain the same four determinative attributes of what Canadian airline pilots do, i.e. flying aircraft of (1) various sizes and (2) various types to (3) domestic destinations and (4) international destinations. The difference in the positions of the parties and the outcome in determining the comparator pilots is whether these factors should be applied conjunctively, based in large part on the inclusion of the word "both" in paragraphs 111 and 112 above, or disjunctively as argued by the complainants.

[93] The distinction is significant inasmuch as the conjunctive formulation will exclude airlines which do not exhibit all of the factors in the Court's test. Conversely, treating the factors

disjunctively includes the pilots of any airline exhibiting any single characteristic from the list of attributes described by Justice Mactavish.

[94] In applying the test in *Vilven* the Court was limited to evidence on comparator airlines contained in an Agreed Statement of Facts. Because the parties appeared to have agreed that the Comparator Airlines comprised major airlines that flew internationally, the evidence comprised 22 airlines only six of which were Canadian which flew to international destinations. The Canadian airlines included the four major competitors at that time, WestJet, Transat Air, Skyservice, and CanJet, which along with Air Canada and its former subsidiary Jazz Air constituted the totality of Canadian airlines found by Justice Mactavish to have similar pilot positions. On the basis of this group of airlines dominated by Air Canada and Jazz, the majority normal age of retirement of pilots in Canadian airlines was age 60.

[95] There is no Agreed Statement of Facts before the Tribunal in the present matter. Instead, the parties introduced evidence on 38 airlines, the pilots of which it could be argued did what Air Canada pilots do based on the attributes described in the *Vilven* test.

[96] In determining the Comparator Airlines, the Tribunal adopted Air Canada's conjunctive interpretation of the *Vilven* test as implicitly described in paragraph 55 of its decision and demonstrated in the application of the test to eliminate airlines from the list of those exhibiting one or more of the attributes described by Justice Mactavish.

> 55 Last but certainly not least, Captain Prentice has constructed his own formula as to what criteria should be used to determine the comparator group. He includes only two of the five criteria

> enunciated by the Court. I have decided that all five should be used to determine the comparator.
>
> [Emphasis added]

[97] Of the total number of airlines on which evidence was introduced before the Tribunal, only eleven smaller airlines, in addition to Jazz Air, met the conjunctive *Vilven* test. As mentioned, due to the numerical dominance of Air Canada and its former subsidiary Jazz Air, pilots with a retirement policy of age 60 were found to make up the majority of pilots, i.e. 56% of all pilots of Comparator Airlines.

[98] I find it significant that the application of the conjunctive test had the effect of eliminating Air Canada's 10 closest major competitors. Of the comparator airlines considered in *Vilven*, Transat Air, Skyservice and CanJet were struck from the list because they do not fly domestically, while WestJet was not included because it only flew one type of jet, although in a variety of sizes.

[99] An outcome that eliminates Air Canada's major competitors on a test meant to compare airlines based on the similarity of their pilots' functions and duties is patently unreasonable and results from the application of wrong principles. I will now turn to an explanation of the Tribunal's failure to apply proper principles, which led to the unacceptable outcome which I determine must be set aside despite the deference owed the decision-maker.

(2) The Tribunal's Reasoning

[100] The Tribunal sought to apply what it considered to be the essence of the directions of the Federal Court decision in *Vilven #1*. For purposes of completeness and as an aid to my analysis, I

set out the full Tribunal reasoning in paragraphs 6 to 12 and 20 to 25 of its decision, marked with my emphasis at significant passages:

> 6 The Court stated that s. 15(1)(c) requires two questions to be answered. First, "what is the proper comparator group to identify the positions that are *similar* to that occupied by Air Canada and secondly, what is the normal age of retirement".
>
> 7 And when assessing whether a position is "similar" to that occupied by the complainants, the focus should be on the objective duties and functional responsibilities of the position in question. That is, what do Air Canada pilots actually do?
>
> 8 For the Federal Court, "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 international airspace", (para. 111).
>
> 9 Thus the appropriate comparator group for the complainants should be "pilots working for Canadian airlines who fly aircraft of varying sizes and types to <u>both</u> domestic and international destinations, through Canadian and international airspace", (para.112) ('Test').
>
> 10 The Court reiterated the Test later in paragraph 125 of its decision where it said, "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 <u>both</u> domestic and international destinations, through Canadian and foreign airspace. There are many Canadian pilots 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 CHRA."
>
> 11 The Court observed that, as of the date of the Agreed Statement of Facts that the parties submitted to the *Vilven* tribunal, there were five airlines in Canada, apart from Air Canada, that transported passengers to domestic and international destinations. They were Jazz, Air Transat, CanJet, Skyservice and WestJet. <u>However, there is nothing in this observation that suggests that the Court accepted that these five airlines satisfied all of the comparator criteria set out in paragraphs 112 and 125</u>.
>
> 12 Interestingly, the Court went on to say in paragraph 170 of its decision that, "as explained earlier, the Tribunal erred in its

identification of 'positions similar'". It is "pilots working for Canadian airlines flying aircraft of various sizes to domestic and international destinations, through Canadian foreign airspace that form the proper comparator group". The words, "transporting passengers" and "both" in reference to destinations and "types" in reference to aircraft are absent in this formulation of the test for the comparator group.

[. . .]

B. What Should be the Test for the Comparator Group?

20 For the comparator group, the Respondents accept and rely on the Court's formula in paragraphs 112 and 125. The Complainants have a different opinion. Both the Complainants and the Canadian Human Rights Commission ("CHRC") assert that the formula prescribed by the Court in these two paragraphs of its decision should not be literally applied in determining the appropriate comparators. Rather, the test that the Court set out in *Vilven* was dictated by the facts in that case and should only be considered as guidelines to assist the Tribunal in defining the comparator group.

21 Both the Complainants and the CHRC point to paragraph 170 of the *Vilven* decision position as support and propose that the Test should be "pilots working for Canadian airlines flying aircraft to either domestic or international destinations through Canadian or foreign airspace". They say that the Court inserted "both" in relation to domestic and international destinations in the Test to emphasize that the Tribunal erred in limiting the comparator group to those airlines that fly only to international destinations. The Court did not intend that the definition of the comparator group to be more restrictive than that of the Tribunal. It should be read disjunctively to include an airline whether it operates only domestically or only internationally.

22 Further, both the Complainants and the CHRC assert that the absence of "varying types" in paragraph 170 makes sense. Otherwise, two of Air Canada's major competitors, who fly only one type of aircraft would be excluded from the comparator group.

23 This is so even though their pilots do essentially do what Air Canada pilots do, fly passengers to domestic and international destinations. The CHRC would also drop Varying Sizes from the Test arguing that size does not matter. Whether an aircraft is small, medium or large, the essence of what a pilot does is the same.

> 24 It is unfortunate that the Court went on to state the comparator test for yet a third time and somewhat differently as it did in paragraph 170 of its decision. There is no explanation from the Court, at this late stage of its decision, as to why the comparator test should be modified. In my view, it should be regarded more as a matter of inadvertence rather than a restatement of the comparator group test.
>
> 25 What the Tribunal must do in this case is what the Court did in *Vilven*, which is to ask and answer the question, what is the essence of what Air Canada pilots do? The evidence in this case demonstrates that what Air Canada pilots do is as described by the Court in *Vilven* in paragraphs 112 and 125. Thus, the criteria to be applied in this case will be the same as the criteria applied in *Vilven* to determine the appropriate group.
>
> [Emphasis added]

(3) Errors in the Tribunal's Decision

(a) The Unreasonableness of the Elimination of Air Canada's Competitors

[101] While deference is owed to the Tribunal, it is unreasonable to eliminate Air Canada's main competitors from a list of airlines in Canada whose pilots actually do the same thing as Air Canada pilots. This illogical result is compounded by a number of errors of principle in the Tribunal's analysis, which are described under the various headings that follow.

(b) The Failure to Conduct a Functional Analysis of the Positions

[102] In *Vilven* the Court concluded that the functions and duties of Air Canada pilots, what they actually do, should be the overriding consideration in determining appropriate comparators.

[103] As the complainants argued, given that *Vilven* was based on an Agreed Statement of Facts, Justice Mactavish was not required, nor able, to apply her test based upon the functions and duties

of Air Canada to determine whether there were similar positions in other airlines. *Vilven*'s only purpose, therefore, was to serve as a guide on how to proceed.

[104] In contradistinction to *Vilven*, in the present matter the parties introduced concrete evidence on the characteristics of a large variety of airlines. The Tribunal was therefore required to perform the functional analysis described in *Vilven* to determine whether the pilots of those airlines actually did the same thing as Air Canada pilots. Unless it first analyzed the functions of Air Canada pilots and determined that every position possessed every one of the five criteria, it could not eliminate pilot positions with other airlines on the basis that the organization did not present one of the factors, such as flying only one type of airplane or flying only domestically, and that this rendered the positions dissimilar.

[105] Take as an example the characteristics of different sizes and types of airplanes. The employer had to discharge its onus of demonstrating on the basis of the duties and functions of the Air Canada pilots that the function of operating more than one size and more than one type was sufficiently distinct from the function exercised by pilots in other airlines operating only one type or only one size of airplane so as to exclude the latter from being Comparator Airlines. Only then could the Tribunal decide that a certain type or a certain size of airplane should be a limiting factor. The same methodological requirement applied for airlines flying only domestically or only internationally. This was not done.

[106] I am fairly certain, however, that it would be difficult to establish that the competitor airlines should be excluded on the basis of a disjunctive interpretation, as there was no suggestion made by

the parties that the functions and duties of the pilots of, for instance, Air Transat differed from those of Air Canada when flying to foreign destinations such that any basis existed to eliminate Air Transat as a Comparator Airline.

[107] Likewise, there does not appear to have been any basis to have eliminated WestJet as a Comparator Airline on the functionally irrelevant consideration that its pilots flew only one type of aircraft. Its pilots obviously "actually do" what Air Canada pilots "actually do". As its principal competitor vying for the same passenger base, WestJet pilots "actually do" what Air Canada pilots "actually do": flying the same flights, with similar types of airplanes.

[108] The evidence showed that Air Canada pilots are only permitted to fly one type of airplane at a time after extensive training on that specific airplane, until they change to another plane and are retrained on it. The actual duties and functions of a pilot at any given time relate to only one type of aircraft.

[109] The obviousness of the fact that WestJet and Transat should qualify as Comparator Airlines demonstrates that the Tribunal did not properly follow the directions in *Vilven*, which required the comparison of the functions and duties of pilots and did not allow for the elimination of an airline due to a criterion that had no impact on what the pilots actually do.

(c) The Failure to Conduct Contextual Analysis of the Vilven Reasoning

[110] The interpretation of any term or definition requires that meaning be found in the context of all the surrounding elements that are said to be connected to the proposed term or definition. With

respect to the Tribunal's interpretation of the concept of comparator airlines, my first conclusion is that its reasoning is circular and tautological.

[111] In its analysis, the Tribunal noted the Court's different statements of the Comparator Airline test as regards the use of the term "both" in relation to domestic and international destinations. By concluding that the transportation of passengers by an airline had to be both domestic and international, it set the tone for the treatment of the other factors in Justice Mactavish's list as also being conjunctive.

[112] No logical explanation was provided by the Tribunal for the inconsistent inclusion of the word "both". Relying on the enunciation of the test twice with the word "both," and only once without, without a contextual analysis of the Court's intention in *Vilven*, was a superficial and unreasonable explanation for why the restatement not including "both" should be "regarded more as a matter of inadvertence rather than a restatement of the comparator group test".

[113] Instead, the Tribunal illogically relied upon its own evidence to interpret the meaning of the direction from *Vilven*: "The evidence in this case demonstrates that what Air Canada pilots do is as described by the Court in *Vilven* in paragraphs 112 and 125". With respect, the Tribunal could not rely on the facts before it to make an *ex post facto* determination of the *Vilven* Court's intention in prescribing the test to apply to such facts. Furthermore, the evidence could also be said to show that pilots do what was described in *Vilven* if the Court's direction was interpreted disjunctively, particularly as no pilot at any time is accomplishing functions which simultaneously have all the attributes in the *Vilven* test.

[114] In this regard, the Tribunal failed to respond to the submissions of the complainants, beyond merely referring to them, which demonstrates a lack of transparency. By not describing why it rejected the principled submissions of the complainants supporting a disjunctive application of the test in *Vilven*, the Tribunal's decision lacked transparency and justification. This further vitiates the unreasonable outcome of eliminating Air Canada's closest competitors as Comparator Airlines. I find the complainants' submissions compelling and largely adopt them in my reasoning that follows.

(d) An Overlooked Reference to Explain the Meaning of "Both"

[115] As part of a contextual analysis of the reasoning in *Vilven*, I have already referred to paragraph 170 of Justice Mactavish's decision where she identified similar positions in reference to domestic and international destinations without using the term "both". The fact that she does not include the word "both" in that paragraph does not seem to be inadvertent in light of her further explanation at paragraph 173. The latter refers to Air Canada pilots and those of the Comparator Airlines exhibiting the same characteristics required to meet her test:

> [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.
>
> [Emphasis added]

(e) An Implication that Vilven was Based on a Misapprehension of Evidence

[116] Similarly, at paragraph 113 of the reasons, the Court referred to the evidence from the agreed statement of facts relating to the "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."

[117] Thus, while Air Transat, Skyservice and CanJet were included in the list before Justice Mactavish and were used as comparators to count employees in similar working positions to those of the Air Canada pilots in *Vilven*, they were rejected as comparator airlines by the Tribunal in this matter. The Tribunal at paragraph 174 of its decision concluded that they did not meet the definition of "domestic", because as charter airlines they flew only to international destinations.

[118] From Justice Mactavish's reasons the Tribunal was aware, or at least should have been, that she had concluded that other Canadian airlines were flying aircraft of various sizes to domestic and international destinations, which could only be possible if the factors in her test were treated disjunctively.

[119] If it did not accept this explanation, the Tribunal would have had to conclude that Justice Mactavish misapprehended the evidence and made an erroneous finding that Air Transat, Skyservice or CanJet flew domestically, as well as internationally.

[120] I do not find that a reasonable conclusion given the more logical explanation that the factors in the test were intended to be treated disjunctively. It is also only in this manner that one avoids an

obviously unreasonable outcome that excludes Air Canada's main competitors, even though expectations would be that their pilots would occupy positions having functions and duties the most similar to those of Air Canada.

(f) Too Limited a Comparator Group

[121] Another contextual aspect of Justice Mactavish's reasoning was her discomfiture with limiting the comparator airlines to those operating in Canada, due to Air Canada's dominance thereby establishing the norm in a statistical defence to a discriminatory provision. This was a concern of the Court, as indicated in paragraph 171 of the reasons:

> [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 section 15(1)(*c*) of the Act.
>
> [Emphasis added]

[122] Given the concern about Air Canada's dominance of the industry skewing the results of any survey of the normal age of retirement of Canadian pilots, it is unlikely that the Court intended to propose a test which would greatly narrow the comparator airlines, as opposed to one which would tend to be more inclusive. In my view, this was a contextual factor from the reasons in *Vilven* that the Tribunal should have taken into consideration in applying Justice Mactavish's test.

(g) A Contextual Interpretation of "Both"

[123] "Both" is an inherently ambiguous word because it may be employed in different circumstances for different purposes. For example, it may be used to emphasize an inclusive response to a question on choice. In answer to a question from a host as to which type of vegetable the guest would like with the rest of her serving, the answer could be "both", meaning to request that "both" types of food be placed on her plate. However, in answer to a question from the same host as to whether the guest generally likes to drink tea or coffee, the answer could also be "both", this time meaning that "either" would be welcome but not that she was expecting both simultaneously.

[124] The Court found itself effectively being asked a similar question by the Tribunal's definition of the attributes of a comparator airline. It was confronted by the *Vilven Tribunal #1* decision that raised the question as to the essence of the positions occupied by Air Canada pilots. The Tribunal suggested that the essential attribute "was that they flew on regularly scheduled international flights [or] on wide-bodied aircraft to many international destinations with a major international airline".

[125] Contextually, the Tribunal was in effect asking the Court whether it should use only international flights as the salient comparator characteristic, to which the Court answered "No, use both domestic and international flights." This answer applied with similar force to wide-bodied airplanes and smaller airplanes.

[126] In the circumstances, it is understandable that Justice Mactavish would have wanted to emphasize that the comparator pilots of airlines should not be limited to those operating one type of airplane (wide-bodied airplanes) or to airlines flying only to international destinations.

[127] I am satisfied that in the context of its reasons the Court used the term "both" to ensure that it was understood that flying only to international destinations was insufficient as a limiting comparator factor, just as the test was not to be restricted to airlines flying one size or type of aircraft.

(4) Conclusion on Normal Age of Retirement

[128] Recognizing the deference owed the Tribunal, I nevertheless find that the Tribunal erred in principle in its interpretation of the direction of the Court in *Vilven* as imposing a rule consisting of a series of factors to be considered conjunctively, when the decision interpreted in its context clearly directed the Tribunal to apply those factors disjunctively.

[129] On the basis of the foregoing, I adopt the reasons of Justice Mactavish in *Vilven* as properly determining the attributes of Comparator Airlines in so far as the enumerated factors are to be applied disjunctively. Otherwise, I would respectfully disagree with her decision on the basis of my reasons described above, which in my view require the enumerated factors identified in her decision to be applied disjunctively in order to avoid the unreasonable outcome of Air Canada's major competitors being eliminated as Comparator Airlines.

[130] The Tribunal's error in applying a restricted exclusionary test based on a conjunctive application of the factors resulted in an unreasonable outcome that eliminated suitable comparators

in the form of Air Canada's competitors whose pilots obviously performed duties and functions similar to those of Air Canada pilots.

[131] The appropriate test required the Tribunal to consider the functions and duties of Air Canada pilots as demonstrated by the employer and then to consider the functions and duties of pilots at other airlines based on the agreed statement of facts. Only then could it conclude that, based on the position characteristics evaluated in accordance with *Vilven*, the functions and duties of pilots in other airlines were sufficiently similar or different so as to require their inclusion or elimination from consideration as comparators. It should be remembered that Air Canada bore the onus throughout on this issue.

[132] Accordingly, the application of the complainants is allowed and the decision of the Tribunal in 2011 CHRT 11 in respect of normal age of retirement is set aside and remitted for reconsideration. Upon reconsideration, the Tribunal is directed to apply the factors of the test in *Vilven* disjunctively. It is also to determine attributes of similarity based on what pilots actually do, i.e. whether the attributes of positions for pilots flying large and small planes are similar, and so on.

C. AIR CANADA'S DEFENCE OF A *BONA FIDE* OCCUPATIONAL REQUIREMENT

[133] As described above, Air Canada was successful in *Kelly* in setting aside the CHRT's decision rejecting its BFOR defence. The redetermination ordered by the Federal Court never occurred because the Federal Court of Appeal brought that litigation to an end when it concluded that the defence of normal age of retirement found to apply in *Vilven* was constitutional.

[134] Air Canada is now attempting to achieve the same result as in *Kelly*. It seeks to set aside the CHRT's 2011 decision concluding that the mandatory retirement rule did not constitute a BFOR for its pilots as envisaged in section 15(1) of the CHRA. Air Canada submits that the Tribunal's evaluation of uncontested key evidence failed to meet the tests of intelligibility, transparency and justification such that its decision must be overturned as unreasonable.

[135] I reject these submissions. I find that the Tribunal properly considered the evidence and that it was justified in rejecting Air Canada's BFOR defence.

[136] In considering the three-step BFOR analysis of the Supreme Court's decision in *Meiorin*, the Tribunal, for the second time, as it had done in *Vilven Tribunal #2*, avoided ruling on whether Air Canada met the first two steps regarding the legitimacy of the standard's purpose and the good faith of the employer in adopting the standard. It noted only that "this is not so much in dispute between the parties as is their disagreement on step three, the accommodation obligation."

[137] When later dealing with ACPA's BFOR defence, the Tribunal appeared to make reference back to Air Canada's situation, by commenting that it was difficult to see how the age of the pilot bore any relationship to the performance of the job when Transport Canada did not impose any maximum age restriction.

[138] It is not clear whether this statement was intended to suggest that Air Canada did not meet the first factor of the *Meiorin* test because age was not related to a standard of pilot performance. I cannot leave any doubt on this issue because, as shall become apparent below, Air Canada's

fulfilment of the first step of the *Meiorin* test is relevant to my conclusions on ACPA's entitlement to plead a BFOR defence.

[139] I conclude that being older than 60 was indeed an appropriate BFOR consideration in relation to the ability of pilots to perform their jobs in the years in question. The evidence established that mandatory rules imposed on Canadian airlines pursuant to ICAO treaties would prevent Air Canada from operating approximately 90 percent of its flights when the Captain is over 60 years old, unless he or she was accompanied by a First Officer under the age of 60.

[140] Accordingly, depending upon the ages of the available Captains and First Officers, there is potential gridlock that will prevent pilots from performing their duties and will require costly remedial measures. If these potential gridlocks were to materialize they would likely constitute a legitimate BFOR defence.

[141] Justice Mactavish in *Kelly* also found that the age of pilots was a consideration for Air Canada's BFOR defence based on the scheduling problems which pilots over age 60 could cause due to the application of the said ICAO rules. The failure of the Tribunal to properly consider the issue resulted in her setting aside its decision and remitting it for reconsideration. The Tribunal in the present matter did take the age factor into consideration.

[142] The complainants limited their submissions on the first two steps of *Meiorin* before this Court to issues concerning the employer's failure to investigate alternative approaches to perform the job that did not have a discriminatory effect. As I am in agreement with the Tribunal that no

undue hardship has been established by Air Canada, I do not need to consider the issue at this time with respect to Court file T-1453-11.

[143] However, with respect to Court file T-1463-11, since I conclude that ACPA would suffer undue hardship due to the infringement of its members' employment rights, I will state my view that procedural accommodation does not arise for the union to consider. Its members being in a form of "chow line", no alternatives for partial accommodation exist because any attempted accommodation to favour one member of the union unavoidably adversely impacts on another member.

[144] Not having taken a clear position on the first two steps of the *Meiorin* test, the Tribunal nevertheless proceeded to consider the accommodation issue, and found no undue hardship caused to Air Canada by the abolishment of the MRP. Air Canada argued that the application of the ICAO rules would cause a scheduling gridlock requiring it to hire and train new staff and that this would represent undue hardship in the form of the extra costs incurred in alleviating the problem.

[145] The Tribunal accepted the premise of Air Canada's argument but found that the contention was speculative because in practice the age profile of Captains and First Officers was such that gridlock was unlikely to occur.

[146] The evidence before the Tribunal was different from that in *Kelly* when that decision considered the BFOR issue. The conclusions reported by the Court in that case depicted different scenarios for gridlock occurring at lower percentages (see paragraphs 446 to 451 of the decision). In

addition, the issue of predicting future Captain-to-First Officer ratios does not appear to have figured in the Tribunal's decision.

[147] For the present judicial review, Air Canada cited three areas in the Tribunal's reasons where it contended that the CHRT had either misapprehended the evidence or misdirected itself. The most significant of these was the allegation that the Tribunal failed to understand the nature of the evidence of Mr. Tarapasky, the Manager of Crew Scheduling in charge of automation and process for flight operations, which evidence Air Canada described in its Memorandum as follows:

> Any possible future changes to the demographics of Air Canada pilots, were the mandatory retirement policy to be abolished, will necessarily be speculative: the mandatory retirement policy eliminates the possibility of now knowing with any certainty the actual demographics of its pilots if mandatory retirement were to be eliminated.

[148] In support of this submission, Air Canada points out that in *Kelly*, the Court set aside the Tribunal's decision on BFOR because it had failed to understand that the "experiment did not require consideration of the actual number of over-60 Captains and First Officers in Vancouver at the time. The purpose of the experiment was to determine whether a flight schedule could be produced if 10 percent of each group was potentially restricted."

[149] I disagree with Air Canada's submission and moreover conclude that *Kelly* has no bearing in this case given the significantly different nature of the evidence before the Tribunal in *Kelly* and in this matter. The evidence in this matter does not demonstrate difficulty in assigning flight schedules unless a high proportion of First Officers are over 60 years of age.

[150] In this matter, the Tribunal specifically referred to the evidence of Mr. Tarapasky and in my view properly captured Air Canada's concern that application of the ICAO standard, by changing the age of retirement to 65 could result in potential pairings of Captains and First Officers over age 60 that would require costly remedial measures to avoid. I cite for example paragraph 270 of the Tribunal's decision:

> 270 Mr. Tarapasky used the same methodology for the rest of the experiments. For June 2009 Vancouver B777 FOs [First Officers], the actual number of pilots was 46 CAs and 73 FOs. In this experiment, a No solution was only reached at the level of 50 percent potentially restricted CAs and 30 percent potentially restricted FOs.

[151] In paragraphs 271 to 274 of its decision, the Tribunal described similar instances from Mr. Tarapasky's evidence, noting similar combinations of Captains and First Officers where gridlock would result for other types of airplanes at Vancouver, Toronto and Montréal.

[152] In the conclusory portion of its decision, the Tribunal pointed out the challenges to the assumptions underlying Mr. Tarapasky's conclusions, which were described as requiring that First Officers remain first officers and that a high proportion of First Officers be over the age of 60.

[153] I quote paragraphs 418 to 421 from the decision as follows:

> [418] The evidence is that certain combinations of potentially restricted captains and first officers reach a threshold whereby PBS cannot produce a block solution. This is with respect to Air Canada's wide-bodied aircraft. Mr. Tarapasky's assumption was that the pilots on these flights would be the most senior and the oldest of the Air Canada pilot groups.
>
> [419] Professor Kesselman challenged the validity of this assumption on the basis that in the absence of mandatory retirement, first officers would not remain such and would progress to captain status. Further, in his opinion, Mr. Tarapasky's assumptions in his

> model that first officers would remain first officers and a high proportion of first officers would be over the age of 60 are not necessarily valid, given the variant ages at hiring and other factors affecting promotions.
>
> [420] Professor Kesselman said that the pilots at the top of the seniority in each classification are not necessarily the ones that will be over 60. Seniority is by years of service at Air Canada; pilots may be hired at different ages and therefore there could be some individuals with higher seniority but lesser age and vice versa. Rather, said Professor Kesselman, more first officers will tend to be younger and over time without mandatory retirement, it would be easier to satisfy the over/under rule.
>
> [421] Mr. Tarapasky's model requires much higher percentages of FOs being over age 60, in most cases 30%, 40% or even 50% before it runs into this gridlock, where it can't do the matching, can't satisfy the over/under rule.

[154] In addition, the evidence of Professor Kesselman, who was qualified as an expert in labour economics, played an important role in the Tribunal's decision. It is referred to at paragraphs 288 and 299 of the reasons, where Professor Kesselman is quoted as noting the lack of empirical studies, such that one could not even "ballpark" the number of pilots choosing to work beyond age 60, describing the estimates as "guesstimates" at best, based upon indirect evidence.

[155] Evidence from the transcript of the hearing includes the Tribunal Chairperson questioning Mr. Tarapasky on this issue. He agrees that the model percentages of Captains and First Officers may never be achieved (Volume VII of Air Canada Application Record (T-1453-11), page 3428 [page 1900-1 of transcript excerpt]).

[156] Similarly, Captain Duke, the General Manager of Crew Resources at Air Canada, stated under cross-examination that "I do not know what the actual impact [of removing mandatory

retirement at age 60] will be, because I do not know how many are actually going to stay." (Transcript Volume 10, p. 2337).

[157] The Tribunal also reviewed the evidence of witnesses Captain Duke and Mr. Rikk Salamat, an expert in collective agreement analysis, on age distribution of First Officers, pointing out that very few First Officers were at the highest seniority level, a factor I rely on in respect of ACPA's appeal.

[158] Accordingly, I reject Air Canada's submission that the Tribunal misconstrued Mr. Tarapasky's experiments by assuming "that pilots on wide-bodied aircraft flights would be the most senior and oldest of the Air Canada pilot group". The Tribunal's conclusions pertained only to the age of First Officers, and were made in reliance upon Professor Kesselman's evidence, which described and challenged the underlying assumption of Mr. Tarapasky's experiments.

[159] Air Canada also criticized the Tribunal for its characterization of Mr. Tarapasky's conclusions as "a snapshot only for one month". The Tribunal specifically relied upon the evidence of Captain Duke, who acknowledged the weakness of Mr. Tarapasky's model based on one month's data.

[160] In conclusion, the Tribunal's decision is reasonable in its justification of the outcome and intelligible in its explanation in concluding that Air Canada had not met the burden of proving that it would suffer undue hardship due to the elimination of the age 60 retirement rule and therefore could not rely upon the BFOR defence under section 15(1)(*a*) of the CHRA.

[161] Accordingly, Air Canada's application is dismissed.

D. ACPA'S DEFENCE OF A *BONA FIDE* OCCUPATIONAL REQUIREMENT

(1) Introduction

[162] The Tribunal also rejected ACPA's BFOR defence, concluding that it failed to meet the requirements of all three steps of the *Meiorin* test. The Tribunal opined that there was no connection between age, performance of the job as an airline pilot and membership in a union, such that ACPA had failed to satisfy the first and second steps of the *Meiorin* test.

[163] It also appears that had hardship been established, the Tribunal would have rejected the BFOR defence on the basis that hardship involving representation of union members is excluded by section 15(2) because it is not one of the three categories that Parliament enumerated in the provision, i.e. health, safety and cost. The sanctity of the collective agreement would certainly not fall within any of these categories. Even were this not the case, because of the limited scope of section 15(2) delineated in the *Kelly* decision, the only hardship evidence presented by ACPA was financial in nature.

[164] Despite these hurdles to the union succeeding in its application, the Tribunal stated that "it is nonetheless prudent" (para 347) to consider whether the union members suffered undue hardship as a result of eliminating the MRP. While the basis for such prudence was not stated, it was likely due to the comments of the Supreme Court in *Renaud*, recognizing that a union may be relieved of a duty to accommodate on account of a discriminatory practice if the accommodation would cause undue hardship to other union members.

[165] For whatever reason subsumed by "prudence", the Tribunal analyzed the relative economic hardship of the financial consequences to Air Canada pilots caused by the elimination of the MRP. It based the analysis on a theoretical extension of the average age of retirement to 63 based on the American experience of extending the age of retirement to age 65. It concluded that while "The choice is difficult" (para 401), on balance the adverse differential impact on the pilots did not reach the level of undue hardship.

[166] Had the Tribunal concluded that undue hardship occurred, the union's BFOR defence would still have been rejected for its failure to meet steps 1 and 2 of the *Meiorin* test. To that extent the Tribunal was not placed in the unsatisfactory situation of finding against ACPA in the face of a conclusion that eliminating the MRP would cause hardship to its members. Indeed, handing down an award against the respondent despite it establishing undue hardship would undermine the purposes of the CHRA by imposing absolute liability when its actions were justified.

[167] Unfortunately, I am not spared this dilemma inasmuch as I conclude that removing the MRP would cause undue financial hardship to union members. As discussed below, I find that the Tribunal failed to consider obvious factors and conclusions arising from Mr. Salamat's evidence and applied wrong principles. This resulted in an unreasonable conclusion that the airline's younger pilots would not sustain undue hardship caused by the adverse differential impact that would result from the elimination of the MRP in the collective agreement.

[168] Because the Supreme Court's decision in *Renaud* declared that liability should not be imposed on a union without allowing it to justify its actions, I feel obliged to reconsider the legal obstacles which would prevent ACPA from fully defending its actions.

[169] This entails a reconsideration of sections 15(1)(*a*) and 15(2) of the CHRA and the applicability of *Meiorin* in the case of a union. As a result of this analysis, I proceed to apply a modified four-step *Meiorin* test to consider ACPA's BFOR defence. The modified test includes an extra step - referred to in *Renaud* - that requires the Court to consider whether the importance of preventing discrimination based on age prevents adoption of a lower standard despite the undue hardship caused.

(2) CHRA Provisions Regarding BFOR

[170] The complainants' arguments based on statutory provisions were twofold. Firstly, they contended that ACPA was not entitled to advance a BFOR defence because unions were not included in section 15(1)(*a*). Secondly, they argued that the nature of the union's hardship, if established, was excluded by section 15(2), which limited this defence to issues of health, safety and costs. The relevant statutory provisions from the CHRA with my emphasis added are reproduced as follows:

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 <u>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</u>	2. La présente loi a pour objet de compléter la législation canadienne en donnant effet, dans le champ de compétence du Parlement du Canada, au principe suivant : <u>le droit de tous les individus, dans la mesure compatible avec leurs devoirs et obligations au sein de la société, à l'égalité des chances d'épanouissement et à la prise de mesures visant à la satisfaction de leurs</u>

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 or in respect of which a record suspension has been ordered.

besoins, indépendamment des considérations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, la déficience ou l'état de personne graciée.

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

7. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :

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

a) de refuser d'employer ou de continuer d'employer un individu;

(*b*) in the course of employment, to differentiate adversely in relation to an employee,

b) de le défavoriser en cours d'emploi.

on a prohibited ground of discrimination.

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

10. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite et s'il est susceptible d'annihiler les chances d'emploi ou d'avancement d'un individu ou d'une catégorie d'individus, le fait, pour l'employeur, l'association patronale ou l'organisation syndicale :

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

a) de fixer ou d'appliquer des lignes de conduite;

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

b) de conclure des ententes touchant le recrutement, les mises en rapport, l'engagement, les promotions, la formation, l'apprentissage, les mutations ou tout autre aspect d'un emploi présent ou éventuel.

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;

[. . .]

(d) the terms and conditions of any pension fund or plan established by an employer, employee organization or employer organization provide for the compulsory vesting or locking-in of pension contributions at a fixed or determinable age in accordance with sections 17 and 18 of the Pension Benefits Standards Act, 1985;

[. . .]

(f) an employer, employee organization or employer organization grants a female employee special leave or benefits in connection with pregnancy or child-birth or grants employees special leave or benefits to assist them in the care of their children

15. (1) Ne constituent pas des actes discriminatoires :

a) les refus, exclusions, expulsions, suspensions, restrictions, conditions ou préférences de l'employeur qui démontre qu'ils découlent d'exigences professionnelles justifiées;

[. . .]

d) le fait que les conditions et modalités d'une caisse ou d'un régime de retraite constitués par l'employeur, l'organisation patronale ou l'organisation syndicale prévoient la dévolution ou le blocage obligatoires des cotisations à des âges déterminés ou déterminables conformément aux articles 17 et 18 de la *Loi de 1985 sur les normes de prestation de pension*;

[. . .]

f) le fait pour un employeur, une organisation patronale ou une organisation syndicale d'accorder à une employée un congé ou des avantages spéciaux liés à sa grossesse ou à son accouchement, ou d'accorder à ses employés un congé ou des avantages spéciaux leur permettant de prendre soin de leurs enfants;

[. . .]	[. . .]
(2) For any practice mentioned in section (1)(*a*) to be considered to be based on a *bona fide* occupational requirement and for any practice mentioned in section (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.	(2) Les faits prévus à l'alinéa (1)*a*) sont des exigences professionnelles justifiées ou un motif justifiable, au sens de l'alinéa (1)*g*), s'il est démontré que les mesures destinées à répondre aux besoins d'une personne ou d'une catégorie de personnes visées constituent, pour la personne qui doit les prendre, une contrainte excessive en matière de coûts, de santé et de sécurité.

(3) Section 15(1)(*a*): Are Unions Entitled to Advance a BFOR Defence?

[171] Before the Tribunal, the complainant pilots argued that a BFOR defence is not available to a union under section 15(1)(*a*) because this provision makes no reference to an employee organization. They sought to apply the interpretive principle of *expression unius est exclusio alterius*, pointing out that sections 15(1)(*d*) and 15(1)(*f*) of the CHRA specifically made the BFOR defence available to an employee organization as well as to an employer. Having made specific reference to its inclusion in other provisions in the same section, they argued, Parliament must have intended it to be absent from section 15(1)(*a*). To soften the blow somewhat, the complainants submitted that a union could provide evidence to support an employer's BFOR defence, but not benefit from the provision itself.

[172] The Tribunal's response to the complainants' argument was threefold. Firstly, in support of ACPA, the Tribunal pointed out that the complainants' discrimination claim was based on section 10 of the CHRA. It concluded that it made no sense either in terms of policy or logic that a

discriminatory practice could be committed under section 10 by an employer, an employee organization or an employer organization and yet of those three, only an employer could raise a BFOR defence. I am in agreement with this view.

[173] Secondly, the Tribunal made reference to *Renaud* for the proposition that the union must have the same right as an employer to justify discrimination. Again, I agree with this premise to permit a union to raise a BFOR defence, which I will discuss in more detail in respect of section 15 (2) below.

[174] Thirdly, and this time in support of the complainant's submissions, the Tribunal concluded that the reference in *Meiorin* only to the "employer" gave weight to the argument excluding unions under section 15(1)(*a*). If I agreed with the Tribunal that *Meiorin* could stand for the proposition that the Supreme Court intended to deny the existence of a BFOR defence for unions, I would conclude that such a direction would outweigh the previous two considerations in favour of a liberal interpretation of section 15(1)(*a*).

[175] However, I was not presented with any Supreme Court jurisprudence considering whether and how a union might raise a section 15(1)(*a*) BFOR defence when its members suffer from undue hardship. Indeed, a union was the applicant in *Meiorin*, so it is difficult to comprehend how that case could stand for any limitation on a union's hardship claim.

[176] Moreover, as I shall describe below, on the basis of statements in *Renaud* that unions should not be denied the right to justify their conduct by demonstrating undue hardship, I conclude that the

appropriate approach to the application of *Meiorin* to novel facts involving a union requires a modification of its test to meet the circumstances of unions facing hardship in accommodating discriminatory rules. Accordingly, I reject the concept that *Meiorin* could somehow support a restrictive interpretation of section 15(1)(*a*).

(4) Is Section 15(2) Limited to Its Enumerated Hardship Factors?

[177] In *Kelly*, Justice Mactavish rejected the Tribunal's interpretation that section 15(2) was not bound by the three enumerated heads of hardship. She conceded that other factors such as the impact on employee morale may be taken into consideration if of sufficient gravity to have a demonstrable impact on the operations of an employer in a way that relates to the three enumerated heads in section 15(2) of "health, safety and cost".

[178] In the present matter, although not citing the *Kelly* decision, the Tribunal confined section 15(2) to its three enumerated factors, applying the same reasoning relating to the interpretive doctrine of *unius est exclusio alterius* and the requirement to narrowly construe exceptions limiting the scope of human rights.

[179] ACPA did not challenge the Tribunal's BFOR in *Kelly*. Nevertheless, Air Canada raised hardship issues in its application with respect to the impact which eliminating the MRP would have on the morale of pilots and their seniority rights. Accordingly, the court in *Kelly* was required to consider the issue of relying on hardship factors not falling within health, safety or costs, the three expressly contained in section 15(2) for the employer.

[180] The situation faced in this matter is novel. It involves direct hardship on unions by undermining the central principles by which they operate, in addition to an indirect form of surrogacy hardship suffered by the union's members on a real and personal basis. It raises a whole host of considerations not of central importance to employers, but only to unions, which may not have been contemplated by the drafters of the CHRA. Yet they are nevertheless very relevant to discrimination, in particular inasmuch as they raise concerns over the imposition of unjust results if the statute is applied in a literal fashion. It is these concerns that largely inform my interpretations of these provisions.

[181] I find my situation different from those who have ruled on this matter ahead of me. Previously, discussion of limiting the scope of hardship factors was "theoretical" in the sense that no serious hardship was advanced on hard facts. In this matter, there was detailed evidence of an adverse differential impact on the younger pilots of Air Canada which would result from accommodating the complainants; an impact which I am satisfied constitutes undue hardship when properly considered. This was not the situation before the courts and tribunals that have previously been called upon to interpret section 15(2).

[182] For example, the Tribunal's findings on adverse differential impact were set out at paragraphs 139 and 140 of *Vilven Tribunal #2* as follows:

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

> [140] There was no evidence that a delay in the career progression and salary increases of younger pilots would cause a substantial interference with the rights of these employees. [. . .]
>
> [Emphasis added]

[183] Relying on this evidence, the Court stated at paragraphs 372 and 373 of its reasons in *Kelly*:

> [372] Insofar ACPA was concerned, the Tribunal examined the issue of hardship to the union in light of the principles articulated by the Supreme Court in *Central Okanagan School District v. Renaud*, 1992 CanLII 81 (SCC), [1992] 2 S.C.R. 970, [1992] S.C.J. No. 75. The Tribunal had particular regard for the effect that accommodative measures would have had on other ACPA members.
>
> [373] The Tribunal found that there was no evidence to show that a delay in the career progression and salary increases of younger pilots would cause substantial interference with the rights of these employees: Tribunal decision #2 at para.140. [. . .]
>
> [Emphasis added]

[184] While there was no finding of an adverse differential impact before in *Kelly*, its decision regarding section 15(2) cannot be distinguished on this basis. Its analysis was in relation to a factor not relating to safety, health or costs, but regarding the impact on employee morale by the elimination of the MRP.

[185] Confronted with this Court's recent legal interpretation of section 15(2), I considered attempting to characterize all aspects of my decision on the undue hardship suffered by the affected pilots in ACPA as a matter of cost, pertaining substantially to reductions in the affected union members' salaries that would result from the elimination of the MRP. However, I conclude that the issue is much too entwined with matters of intangible benefits such as those attached to hours and routes, life-style factors of access to financial returns to raise families, the unequal impact on

seniority rights in violation of the sanctity of the collective agreement, and the infringement of employment rights and benefits. As a result, I have no alternative but to confront the correctness of the Court's interpretation of section 15(2) in *Kelly*.

[186] By the doctrine of comity that binds judges, I am required either to apply the legal interpretation of section 15(2) in *Kelly* or provide cogent reasons in support of my dissent. The doctrine was recently summarized by Noël J.A. of the Federal Court of Appeal in *Apotex Inc v Allergan Inc*, 2012 FCA 308, at paras 46-48. Justice Noël noted that:

> [47] In the Federal Court, the above passage has been referred to as authority for the proposition that while the decisions rendered by colleagues are persuasive and should be given considerable weight, a departure is authorized where a judge is convinced that the prior decision is wrong and can advance cogent reasons in support of this view (*Dela Fuente v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 992 (CanLII), 2005 FC 992, para. 29; *Stone v. Canada (Attorney General)*, 2012 FC 81 (CanLII), 2012 FC 81, para. 12).

[187] After carefully considering the issue and with all due respect, I conclude that the hardship factors encompassed by section 15(2) are not limited to those specifically enumerated therein. My reasons to support an expansive interpretation of the provision follow below.

(a) Lack of Policy Rationale for the Imposition of Absolute Liability

[188] As with the application of section 15(1)(*a*) to unions, I can think of no logic or policy reason that could be advanced to deny them the right to justify their actions on the basis of accommodation causing undue hardship. Nor have I seen any policy grounds or logical explanation why imposition of liability should occur without the right to defend oneself.

[189] By that I mean that I cannot conceive why a court or legislature would place strict limitations on any evidence that might be introduced to prove hardship. Discrimination can arise from unlimited factual circumstances. Moreover, if discrimination concerns such varied intangibles as dignity, self-esteem, vulnerability and attitudes of prejudice and stereotypes, why limit the consideration of disadvantage to three fixed categories of hardship?

[190] The requirement to categorize evidence under one of the three hardship factors adds another layer of complexity to an already complex subject. For example, in this matter does "cost" include a delay in receiving salary or benefits to members? Indeed, costs are something that concern employers. For workers, salaries are the equivalent of the employers' revenues (the loss of which would also not be a "cost" to an employer, unless prepared to abandon a literal interpretation); costs for workers are what they spend their salaries on. Are the life-style factors that often tend to be more important than salaries to workers costs? Does hardship include the relative needs of the pilots at different ages due to their family and other situations? If yes, why not the similar impact on worker morale or the dissension in union ranks caused by removing the mandatory age retirement rule? They are all indirect factors relating to monetary issues.

[191] In order to prove something in the context of legal proceedings, all of the relevant and admissible evidence on the issue (in this case the issue of the disadvantage caused to one party by accommodating another) must be presented and considered. The Court's ultimate task is to assess the entirety of the evidence in accordance with understandable and practical precepts and decide whether the person, or in this case the collective of persons, would suffer undue hardship. Hardship, like fairness, is an indefinable term that is a so multifaceted that it must be left to judges to

determine based on all the relevant evidence. That is because hardship is not definable in terms of circumstances, but rather depends on circumstances for its determination.

[192] Moreover, in terms of purposes of the CHRA, section 2 provides that successful complainants should "have their needs accommodated, consistent with their duties and obligations as members of society." Reference to the duties and obligations of members of society cannot just cut in one direction, i.e, in respect of the claimants only. Accordingly, I would submit that this language contradicts any suggestion that the purpose of the legislation is to impose accommodation requirements on persons that are inconsistent with their duties and obligations as members of society, such as would result from arbitrary limits on the scope of hardship factors.

(b) Avoidance of Absolute Liability

[193] Despite the reference to *Renaud*, it does not appear that the court in *Kelly* had been directed that the consequence of denying a right to argue hardship would equate to the imposition of absolute liability on a union. Similarly, the Tribunal in the present matter, while referring to *Renaud*, did not appear to consider the explanation for the Supreme Court's conclusion that unions must be able to justify their position because to do otherwise would impose absolute liability on them. Its only reference to *Renaud* was to note that a "union must have the same right as an employer to justify the discrimination" (para 340 of *Adamson*).

[194] The rationale for asserting the union's right to justify the discriminatory standard is found at paragraph 32 of Justice La Forest's reasons in *Renaud*:

> …. Moreover, any person who discriminates is subject to the sanctions which the Act provides. By definition (s.1) a union is a

> person. Accordingly, a union which causes or contributes to the discriminatory effect incurs liability. In order to avoid imposing absolute liability, a union must have the same right as an employer to justify the discrimination. In order to do so it must discharge its duty to accommodate.
>
> [Emphasis added]

[195] I base my conclusion on the requirement for an inclusive interpretation of section 15(2) to avoid imposing absolute liability. This springs not simply from the sense of injustice that arises in imposing liability when evidence would establish that undue hardship would result from accommodation of the complainant. There is also a rule of statutory construction that statutes ought not to be interpreted so as to impose absolute liability unless there are express words to that effect.

[196] This doctrine was stated by the House of Lords in *London Guarantee & Accident Co, Ltd v Northwestern Utilities, Ltd*, [1936] AC 108, [1935] JCJ No 2 (QL) at para 18 by the Master of the Rolls, Lord Wright as follows:

> 18 In *Hammond v. St. Pancras Vestry* (1874), L.R. 9 C.P. 316, where the Act imposed on the Vestry the duty of properly cleansing their sewers, it was held that as these words were susceptible of meaning either that an absolute duty was imposed or that the duty was only to exercise due and reasonable care, the latter meaning was to be preferred, since the absolute duty could not be held to be imposed save by clear words. That case was followed in *Stretton's Derby Brewery Co. v. Derby Corp.*, [1894] 1 Ch. 431.
>
> [Emphasis added]

[197] The Supreme Court has applied this doctrine to regulatory penalties. See *Lévis (City) v Tétreault; Lévis (City) v 2629-4470 Québec inc*, 2006 SCC 12, [2006] 1 SCR 420 paras 13-19**;** *R v Sault Ste Marie (City)*, [1978] 2 SCR 1299, [1978] SCJ No 59 (QL). In *R v Desousa*, [1992] 2 SCR 944, [1992] SCJ No 77 (QL) at para 21, Sopinka J. explained the rule as follows:

> It is axiomatic that in criminal law there should be no responsibility without personal fault. A fault requirement was asserted to be fundamental aspect of our common law by this Court in R. v. City of Sault Ste. Marie, [1978] 2 S.C.R. 1299, and as a matter of constitutional law under s. 7 of the Charter in Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486. As a matter of statutory interpretation, a provision should not be interpreted to lack any element of personal fault unless the statutory language mandates such an interpretation in clear and unambiguous terms.
>
> [Emphasis added]

[198] If the rule of not imposing absolute liability without unambiguous words to that effect has not yet been recognized as a maxim of interpretation in civil matters, I would nonetheless think that only logical and cogent policy grounds, such as may be found in workplace safety or products liability law, could support the imposition of absolute liability on a party.

[199] Consequently, on the one hand there appears to be no policy ground advanced supporting the truncation of hardship factors; while on the other, there is an opposing policy consideration that prevents the imposition of absolute liability by a doctrine of statutory interpretation that requires a clear statement of intent for that purpose.

(c) Expressio Unius Est Exclusio Alterius

[200] The Court in *Kelly* relied upon the interpretive doctrine of *expressio unius est exclusio alterius* to support its conclusion that *Meiorin* dictates that hardship factors are not entrenched, unless they are expressly included or excluded by statute. In explaining her reliance upon this maxim, Justice Mactavish stated at paras 393-6 of her reasons in *Kelly*:

> 393 As the Tribunal itself noted, the Supreme Court stated in *Meiorin* that the factors to be considered in determining whether accommodation imposes undue hardship "are not entrenched, *unless*

> *they are expressly included or excluded by statute*": at para. 63, emphasis added. In this case, Parliament has chosen to specifically identify the matters that may be taken into account by the Tribunal in an accommodation analysis: see Russel Zinn, *The Law of Human Rights in Canada: Practice and Procedure*, loose-leaf, (Aurora: Canada Law Book, 1996) at s. 14:60:2.
>
> 394 Moreover, there are two different interpretative principles that were not addressed by the Tribunal, both of which suggest that the factors identified in section 15(2) of the *Canadian Human Rights Act* should be read as an exhaustive list. These are the principle of *expressio unius est exclusio alterius*; and the approach that is to be taken in interpreting human rights statutes.
>
> 395 The "*expressio unius est exclusio alterius*" maxim refers to a general principle of statutory interpretation which suggests that to express one thing is to exclude another: see Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008) at p. 244.
>
> 396 That is, the failure of Parliament to mention a thing in a list will give rise to the inference that it was deliberately excluded. As Professor Sullivan says, 'The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature": at p. 244.
>
> [Emphasis added]

[201] I have two comments with respect to this reasoning. Firstly, if the *Meiorin* decision requires a factor to be "expressly excluded", it cannot be excluded by implication. Excluding something expressly can only be achieved by clear unambiguous words that require no interpretive maxim to determine their meaning. Interpretive doctrines are only needed where the words are ambiguous. This is acknowledged in Sullivan's text, because if recourse is required to a maxim of statutory interpretation where "The force of the implication depends on…" the meaning of the provision, the point cannot be considered to be expressly stated. [Emphasis added]

[202] Secondly, again with reference to the Sullivan text whereby "the strength and legitimacy of the implication depends upon the expectation of express references", [Emphasis added] I would think that the expectation of naming all of the hardship factors in a statutory provision should be very low. Determining hardship is entirely circumstantial, depending upon the nature and significance of the impugned standard and "the duties and obligations as members of society" to accommodate complainants. Being entirely circumstantial, the categories of hardship are never closed, as indicated by the Supreme Court in *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale*, 2000 (SCFP-FTQ), 2008 SCC 43, [2008] 2 SCR 561 at paragraph 12 of its decision:

> [12] … What is really required is not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship, which can take as many forms as there are circumstances. This is clear from the additional comments on undue hardship in Meiorin (at para. 63): […]
>
> [Emphasis added]

[203] If the categories of hardship are never closed, there should be no expectation that hardship factors be expressly listed in a statute, and therefore the "*expressio*" rule should not apply.

(d) Exceptions to Human Rights Legislation should be Narrowly Construed

[204] The second interpretive principle relied upon in *Kelly* was that exceptions and defences to human rights legislation should be narrowly construed; *ergo*, when only three hardship factors are referred to in legislation, the provision should be narrowly construed and limited to those factors alone. The Court's reasoning is set out at paragraphs 399 to 401 as follows:

> 399 My conclusion that section 15(2) of the *Canadian Human Rights Act* should be interpreted as limiting the factors to be taken

> into account in an accommodation analysis to health, safety and cost is reinforced when the issue is examined in light of the principles to be applied when interpreting human rights legislation.
>
> 400 That is, while the quasi-constitutional rights conferred by human rights legislation are to be broadly interpreted, this is not so with respect to the defences provided in the human rights statute in question. Defences to the exercise of those rights are to be interpreted narrowly: see *Brossard (Town) v. Québec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279, [1988] S.C.J. No. 79 (QL) at para. 56, and Dickson at para. 17.
>
> 401 As Justice Sopinka observed in *Zurich Insurance Co. v. Ontario (Human Rights Commission)* [1992] 2 S.C.R. 321, [1992] S.C.J. No. 63, human rights legislation is often "...the final refuge of the disadvantaged and the disenfranchised". He went on to observe that "As the last protection of the most vulnerable members of society, exceptions to such legislation should be narrowly construed ...": at para. 18.

[205] I think there is a distinction to be made in strictly interpreting a hardship factor and strictly interpreting hardship to eliminate obvious relevant factors that cause hardship. I also would suggest caution in reliance upon *dicta* from Supreme Court cases such as *Zurich Insurance* to support an argument that hardship categories should be strictly constrained. The opposite point was made in *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 SCR 161. It made specific reference at para 15 to hardship factors that would apply to unions and their members, such as the disruption of collective agreements and infringing their employment rights, stating as follows:

> 15 The factors that will support a finding of undue hardship are not entrenched and must be applied with common sense and flexibility (*Meiorin* at para. 63; *Commission scolaire régionale de Chambly v. Bergevin*, 1994 CanLII 102 (SCC), [1994] 2 S.C.R. 525, at p. 546; and *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, 1990 CanLII 76 (SCC), [1990] 2 S.C.R. 489, at pp. 520‑21). For example, the cost of the possible accommodation method, employee morale and mobility, the interchangeability of facilities, and the prospect of interference with other employees'

> rights or of disruption of the collective agreement may be taken into consideration. Since the right to accommodation is not absolute, consideration of all relevant factors can lead to the conclusion that the impact of the application of a prejudicial standard is legitimate.
>
> [Emphasis added]

[206] Secondly, the circumstances of the complainant, i.e. being "disadvantaged" and "disenfranchised" (*Zurich*, at para 18) should not exclude consideration of relevant hardship factors of the respondent. This does not mean however, that the seriousness of the discrimination may not outweigh a hardship factor in considering whether it is "undue".

[207] Moreover, not all complainants are disadvantaged and disenfranchised, by which I understand to mean that they are vulnerable or needy. If that was the criterion, this case would not have reached first base. There is no sense of the complainants being "disadvantaged" and "disenfranchised" when a case deals with pilots earning over $200,000 a year with benefits including an advantageous life-style founded on a compressed 8-day work month and the ability to retire with generous pension benefits and ready opportunities for work with other airlines, as demonstrated by Messrs. Vilven and Kelly.

[208] On the other hand judicial notice can probably be taken of the notorious fact that the younger generation tends to disenfranchise itself by its failure to participate in the political process; while in terms of financial position and general living standards, the complainant pilots collectively are surely better off in comparison to those who are subsidizing the continuation of their advantageous working conditions and high economic returns.

(e) Parliamentary Intention

[209] In *Kelly*, the Court took note at paragraph 397 of its reasons that "Parliament would thus have been well aware that factors such as impact on employee morale and interference with the rights of other employees had been identified as relevant considerations in an accommodation analysis", "well before the addition of subsection 15(2) to the *CHRA* in 1998". This was said to support a strong inference that "Parliament intended the list set out in subsection 15(2) of the *CHRA* to be an exhaustive one" (*Kelly*, para 398).

[210] It is difficult to disagree with that position, except to conclude that it is doubtful whether either the drafters or Parliament contemplated hardship factors pertaining to unions or their members.

[211] Nevertheless, it is arguable that the Supreme Court in *Meiorin* appears to have gone out of its way to maintain its position that recourse should be had to all relevant hardship factors despite section 15(2) of the CHRA. Although the term "hardship" was not included in the British Columbia statute under consideration, the Court mentioned the need for a unified approach to justification by hardship, including making specific reference to the amendment to section 15(2) of the CHRA, but without mentioning the limitations on the scope of hardship factors:

> 52 Furthermore, some provinces have revised their human rights statutes so that courts are now required to adopt a unified approach: see s. 24(2) of the Ontario Human Rights Code, R.S.O. 1990, c. H.19; s. 12 of the Manitoba Human Rights Code, S.M. 1987-88, c. 45, and, in a more limited sense, s. 7 of the Yukon Human Rights Act, S.Y. 1987, c. 3. Most recently, the Canadian Human Rights Act, R.S.C., 1985, c. H-6, was amended (S.C. 1998, c. 9, s. 10) so that s. 15(2) of the Act now expressly provides that an otherwise discriminatory practice will only constitute a BFOR if the employer

> establishes that the needs of the individual or class of individuals cannot be accommodated without imposing undue hardship.
>
> 53 Finally, judges of this Court have not infrequently written of the need to adopt a simpler, more common-sense approach to determining when an employer may be justified in applying a standard with discriminatory effects. See Bhinder, supra, at pp. 567-68, per Dickson C.J. (dissenting); Central Alberta Dairy Pool, supra, at pp. 528-29, per Sopinka J.; Large, supra, at para. 56, per L'Heureux-Dubé J. It is noteworthy that even Wilson J., writing for the majority of this Court in Central Alberta Dairy Pool, supra, arguably recognized that a form of accommodation -- the search for proportionate, reasonable alternatives to a general rule -- had a certain place within the BFOR analysis, then applicable only to cases of direct discrimination. See in particular her references, at pp. 518-19, to Brossard, supra, and Saskatoon, supra.
>
> [Emphasis added]

[212] While it may be supposition on my part, I think the Court, out of concern that the hardship factors were expressed too narrowly in the *CHRA*, may have directly addressed the proper approach to the inclusion or exclusion of the categories of hardship, including with reference to *Renaud*, when it stated at para 63 as follows:

> . . . Among the relevant factors are the financial cost of the possible method of accommodation, the relative interchangeability of the workforce and facilities, and the prospect of substantial interference with the rights of other employees. See also Renaud, supra, at p. 984, per Sopinka J. The various factors are not entrenched, except to the extent that they are expressly included or excluded by statute. In all cases, as Cory J. noted in Chambly, supra, at p. 546, such considerations "should be applied with common sense and flexibility in the context of the factual situation presented in each case"
>
> [Emphasis added]

[213] Although irrelevant to the British Columbia statute that did not mention hardship, but where specific mention was made to section 15(2) of the CHRA without reference to its three limiting factors, the Supreme Court proscribed the entrenchment (obviously referring to legislation) of

factors, unless expressly excluded by statute. In other words, the *zeitgeist* of the Supreme Court's thinking on this issue appears to be that all factors not expressly excluded in section 15(2) should be included.

[214] In addition to the grounds above, I refer to the reasoning at paragraphs 376-380 which describe how the justification of a claim, including a claim of fundamental rights, would be proscribed by a literal interpretation of section 15(2).

[215] For the reasons outlined above, I respectfully disagree with the decision in *Kelly* and conclude that the categories of hardship under section 15(2) are not limited to health, safety and costs.

(5) Modification of the *Meiorin* Test to Apply to Unions

[216] The Supreme Court in *Renaud* stressed that a union which is subject to the same liability as the employer "must have the same right as an employer to justify the discrimination. In order to do so it must discharge its duty to accommodate" (para 32).

[217] I consider these observations to be strong *dicta* in support of a conclusion that ACPA must be afforded the same right as Air Canada to justify the discrimination in order to avoid being subjected to absolute liability. I also take cognizance of ACPA's submission that its joint liability with Air Canada for the consequences of the impugned MRP should provide it with an avenue to justify its conduct.

[218] As already noted, *Meiorin* did not involve a union as a respondent; the union in that case was the claimant advocating on behalf of a member. I was not presented with any case that had considered *Meiorin* in light of the principles in *Renaud*, i.e. how to provide a union with an opportunity to justify its conduct in a BFOR case.

[219] Recognizing that I am in somewhat uncharted waters, I would think that a reasonable approach to reconciling the principles of *Meiorin* and *Renaud* in a novel situation involving a union is to suggest a test that would reconcile the purposes of the two decisions to the extent possible. In my view, this would entail maintaining the *Meiorin* test, but adapting each step of the test to accommodate the different circumstances of a union as a function of representing its members.

[220] On this basis, a hybrid BFOR test incorporating the requirements of *Meiorin* and *Renaud* could be advanced for the purpose of determining whether ACPA's joint participation in the discriminatory practice with the employer is justified. It would impose the following requirements:

a. The employer adopted the standard for a purpose rationally connected to the performance of the job;
b. the union adopted the particular standard in an honest and good faith belief that it was in the collective best interests of its membership;
c. the standard is reasonably necessary to the accomplishment of the legitimate work-related purposes of the union. For a union to show that the standard is reasonably necessary, it must be demonstrated that it cannot accommodate the individual members of the union sharing the characteristics of the claimant without imposing undue hardship on other members of the union; and

d. the degree of hardship must be weighed against the nature of the discrimination to ensure that the importance of promoting freedom from the discriminatory conduct, in this case freedom from age discrimination, can admit a lower standard.

(a) First Step – Piggyback on the Employer

[221] I am in agreement with the Tribunal's view that imposing on the union the first step of the *Meiorin* test - demonstrating that it adopted the standard for a purpose rationally connected to the performance of the job - is a non-starter. If not modified in some manner, this stands in the way of any union's ability to justify its participation in an employer's discriminatory practice.

[222] It is not a union's responsibility to propose standards or qualifications for the employees' performance. This falls within the employer's exclusive right to manage its affairs. Therefore, the only manner by which a union can be provided with a right to justify its practice is to piggyback on the employer's responsibility to define the standards of performance. In this regard, the Court adopts ACPA's argument that the *Meiorin* test should be modified to reflect that the workplace standards were agreed to by the employer and the trade union jointly, making them jointly liable.

[223] On this basis the union shares liability with the employer. If no rational connection of the standard with the performance of the job can be demonstrated, the union cannot be in a better position than the employer. For similar reasons, it would be hard to imagine how elimination of the standard would infringe the rights of other employees if it bore no relationship to performance of their duties.

(b) Second Step – Good Faith of the Union

[224] The second step in the hybrid test simply reflects that the union must be acting in good faith in agreeing to adopt the standard in its collective agreement. This step would normally be "a given" considering the democratic nature of unions. All that would be required was to demonstrate that the standard was adopted in the best collective interests of its members.

(c) Third Step – Hardship

[225] With respect to the third step of demonstrating undue hardship, the point to recall is that section 15(2) is not limited to factors of health, safety, and cost. All forms of disadvantage visited on the comparator pilots and the union should be considered.

(d) Fourth Step - Weighing Hardship and the Nature of the Discrimination

[226] The principles described in *Renaud* suggest a two-step process, as described at para 38 of the Supreme Court's reasons:

> 38 …. I agree with the submissions of the respondent union and C.L.C. that the focus of the duty differs from that of the employer in that the representative nature of a union must be considered. *[1]* The primary concern with respect to the impact of accommodating measures is not, as in the case of the employer, the expense to or disruption of the business of the union but rather the effect on other employees. The duty to accommodate should not substitute discrimination against other employees for the discrimination suffered by the complainant. Any significant interference with the rights of others will ordinarily justify the union in refusing to consent to a measure which would have this effect. Although the test of undue hardship applies to a union, it will often be met by a showing of prejudice to other employees if proposed accommodating measures are adopted. As I stated previously, *[2]* this test is grounded on the reasonableness of the measures to remove discrimination which are taken or proposed. Given the importance of promoting religious freedom in the workplace, a lower standard cannot be defended.
> [Emphasis added, with added numbers in square brackets]

[227] Any significant interference with the rights of other members caused by an accommodation will ordinarily justify a union's refusal to consent to such a measure. However, the test remains the reasonableness of the measures to remove discrimination which are taken or proposed. The importance of preventing the form of discrimination involved may nevertheless override the hardship caused to the other members of the union. It is a matter of weighing the two considerations.

(6) Applying the Modified *Meiorin* Test to ACPA

(a) Step One – Rational Connection and Attempts to Accommodate

[228] In this case, the first step of the *Meiorin* test remains unchanged from that applied to the employer: the employer must have adopted the standard for a purpose rationally connected to the performance of the job.

[229] ACPA argued that the Tribunal found that Air Canada had satisfied the first (and second) *Meiorin* step. I disagree. At paragraph 402 of the Tribunal's decision in *Adamson*, in reference to the first two steps, it stated only that "This is not so much in dispute between the parties as is their disagreement on step 3, the accommodation obligation." Thereafter, the Tribunal dealt at length with the hardship issue and rejected Air Canada's arguments, without determining whether the first two steps had been satisfied.

[230] In reviewing the submissions of the complainants before the Tribunal and in the present proceedings, I find that they made no distinction between steps 1 and 2 of the *Meiorin* test,

inasmuch as their principal argument was that procedurally Air Canada made no attempt to accommodate the pilots, simply applying its blanket MRP without exception. In other words, the issue raised by the complainants was not so much whether there was a rational connection of the standard to the performance of the job as whether its effects could be mitigated by some lesser form of accommodation than eliminating the MRP from the collective agreement.

[231] As I indicated during the hearing, I do not consider the situation to be one where it was possible to accommodate the complainant pilots without causing the airline and union members undue hardship.

[232] In the course of the hearing, Air Canada presented evidence demonstrating that gridlock in scheduling would occur with certain combinations of Captains and First Officers if the MRP were eliminated, resulting in a costly requirement to hire new pilots while keeping the older pilots on staff without work to do.

[233] The evidence placed before the Tribunal demonstrated that scheduling more than 2,800 pilots, with the challenges of seniority and the vast number of flight options to cope with, is already a horrifically complicated procedure. Redefining the inputs to satisfy the 70 complainants and other pilots as they reach 60 years of age while still operating under the old system is not a requirement that I would impose on Air Canada pending the outcome of the Tribunal's decision.

[234] Moreover, on each occasion that one allows a pilot to work over the age of 60 it imposes hardship on the younger pilots, with no means to recover their lost income and future lost working

advantages. The complainants, on the other hand, may recover damages for lost income similar to that awarded in the *Tribunal Vilven Damages* decision.

[235] This is clearly what I would describe as an all-or-nothing accommodation situation. It presents no scope to allow individual exceptions to the mandatory age of retirement requirement. Accordingly, I am satisfied that Air Canada met the first step of the *Meiorin* test, including any requirement to demonstrate that partial accommodation was not possible.

(b) Step Two – Good Faith of ACPA

[236] Despite accepting that the union acted honestly and in good faith, the Tribunal found that it failed the second step of the *Meiorin* test because the mandatory retirement requirement was not for the fulfillment of a work-related purpose. I respectfully disagree. In my view, the *gravamen* of the second step relates to the mental element or motive in adopting the standard. Therefore, ACPA did not fail the second step of the *Meiorin* test as it was clearly acting in good faith in adopting the MRP. The issue was simply no longer relevant given the Tribunal's conclusion on the first step.

[237] With respect to the proposed modified second step of the union *Meiorin* test, the evidence proves that the union overwhelmingly adopted the standard in an honest and good faith belief that it was in the collective best interests of its members. There is no dispute that the system of seniority was fundamental to the larger array of benefits provided to ACPA members by the collective agreement. As shall be seen, I conclude that it is an ameliorative rule. Moreover, when adopted, the mandatory retirement requirement was part of the international standards directing flight operations.

(c) Step Three – Hardship

(i) The Evidence on Undue Hardship to the Comparator Pilots

[238] Mr. Salamat provided evidence upon which the issue of ACPA's hardship was determined. The basic methodology employed focused on the salary losses the comparator pilots would incur over their careers due to their advancement being delayed by the complainants continuing to occupy positions, versus the total salary gains they would make after turning 60 by working to the fictive retirement age of 63.

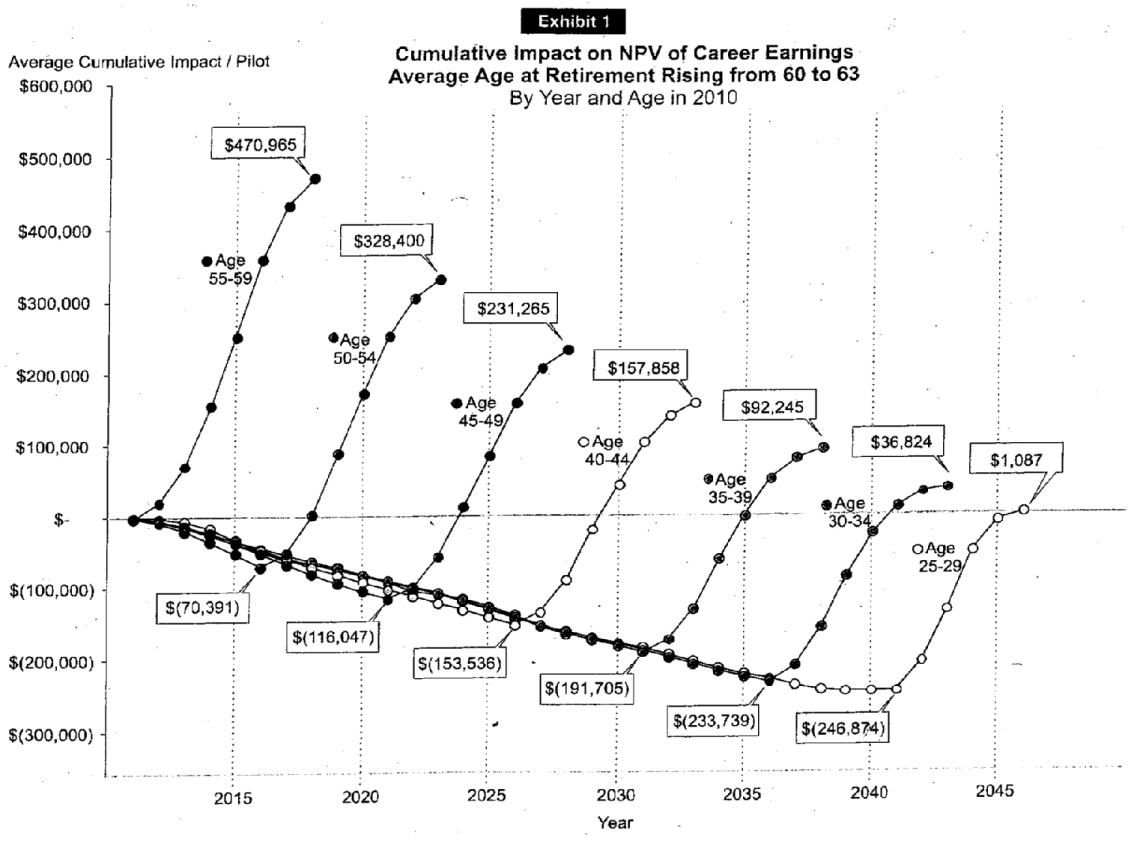
[239] Because the advancement of Air Canada pilots is entirely determined by seniority, a system described by Mr. Salamat as being similar to a "chow line", everything about a pilot's advancement and therefore his or her income relative to other pilots can be determined based on the hiring date. The only exception occurs when pilots leave before age 60, which does not affect the comparability of the financial outcomes. The fact that the age and seniority of Air Canada's pilots was known provided the basis upon which Mr. Salamat could accurately plot the relative earnings situation of every pilot employed at the time the complainants retired until 35 years in the future, based on the career of the youngest pilot at the date of the application.

[240] Mr. Salamat used Air Canada's pilot seniority list as it existed in 2009. He extended it into the future, removing pilots as they turned 60 and then backfilling those positions in the order of seniority of the remaining pilots. This entire process was repeated until all the employees on the current list were retired.

[241] He then applied the relevant pay scales, also determined by the collective agreement, to the pilots in their varying positions throughout their career. Using a discount rate of 3 percent on future earnings, he calculated a lump sum aggregate total which was described as the net present value of the potential career earnings ("the NPV") of the comparator pilots at age 60.

[242] Mr. Salamat conducted the same analysis for retirement years of 61 through 65. Ultimately, he settled on age 63 as the average age of retirement based on pilot retirement data from the United States after the age of retirement there was extended to 65 in 2007.

[243] Using the average retirement age of 63, he recalculated the NPV of the comparator pilots at age 63. The results of his analysis were initially displayed in chart form in Exhibit 1 of his report. I have set it out below for the purpose of better comprehending his evidence.



[244] The numbers in parentheses at the bottom of the chart indicate the average loss of NPV in total earnings for each of the seven age groups of pilots up to age of 60. As the reader moves to the right along the year axis, the average retirement date for each of the age groups is encountered. At that point the chart provides an aggregate average loss of salary for the age group caused by deferral of promotions to age 60. As salary is earned after age 60, the plot line climbs above the zero NPV axis, ending at the 63 year mark for the last member of the age group. At the top of each age group the NPV of total earnings at age 63 is displayed.

[245] Mr. Salamat thereafter re-grouped the pilots into four categories, intended to reflect the manner in which the potential benefits and risks were distributed among each pilot group after the elimination of the mandatory retirement age. This means that he calculated the maximum potential benefit and the maximum potential damage for each pilot and based on the two extremes, rated the risk as nil, moderate, significant or no benefit from the elimination of the MRP.

[246] These results were charted in Exhibit 6 to his report. It plots the loss of NPV of each pilot prior to turning 60 and the increase of NPV gained by working to age 63, along a seniority axis. It is not in a form that can be reproduced, as it relies on colours to distinguish the four risk groupings of pilots, while the tiny individual points representing the 2,957 pilots' NPVs are interspersed throughout the chart.

[247] His conclusions from the re-grouping of the pilots are as follows: for Group 1, representing 14% of the pilots (generally those with the highest seniority), there is no risk whatsoever; for Group 2, representing 57% of the pilots, there is a moderate risk; for Group 3, representing 28% of the

pilots, there is a significant risk; and for Group 4, representing only one percent of the pilots, they obtain no benefit, i.e. only losses, from the elimination of the MRP.

[248] The general conclusions of Mr. Salamat's report are as follows:

> For only 14% of the active Air Canada pilots does the elimination of mandatory retirement present a clear financial advantage. Because the decrease in the number of pilots retiring will translate into a delay in advancement opportunities, the other 86% of pilots will have to work beyond 60 in order to maintain the same potential earnings they would have if the mandatory retirement age was left in place. Within that group, there are some for whom the decrease in career opportunities is relatively small compared to the value of being able to work additional years. However, approximately 29 percent of pilots will have to work additional years for relatively little additional career earnings, as the near-term impacts they face are relatively large.

(ii) The Tribunal's Decision on Hardship

[249] To determine the relative hardship for the pilots, the Tribunal applied what I would describe as a salary gains and losses "balancing" methodology used by Mr. Salamat, by which he attempted to weigh the hardship in terms of the potential loss of NPV suffered by complainants who could not work beyond age 60 in comparison with the potential loss to a comparator group of pilots if the MRP was eliminated. The comparator group comprised the pilots under the age of 60 who had the option of retiring at age 60 or working to age 63. The Tribunal's conclusions were set out at paragraphs 398 to 401 of its reasons in *Adamson* as follows:

> 398 The question is what is the extent of the hardship that is acceptable in this case. Of the total number of active pilots employed by Air Canada in January 2009, 99% stand to benefit with positive earnings (if) they worked to retirement age 63. There is no doubt that the more senior pilots would benefit to a greater extent, the value depending on the relative seniority levels. The downside for the less senior pilots is that their ability to choose to retire at age 60 would be negatively impacted in terms of their earnings.

> 399 The most significant impact would be on the most junior pilots. They would suffer a significant loss of earnings at retirement age 60 and at best would be in a no benefit position even if they work to retirement age 63.
>
> If some degree of hardship is acceptable should it be the pilots whose ability to continue working at Air Canada was cut off at age 60 no reason other than that they attained age of 60? Or should it be the majority of pilots for whom their ability to choose to retire at age 60 would now be more constrained but who would still be in a positive earnings position if they worked to age 63? This is not to underestimate the more serious impact on the younger pilots with the least seniority, but this group of pilots constitutes only 1% of the total Air Canada pilot cohort.
>
> The choice is difficult. But in my opinion, the impact of eliminating the age 60 retirement rule does not reach the threshold of "undue" hardship. I have concluded therefore that ACPA has not satisfied the third step of the Meiorin test.
>
> [Emphasis added]

[250] I conclude that it is necessary to send this matter back for a redetermination inasmuch as I have found that the novel circumstances presented should give rise to modifications of some of the legal principles on BFOR in order to avoid unjust results. I have also argued for a broad interpretation of the hardship factors under section 15 (2). These changes in legal principles affect how this case would have been prepared and argued. For example, there are significant qualitative lifestyle issues, issues relating to relative need of the opposing groups in the union, and issues about the impact on the collective agreement and worker morale at stake, all of which are germane to determining relative hardship. I also conclude that the data on adverse differential income breathes a new life into the significance of the sanctity of the collective agreements that augment and distribute benefits equally to all members.

[251] As well, I have incorporated the principles expressed in *Renaud* into the *Meiorin* test. This recognizes the unusual nature of a union's hardship in terms of the effect of accommodation on the rights of other members of the union, a factor not just limited to economic considerations. There are significant employment rights of the comparator pilots not considered by the Tribunal, which ought to have been considered.

[252] However, even aside from the changes to the *Meiorin* test and the scope of hardship factors, I find that there are deficiencies in the Tribunal's decision from its failure to consider significant factors arising from Mr. Salamat's evidence that lead me to conclude that the decision does not fall within the range of possible reasonable outcomes based on the law and facts. I discuss these below along with some comments on employment rights affected by the elimination of the age 60 retirement rule.

(iii) Errors in the Tribunal's Decision

1. Reduced Salary During the Make-up Period

[253] I conclude that the Tribunal mischaracterized the comparator pilots' loss, significantly understating the economic disadvantage that would befall the "majority of pilots for whom their ability to choose to retire at age 60 would now be more constrained but who would still be in a positive earnings position if they worked to age 63." [Emphasis added]

[254] The error of this statement is that the Tribunal ignores ACPA's most important point: that the comparator pilots have to work at effectively no salary, or for a reduced salary, for three years to "make up" for the loss of income accrued to age 60. Mr. Salamat's report points this out: "The

youngest pilots, however, will suffer significant losses should they retire at 60 and enjoy only negligible benefits for three additional years of work."

[255] The younger pilots would not accept that they were in a "positive" aggregate earnings position when their NPV position at age 63 after three years of additional work places them little ahead of what they would have earned at age 60 with an MRP in place, meaning that they worked those three additional years at a highly reduced effective salary rate.

[256] As an example, considering the median 40-44 age group from Exhibit 1 of Mr. Salamat's report, the cumulative NPV after working three years to age 63 is $157,858 above what their NPV would have been at age 60, which is a negative NPV of $153,536 (all expressed in discounted dollars). In effect, these pilots would earn approximately $52,500 annually, rather than their $200,000 plus salary normally earned at that age, to obtain their increased cumulative NPV. This is because they would have to work for free (i.e. not financial benefit to themselves) until achieving a positive NPV amount.

[257] Obviously the returns for working the three extra years fall even more precipitously for the age 25-29 group, who would be earning an additional $1,087 in NPV at age 63 for their three years of extra work, or $362 per year on the basis of an annual salary, to eliminate their negative NPV at age 60 of $246,874. There is nothing "positive" about working without pay for three additional years to end up in the same financial situation that they would have been in if retiring at age 60 under the mandatory retirement regime.

[258] This does not even account for the fact that if retiring at age 60, this age group would be entitled to approximately 2/3 of their salary earnings in the form of pension benefits for those three years, which I discuss below.

[259] The final point, which is another aspect of the "unfairness" of the deferred make-up deal, is that because all of the age groups (except the age 55-59 group) start from negative NPV cumulative earnings at age 60, if for some reason those pilots do not work the extra three years to age 63, there will be a further shortfall in their career cumulative earnings.

2. Permanence of Lost Wages due to Deferral of Salary until Age 60

[260] The Tribunal failed to comprehend that working for free or at some reduced salary to make up for the reduced MVP at age 60 is an indication that the loss is permanent and cannot be made up. It is an illusion to state that the pilots will be in a positive earnings position relative to retiring at age 60.

[261] As is plainly evident from Mr. Salamat's Exhibit 1, all age groups sustain an annual salary reduction in the neighbourhood of $7000 to $8000 annually due to the elimination of the MRP. The aggregate loss of this income at age 60 for pilots under age 55 ranges from $70,000 to $247,000, the latter being the loss for the youngest group of pilots retiring in 31 to 35 year from 2010.

[262] The Tribunal mischaracterized Mr. Salamat's conclusions on working an extra three years as a form of recouping losses such that they were in a "no benefit" or a "positive earnings position if they worked to age 63". This fails to comprehend that loss of salary to age 60 is permanent and

cannot be made up in any fashion by working longer. The only way in which this loss could be eliminated would be if they were paid at a higher rate than under the collective agreement during the make-up period, which would then constitute hardship to the employer.

[263] Working longer to compensate for a debt on which one cannot collect is not repayment. It is merely working longer to make up for what somebody else has taken away. The debt is never repaid. Each pilot's loss of income to age 60 has to be understood therefore as an unrecoverable loss. For that reason the complainants should understand that their gain would be at the expense of the pilots that follow them.

[264] Neither is there traction in the complainants' argument that the situation is no different for any worker who instead of retiring early at age 55, decides to work to 60. This scenario gives rise to no loss of income by other workers in the same workplace. As long as there is a benchmark retirement age, no negative consequences ensue until the retirement age is exceeded. The maximum NPV of a pilot at hire was calculated going forward on the basis of working to age 60. It is only when that age is exceeded by others that the losses will occur relative to what the pilot was entitled to earn when first hired by Air Canada, as then agreed by the employer, the employees, and the union.

[265] The Tribunal therefore mischaracterized the comparator pilots' loss by concluding that "their ability to choose to retire at age 60 would now be more constrained but [they] would still be in a positive earnings position if they worked to age 63". At age 60, the youngest pilots are short

approximately $250,000 which has been permanently taken from them as a result of the elimination of the MRP. That is exactly what is shown from Mr. Salamat's Exhibit 1.

[266] Moreover, reference to constraining retirement simply throws anyone analyzing the problem off the trail by transforming a financial loss issue into one about delayed life-style on retirement. This also ignores the hardship impact from a lack of financial resources on the younger pilots to meet pressing needs such as for housing or raising families. In addition, this mischaracterization of the pilots' loss turns it into a non-financial hardship factor falling outside the narrow interpretation that the Tribunal was applying to section 15(2).

3. The Windfall Earnings of the Complainants

[267] Another factor that the Tribunal failed to consider in its adverse differential impact comparison was the windfall nature of the complainants' extra earnings from working past age 60. Instead it focussed on the hardship of "the pilots whose ability to continue working at Air Canada was cut off at age 60 <u>for no reason other than that they attained age 60</u>."

[268] The Tribunal's sympathetic characterization of the complainants' financial loss ignores the evidence that the complainants would be obtaining windfall earnings and benefits at the other employees' expense. No other employees, <u>before or after</u> them, except for Captains also near retirement when the age 60 rule is eliminated, would receive a similar prolongation of their salary and benefits at the level reached during the most lucrative period of their piloting career.

[269] Mr. Salamat described the windfall effects provided to the complainants in the following terms:

> Again for the junior pilots the cost of retiring at 60 will be $222,000 and for the most senior it will be nothing. So they, you know, it's the same pattern that we saw with the other ones. One of the, I mean one of the more interesting things about this view of looking at the impact is that pretty much all pilots start off down at the bottom here, as the first officers in the little plane, and as people retire they move up and it's really just incredible luck, you know should the age change happen, and you happen to be at the top of the list, because you would have had a career-long benefit of pilots having retired at 60 and moving up, and then at the very moment when you're supposed to retire, you get to stay. So you know really it's quite a windfall if you happen to be there.
>
> (Tribunal transcript, pages 2575-2576)

[270] The purpose of the collective agreement was to prevent such unequal distribution of the fruits of working for Air Canada amongst members of the union. Windfall gains, the undermining of the purpose of the collective agreement, and impact on worker morale and harmony within the workforce are not cost factors or otherwise falling within a narrow interpretation of hardship factors under section 15(2). This may explain why the respondents and the Tribunal failed to consider what I would describe as intangible or equitable hardship issues arising from the elimination of the MRP.

4. The Infringement of the Comparator Pilots' Employment Rights

[271] Because the hardship factors were limited to purely financial matters, the parties could not present arguments relating to the infringement of basic employment rights, which also meant that the Tribunal did not consider the impact of eliminating the age 60 rule from that perspective. I believe that this omission also resulted from the Tribunal's failure to grasp that the comparator pilots would suffer an unrecoverable loss of income by the elimination of the retirement rule. In any

event, the Tribunal did not consider whether, by normal employment law standards, sustaining a loss of income during the pilots' careers to age 60 would constitute an infringement of their rights, even if the loss could be made up after age 60.

[272] An employer who unilaterally reduces an employee's salary without reasonable cause will face a claim for constructive dismissal. It would be possible in some work situations to insert employees at higher paying positions to the same effect, but that would not be permitted under Air Canada's collective agreement.

[273] In any event, that is not what is happening here. The scenario described is that of the comparator pilots' income being reduced; in effect transferring their loss of income to the complainants in the form of windfall gains. Employment law makes no exception for transferring income from one group of employees to another.

[274] It is not as though the comparator pilots have contributed to this situation. Most of them (75%) voted, when the issue first arose, to adhere to the terms of the collective agreement. It is clear why. As shall be discussed when considering below whether the MRP is discriminatory, the complainants at age 60 would have already benefited by their predecessor pilots having adhered to the collective agreement and thereby allowing them to enjoy the higher salary levels in the later period of their careers intended by the collective agreement. They now propose to extend these late career high salary benefits without having "paid into" the agreement, thereby imposing the additional costs of these benefits on the pilots that follow them.

[275] Also, as shall be seen below, the purpose of the collective agreement is to distribute benefits equally, including on a generational basis. By eliminating the MRP in the agreement this fundamental foundation of the collective agreement has been overturned. This seriously impacts the "sanctity of the collective agreement" issue which I discuss in the context of whether *prima facie* discrimination is established. I find that this issue fits more readily into the union's argument that the MRP is not discriminatory, as opposed to the union's hardship. Nevertheless, as it is not clear that my conclusion that the MRP is not discriminatory will be upheld, the negative impact on ACPA's collective agreements may also be considered a hardship factor.

[276] Nor is there any principle in employment law that allows for a salary reduction based on a deferral of income that can be made up by the employee later by working longer and earning the same or more total income, even were this the case, which it is not.

[277] This scenario is also unfair in that the younger pilots are required to assume all the risk of a contingent "bargain" that the Tribunal sees as amounting to the pilots arriving back at a positive earnings position 20 to 35 years in the future.

[278] Common sense dictates that no pilot under 40 would contemplate accepting such an offer if given the choice. It is unreasonable and perverse to suggest that it is fair for the younger pilots to defer present income based on an opportunity that it may be recovered in the far future.

[279] In this regard, I find that the Tribunal also erred in ignoring the cogent evidence, admittedly from previous related cases, of the referendum on the removal of the MRP from the collective

agreement. As previously mentioned, removal was overwhelmingly rejected by 75% of the members.

[280] The pilots' decisive vote is highly probative evidence attesting to the negative consequences in terms of the hardship that the pilots consider will be imposed on them by eliminating mandatory retirement. No one knows the impact of a change in the collective agreement better than those directly affected by it.

[281] Nor can this vote be considered the "tyranny of the majority," as was suggested by the Commission. The issue before the Tribunal was one of comparative economic hardship. The pilots voted in a common sense fashion to reject a proposal that would significantly change the status quo to their detriment, impairing their employment rights to the benefit of the complainants and older pilots who voted for the change because they would be better off.

[282] Accordingly, taken without colour of right, the elimination of the MRP in the collective agreement would infringe the comparator pilots' employment rights as described in the *Renaud* decision.

[283] It also would undermine the founding principles of the collective agreement, which should be understood as an ameliorative scheme for ensuring equalization in the distribution of the fruits of labour among the members of the union.

5. The Impact of Pensions on Working to Age 63

[284] The impact of pensions in reducing the net value of earnings of pilots at age 63 from those recorded on Mr. Salamat's NPV calculations was raised by the Commission's counsel during the hearing. The Tribunal peremptorily rejected pensions as a factor affecting Mr. Salamat's data on Exhibit 1. It nevertheless went on to consider Mr. Salamat's pension evidence concerning the increase in the pilots' average income during their best five years – the baseline for calculating the increase in the value of their pensions as a further advantage of working to age 63. This was misleading and inaccurate due to its incompleteness.

[285] I am at a loss as to why ACPA would lead evidence supporting the complainants' position which was inaccurate and misleading, yet fail to introduce easily calculable evidence showing that the financial benefits to the pilots at age 63 in Mr. Salamat's Exhibit 1 were significantly overstated because they were not calculated as the net of the pension income that would have been earned during the additional three years along with the cost of pension contributions not required to be paid during the same period.

[286] Not having entered into evidence the impact of pension income not taken on the NPV projections at age 63, ACPA obviously did not argue the issue. However, it was raised by the Commission during the hearing along with an argument for its consideration. It was peremptorily rejected by the Tribunal.

[287] I conclude that the Tribunal made obvious errors regarding pensions in its reasons: on the one hand considering misleading and incomplete evidence favouring the complainants; and on the

other rejecting any evidence demonstrating that the NPV numbers were significantly overstated at age 63.

- The Increase in the Value of Pensions at Age 63

[288] In its decision, the Tribunal described Mr. Salamat's evidence on pensions at paragraphs 374 to 376 as follows:

> 374 Mr. Salamat next produced a Table showing the impact on the average income for the last five years of employment by retirement at age 60. He assumed that the Pension was based on the average of the last five years of earnings. (Air Canada's Pension is based on the best 60 consecutive months).
>
> 375 Mr. Salamat explained that, whereas the previous scenarios illustrated what happens during the employment phase, this Table is intended to show the impact on Pensionable earnings if pilots choose to retire at age 60 when the retirement age rises to age 61-65.
>
> 376 What the Table ultimately concludes is that the average impact on a pilot's earnings for Pension purposes is $3,762 or 3% less if they retire at age 60 when the average retirement rises to age 61. If the average retirement age goes to 63 and the average pilot retires at 60 when the average age rises to 63, the negative impact will be $13,900, or eight percent less for Pension purposes. And so on for the years, 62, 64 and 65.
>
> [Emphasis added]

[289] The $13,900 [rounded to $14,000] "negative impact" for "pension purposes", is expressed as a disadvantage to the comparator pilots if they continue to retire at age 60 instead of working to age 63. This is factually inaccurate because evidence of a $14,000 increase in the best five-year average income by working to age 63 has no relevance unless used as a factor in the valuation of the pension which in turn is used to increase the total advantage from working to age 63.

[290] However, introducing evidence increasing the valuation at age 63 would be even more misleading. Any gain in the value of pensions by working three more years would normally be more than offset by the decrease in economic position if one deducted pension benefits available and contributions not made from age 60 to 63.

[291] Therefore, if the Tribunal wished to refer to evidence on the average increase to the pilots' best five-year salary, it should only have been for the purpose of questioning Mr. Salamat as to why he was introducing this evidence without ACPA having used it to calculate the increase in the pension value at age 63 in comparison with age 60, and more importantly, why no deduction was being made for pension benefits not drawn on to age 63. This assumes, that workers in the federal public service understand that the value of their pension in terms of benefits received is based on the two factors of their best five year income average and the number of years worked, which together determine the percentage of that average salary that they will receive based on a 2 percent rule for every year worked.

[292] Pension administrators or actuaries could produce the increase in the value of the Air Canada pension earned by working to age 63 as they do all the time, for example in the context of family law. They would use the $14,000 increase in the five-year average while also utilizing the 6% increase in annual salary gained by working the three additional years. The calculations would have to be generalized somewhat and grouped into age cohorts, but Mr. Salamat's evidence was already generalized in this fashion.

[293] The increase in the value of the pension would have been considerably greater than the $14,000 increase in the best five-year average income. However, the additional value of the pensions at age 63 would be considerably less than the pension income available but not taken during the three extra years worked plus pension contributions not paid over the same period.

- The NPV at Age 63 Net of Pension Benefits

[294] The Chairperson was aware from his decision in *Vilven Tribunal Damages*, 2010 CHRT 27, that the true calculation of the differential in wages when working an additional three years from age 60 to age 63 would have to be net of the pension amounts that the pilots would have been paid during that same period.

[295] In *Vilven Tribunal Damages*, he calculated the lost salary incurred for Messrs. Vilven and Kelly from their retirement at age 60 to their date of reinstatement as being net of pension benefits received during the same period. His order at para. 174(7) stated as follows:

> 174(7) The compensation for lost wages shall be net of the amounts of the Pension paid to the complainants from September 1, 2009 to the date of their reinstatement.

[296] There was a similar deduction for pension contributions that the complainants would have had to pay had they remained on staff after age 60.

[297] Commission counsel posed a number of questions to Mr. Salamat about his failure to deduct pension benefits for the three additional years worked to age 63. There was also an exchange with the Tribunal over whether it was prepared to consider the issue. Counsel's purpose was to demonstrate that the NPV numbers at age 63 of Mr. Salamat's report were inflated because they did

not deduct pension amounts available but not taken by pilots working beyond age 60. The transcript of these exchanges is as follows:

> **T-1453-11 application record of the Applicant Air Canada, Vol VII of IX: transcript, page 2614, line 16 to page 2615, line 8:**
>
> Mr. Poulin: Versus – but you did not take into account the amounts of money that he'd be making you know, if he stayed out, the pension he would receive. And thus that there would be a much smaller difference.
>
> Mr. Salamat: Yeah. No, the pension impacts on an individual are beyond the scope of this analysis.
>
> Mr. Poulin: But the position of individuals is very important, as you showed in your display when you pointed to that lone little red dot at the top left.
>
> Mr. Salamat: Mm'hmm.
>
> Mr. Poulin: The position of any individual at any point can have quite an impact on any potential income or potential revenue or potential losses.
>
> Mr. Salamat: That's correct.
>
> [Emphasis added]
>
> **T-1453-11 application record of the Applicant Air Canada, Vol VII of IX: transcript, page 2616, line 24 to page 2619, line 15:**
>
> Mr. Poulin: Yes, so that's the – what I'm basically saying to you and to Mr. Salamat, and I think he agrees with me, is that number in reality is quite smaller since those pilots would have received a pension. There's quite a difference.
>
> Mr. Salamat: I – no, I couldn't actually specifically agree to that. I question that it would be quite smaller. I have no doubt that there is a pension impact, but like I say, pensions is not my area of expertise. You know if you work past the age when you're supposed to retire, that means one thing. But if you can continue to contribute that means another thing. And so, you know this is not my area of expertise, and so this is why we didn't really approach it in the analysis.

Mr. Poulin: Can we, can we agree that – sorry, I interrupted you. I have a bad tendency. Can we agree then just to say that there is an actual impact between the, what you've calculated as a potential benefit and what would happen in reality?

Mr. Salamat: Because of, because of the pension?

Mr. Poulin: Because of a number of uncertain factors including pension – how much money one would receive in pension, depending on the size of this pension –

Mr. Salamat: Well yeah. I mean the two things that jump to mind are pensions and taxes, right? So those two things alone will mean that $600,000 is almost guaranteed to be not the amount the pilot would realize.

Mr. Poulin: Okay.

Mr. Salamat: So, but then again I hope I didn't imply that this was taking taxes or pensions into account.

Mr. Poulin: Okay.

The Chairperson: I think, Mr. Poulin, I think what you're getting at is if you just look at this model and it says if you work three years longer, if you're in the age group say – if you look in Exhibit 1 – 50 to 59 – your NPV as of this year (inaudible) $470,965. And I take it that you're saying is well I may not earn that amount of money, because I'm going to look at how much I'm going to earn if I were to retire, and I want to look at what my pension is going to be when I retire. And so I may choose not to stay for three more years, because it's not worth it for me, because I'm not going to make $479,069, because I may make that or I may make a pension that's so close or relatively close that it's not worth it for me to work three more years, after you take away taxes and all these other considerations. Is that your point that you're trying to make?

Mr. Poulin: Yeah, in the end that's the point I'm basically saying, is you don't know. The problem is with Mr. Salamat's model is you don't know, and there's no way of knowing. What is the potential issues and potential benefit is so – it's so –

The Chairperson: Well you can argue that. What I understand is Exhibit 1 then – if you're in that age group and you work till age 63 instead of leaving at 60, given (inaudible) that income level, that's your potential benefit.

Mr. Poulin: True.

The Chairperson: That amount. Period.

[Emphasis added]

[298] In his evidence Mr. Salamat agreed that deducting the available pension benefits of the pilots that could have been earned to age 63, if they instead retired at age 60, would have "quite an impact on any potential income or potential revenue or potential losses" on his charts. He later resiled somewhat from that position when he would not "actually specifically agree" that in reality the amounts paid to pilots receiving a pension would be quite a bit smaller. He had placed himself in a difficult position in light of his earlier admission of failure to consider an item that would have "quite an impact on any potential income or potential revenue or potential losses", which undermined his opinions. Ultimately he fell back to a safer position that pensions were not his area of expertise, which he stated was the reason why he did not consider pensions in his analysis.

[299] Of more significance is the Chairperson's intervention on the point that demonstrates that he misapprehended Commission counsel's point, which was that the potential benefits working to age 63 described in Mr. Salamat's report could not be determined without including the impact of pensions. Instead, the Tribunal characterized counsel's explanation as whether it would be "worth it for me [pilots] to work three more years, after you take away taxes and all these other considerations". It is unreasonable to rationalize a decision not to consider the impact of pension income earned by reference to taxes imposed by the state. Pension revenue is earned by pilots as part of their compensation for working. It is also paid to pilots as a revenue stream similar to the salary earned. By omitting its consideration, the Board fails to properly consider the compensation

in earnings that the pilots would have at age 63 by retiring or not retiring, which was the purpose of Mr. Salamat's evidence. If, pension income is not relevant why did Mr. Salamat lead evidence on the best five years of pension amounts And why did the Board refer to these results in its decision?

[300] After not comprehending the point being made by Commission counsel that the problem with Mr. Salamat's model was that you needed pension information to determine the benefits or costs of retiring at age 60 versus at age 63, the Chairperson dismissed any suggestion that the total earnings at age 63 should be netted out after deductions for pension benefits. He stated in reply to counsel, "Well you can argue that". Thereafter, he rendered his decision on the point by referring to Mr. Salamat's Exhibit 1 and stating "that's your potential benefit", without any consideration of the impact of pensions on Mr. Salamat's calculations of NPV of total earnings at age 63.

[301] The significant impact of pension benefits, in particular for younger pilots, may be understood by considering the situation of the youngest age group of pilots aged 25 to 29, as depicted in the evidence before the Tribunal. While the same effect should apply to most pilots, I illustrate this with the youngest age group because the correlation between seniority and age is nearly perfect. By that I mean that the 25-29 age group cannot contain members whose age and seniority do not correlate. For example, the 30-34 age group may contain both pilots who joined Air Canada when 25 to 29 years old and have accumulated up to a decade of seniority as well as pilots who have just joined aged 30 to 34 years old and have accumulated little or no seniority.

[302] Assuming the 27-year-old pilot represents the average age of the 25-29 group, his or her pension at age 60 will be 2/3, or 66%, of the best consecutive 60 months [60 less 27 = 33 years

times 2 equals 66% of income]. With the highest seniority possible amongst all the pilots at the age of retirement, the pilot will have attained the rank of Captain with the highest pay [by the terms of the collective agreement this must be the group of most senior pilots on retirement] earning $200,000-plus assuming today's salary for these purposes. Accordingly, applying a deduction for pension benefits, the total of three years' earnings of $600,000 would be reduced by 66% or $400,000, in addition to three years of unpaid pension contributions - approximately $25,000, based on the pension contributions in the *Vilven Tribunal Damages* decision).

[303] Anyone who has a pension would know that no increase in the value of the pilot's pension based on a 6% increase in the average income of $14,000 is going to approach anywhere close to the $425,000 deduction that should be applied to the NPV of these pilots at age 63, particularly as the pilots' pension is not even indexed.

[304] Even pegging the increase in the value of the pension at an exaggerated amount, the NPV of total earnings on Mr. Salamat's chart will be significantly overstated. This was the point that Mr. Salamat originally acknowledged and the point which Commission counsel was trying to make, that the true NPV of total earnings was greatly overstated because it did not net out the pension income not drawn on by pilots who continued to work.

[305] This means that besides working for free for three years to achieve the same NPV at age 63 as at age 60, the youngest pilots will still be in a significant deficit position at age 63, representing three years of untaken pension, as opposed to breaking even, as shown in Mr. Salamat's numbers.

[306] In my view, the Tribunal erred in refusing to consider the evidence from Mr. Salamat's questioning and Commission counsel's submissions demonstrating that Mr. Salamat's NPV numbers were too high and could not be relied upon for comparative purposes of working to age 63 versus retiring at age 60 without pension information.

- Conclusion on Pension Evidence

[307] In regard to pensions, the Tribunal's errors are twofold. Firstly, it should not have given any credence to the allegedly positive increase of $14,000 in the 60-month average income used as the pension baseline, as presented in Mr. Salamat's evidence. This evidence was used to weaken the comparator pilots' position even though it was incomplete and served no probative value unless integrated into the valuation of the pension at age 63, in which case a greater deduction would also have been required for the pension benefits not taken from age 60 to age 63.

[308] Secondly, the Tribunal misapprehended the evidence and the purpose of the questioning of Mr. Salamat by Commission counsel, which demonstrated that the true NPV of the comparator pilots at age 63 would be incomplete and misleading in demonstrating the economic advantage of working to age 63 without considering the net amount after deducting for untaken pension income.

[309] That being said, however, I acknowledge that the principal problem on this issue is that ACPA only advanced evidence <u>not</u> helpful to its case, without providing the information necessary for the Tribunal to properly consider pension factors in rendering its decision.

[310] Nevertheless, the Commission's questions were sufficient to draw the Tribunal's attention to the significant understatement of the comparator pilots' true economic situation at age 63, such that it was compelled to react to the evidence in some form or fashion. Because it failed to recognize the significant misstatement of the NPV calculations at age 63 without the inclusion of pension factors, it foreclosed its opportunity to consider what procedure would best meet its mandate in the circumstances.

[311] Two factors weigh heavily in the Court's decision in analyzing what the Tribunal should have done had it not peremptorily dismissed the Commission's evidence and submissions regarding pension income. Firstly, the CHRT is an administrative Tribunal dealing with issues of social equity involving the rights of citizens to be free of discriminatory disadvantages that are unfair or objectionable, the accommodation of which does not create undue hardship.

[312] In circumstances where this Tribunal should have concern about the insufficiency of evidence that would be determinative of, or significantly affect the outcome, I conclude that it has a duty to intervene in the fact determination process to encourage the parties to bring forward all of the evidence necessary to allow it to properly decide the matter. In that respect, I consider its role to be different from that of courts, which to a greater extent must leave the parties to develop their evidence.

[313] Secondly, given the intervention of Commission counsel, which should have drawn the attention of the Tribunal to the inadequacies of ACPA's evidence for want of consideration of the impact of pensions, the Tribunal erred in peremptorily stating that it was relying on Mr. Salamat's

evidence on NPV values at age 63 to determine that the younger pilots were in a positive economic position if working to age 63. Had the position of the Commission been understood, any serious reflection on the issue would have led the Tribunal to conclude that the evidence on NPV values at age 63 was compromised for the purpose of demonstrating the relative economic positions of age groups working to 63.

[314] In my view, the appropriate action for the Tribunal would have been to ask the parties whether they wished to introduce evidence on the effects of pension income and contributions in order to provide the basis for an accurate comparative analysis of the effect of eliminating the MRP and working to age 63.

[315] I say parties, also including the complainants. Commission counsel may not have realized it, but his questions could only undermine the reliability of Mr. Salamat's NPV evidence at age 63. There is no similar difficulty with pensions affecting Mr. Salamat's evidence on the loss of accumulated earnings up to age 60. His evidence accurately reflects salary loss caused by the delay in pilot advancement dictated by the effects of the collective agreement.

[316] Accordingly, if the NPV data at age 63 is compromised, ACPA has nevertheless made its case demonstrating the significant loss to pilots at age 60 with the elimination of the MRP. The evidentiary burden would then fall upon the complainants, who would be left without the means to attempt to demonstrate that it could be recovered by the pilots working longer.

(iv) Hardship Factors Other Than Costs

[317] In light of previous interpretations of the *Meiorin* decision which did not contemplate unions advancing hardship submissions as an aspect of a BFOR defence in addition to the previously limited scope of hardship factors under section 15(2) of the CHRA, it is understandable that the non-economic factors that represent a disadvantage to younger pilots by the elimination of the MRP were not raised.

[318] As I am setting aside the decision and sending it back to the Tribunal for a fresh determination based on the union-*Meiorin* test described above, the parties may wish to lead evidence on the non-economic factors such as the relative needs of the complainants and the comparator pilots. This evidence appears to be relevant and significant when comparing the hardship of the claimants and the comparator pilots.

[319] ACPA may also lead evidence of the effects of sustaining an annual salary loss in the order of $8,000 over 20 to 35 years as a result of the elimination of the MRP in terms of hardship to the younger pilots. The evidence on the value of the pensions of the retiring pilots is also a factor in terms of the relative net worth of the groups of pilots.

[320] The parties may also wish to lead evidence concerning the types of expenditures which the different groups of pilots face on average at their position on the career timelines, i.e. for younger pilots raising families, educating their children, purchasing homes, other capital expenditures and other family burdens of the "sandwich generation" compared with the expenditures of the older pilots.

[321] Reference has been made in earlier cases to the issue of non-financial considerations such as those referenced at paragraph 220 of *Vilven* (2009 FC 367):

> [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 they had as Air Canada pilots. Mr. Kelly had also testified to missing the friendships that he had formed at Air Canada.

[322] The parties can lead evidence on other non-financial considerations that result or not from the elimination of the MRP. This would include the effects on employee morale and similar disruptive factors to the union and employer. I would think that dissension in the ranks of members and employees would be a significant hardship factor for all concerned if it can be demonstrated by probative evidence.

[323] In addition to the personal hardship suffered by pilots, ACPA may discuss the impact of eliminating the MRP on the collective agreement, the undermining of a fair and equitable distribution income and benefits system and the infringement of standard employment rights on the premise that one can reduce salary and somehow make up for it many years in the future.

[324] None of the foregoing is intended to limit the initiatives of the parties to lead other non-financial evidence relating to the hardship of the pilots or the union proper.

(d) Fourth Step - Whether a Lower Standard May be Defended

[325] In recasting the hardship test for unions by incorporating the principles of the *Renaud* decision, an issue arises that was not considered by the Tribunal. The Supreme Court concluded

that despite a finding of hardship to other members of a union, a decision-maker must nevertheless determine whether the importance of promoting the right that was the subject of the discrimination was such that it prevented a lower standard from being defended. Justice La Forest's comments on this point at paragraph 38 of *Renaud* are as follows:

> As I stated previously, this test [of undue hardship] is grounded on the reasonableness of the measures to remove discrimination which are taken or proposed. Given the importance of promoting religious freedom in the workplace, a lower standard cannot be defended.

[326] As this is a new issue, I will attempt to provide some guidelines to the Tribunal for its consideration.

(i) A Nuanced Approach to Age Discrimination

[327] The importance of promoting freedom from age discrimination was an issue implicitly considered by the Supreme Court in *McKinney*. In upholding the constitutionality of the MRP in that case, the Court pointed out the need for a nuanced and balanced approach towards age discrimination in comparison with more emotionally charged forms of discrimination. It explained the difference at paragraph 88 of *McKinney*:

> . . . Racial and religious discrimination and the like are generally based on feelings of hostility or intolerance. On the other hand, as Professor Ely has observed, "the facts that all of us once were young, and most expect one day to be fairly old, should neutralize whatever suspicion we might otherwise entertain respecting the multitude of laws . . . that comparatively advantage those between, say, 21 and 65 vis-à-vis those who are younger or older", *Democracy and Distrust* (1980), at p. 160. The truth is that, while we must guard against laws having an unnecessary deleterious impact on the aged based on inaccurate assumptions about the effects of age on ability, there are often solid grounds for importing benefits on one age group over another in the development of broad social schemes and in allocating benefits. The careful manner in which the General Assembly Resolution on the rights of the aged is framed is worth noting. Its recommendation discouraging discriminatory practices in

> employment based exclusively on age is prefaced by the words that this be done "wherever and whenever the overall situation allows".
>
> [Supreme Court's emphasis]

[328] Justice Mactavish in *Kelly*, after a careful review of *McKinney* and developments since its release, concluded that many of the factors that informed its reasoning had less relevance in the intervening years, thereby undermining its precedential value. Her decision was reversed by the Federal Court of Appeal, which concluded that *McKinney* continued to bind the lower courts. As a result, *McKinney* can be understood as confirmation that the importance of protection against age discrimination would not prevent a defence of hardship justifying a lower standard.

(ii) Adverse Differential Impact

[329] The Supreme Court in *Gosselin* pointed out at paragraphs 31 and 32 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 might.

[330] Justice Mactavish in *Vilven*, in the finding that the MRP was discriminatory under section 15(1) of the *Charter*, distinguished these conclusions in *Gosselin* by noting that they were made in the context of an adverse differential effect in relation to younger individuals. By this distinction, she implied that an adverse differential impact would be a factor in concluding a rule was discriminatory. This would support a conclusion that hardship factors may justify a lower standard of promoting freedom from age discrimination where it relates to an adverse differential impact suffered by the respondent.

[331] I therefore, do not see any suggestion in the foregoing passages from the *McKinney*, *Gosselin* or *Vilven* decisions that the importance of promoting age discrimination would prevent a lower standard in being justified by hardship.

(e) Conclusion and Directions on ACPA's BFOR Defence

[332] In conclusion, although entirely understandable, I find that ACPA's BFOR defence was premised on wrong principles such that no proper hearing was held on the issue. First, the Tribunal applied a BFOR test for employers, when the test should have been one that would permit ACPA to advance defences justifying the mandatory retirement rule. Second, the case was conducted on the basis that the hardship factors had to be limited to safety, health and costs, thereby limiting hardship considerations to the financial impact of extending the age of retirement of pilots. As a result of these two errors in principle, the matter must be redetermined using an appropriate BFOR test at a hearing at which the parties may lead evidence and advance arguments on all factors of hardship not considered in these proceedings.

[333] I deal below under the heading of discrimination with what I describe as the notion of upholding the sanctity of the union's collective agreement rights based on the principle of equal treatment of members. Infringement of the union's fundamental principles, and thereby its rights, could be considered a hardship factor under the broadened scope of section 15(2), if it turns out that it is rejected as a rationale to disprove substantive discrimination occurred. Accordingly, undermining the basic collective agreement rights of ACPA should also be considered a hardship factor, as was indicated in *Meiorin*.

[334] Based on all of the above, I conclude that the decision on hardship is not justified or transparent and does not fall within the range of possible reasonable outcomes. Accordingly, ACPA's application is granted and the decision of the Tribunal rejecting ACPA's BFOR defence is set aside. In returning the matter before the same panel, I provide the following directions:

a. The Tribunal is to apply the four-step hybrid *Meiorin* test as described at para 220 above.

b. The Tribunal shall not limit the evidence on hardship to health, safety or costs, but shall consider any evidence of disadvantage to the comparator pilots and the union caused by the elimination of the MRP.

c. In determining whether financial hardship is occasioned to the comparator pilots, the Tribunal will give due consideration to the areas of concern described above.

d. The Tribunal is to provide the parties with an opportunity to present evidence on the net economic effect resulting from extending the age of retirement from age 60 to 63, which may include evidence on the impact of pensions, but not taxes.

E. IS THE MANDATORY RETIREMENT PROVISION DISCRIMINATORY?

(1) Introduction

[335] My initial analysis of this case was from the perspective of hardship. Hardship was the focus of the previous related decisions concerning mandatory retirement. In addition, Air Canada and ACPA limited their defences to proving that there was hardship or that the normal age of retirement in the Canadian airline industry was 60. *Renaud* also considered the disadvantages to union members caused by accommodation and their rights under the rubric of hardship. It made no

reference to separate and distinct hardship for the union caused by the undermining of its collective agreement.

[336] Despite this background and the fact that this matter is being remitted for a redetermination on hardship, I nevertheless have concluded that my direction should include an option that ACPA (and Air Canada) may argue that the MRP in the collective agreement did not cause substantive discrimination against the complainants.

[337] Somewhat like the Tribunal chairperson herein who thought it prudent to consider the hardship of the union, I think it prudent for a number of reasons to direct the Tribunal to consider the complaint in a two-stage process: firstly from the perspective of discrimination, and thereafter hardship.

[338] Firstly, I find that the evidence demonstrating an adverse differential impact on the comparator pilots is applied for different purposes to the union and the member pilots. For the union, its primary concern is defending what I have called the sanctity of its collective agreement rights. ACPA originally argued that the retirement rule was not discriminatory as it provided for a "life-cycle" egalitarian treatment of its members. Seen in this light, the mandatory retirement rule appears to be a meritorious ameliorative rule intended to distribute the benefits of the workplace, using age as a basis, in a fair and equal fashion.

[339] The purpose of the rule is to ensure equal favourable treatment of all union members over time. I conclude that this purpose was not completely apparent prior to Mr. Salamat's evidence that

demonstrated that by passing the burden of their gains to the pilots left behind, the complainants would introduce unequal treatment of all employees. ACPA's argument, therefore, is at the level of the rule; that there is no discrimination by the retirement rule because it serves a meritorious or ameliorative purpose, which laws are supposed to promote, not prevent.

[340] ACPA's members, on the other hand, personally suffer from the consequences of the adverse differential treatment resulting from elimination of the MRP in their lowered incomes and delayed careers, plus other non-financial disadvantages. They argue that not accommodating the complainants' rights is justified because to do so would cause them personal undue financial and other personal hardship which varies with their personal circumstances. They could also claim that their union rights have been breached, but I do not see this as occurring at the level of the individual member. I think that this issue arises at the collective level and falls under the union's responsibility as an extension of its mandate to negotiate and enforce the mandatory retirement rule.

[341] Because the Court in *Renaud* saw the union's hardship in terms of the disadvantage to its members, it categorized adverse impact under hardship. I have already raised the point that unions could also suffer hardship in the infringement of their basic collective rights, but I think this is truly a matter related to discrimination, as perhaps is the question of members' rights under the collective agreement.

[342] I see the factor of union rights benefiting members by their equal treatment as an issue arising under the rubric of discrimination, rather than justifying the discrimination by demonstrating hardship and a failure to accommodate. The issue of a beneficial rule would seem to arise when

determining whether *prima facie* discrimination has been proven, because it relates to the substantive nature of the deviation in treatment of the complainants as meritorious or not. One should not have to justify meritorious deviations. Only non-meritorious deviations in treatment of complainants require justification by respondents relating to the burden of accommodating the discrimination by the impact it has on respondents.

[343] Because of my concern that the ameliorative effect of a rule may not fit into the hardship tests, I consider it necessary to direct the Tribunal to consider whether the retirement rule is ameliorative in the nature of its distinction and whether a case of *prima facie* discrimination exists.

[344] Even if I am wrong in concluding that the issue of the rule being meritorious can only be considered at the *prima facie* determination stage, I would nevertheless direct the Tribunal to consider the issue. That is because to find a solution to what appears to be an unjust result, I have already travelled far into uncharted waters on the principles of hardship for a trial level court, which usually navigates by the rules of other courts. This includes modifying the Supreme Court's *Meiorin* test so as to allow unions to justify their actions and to avoid the application of absolute liability. I have also upheld the Tribunal's interpretation of section 15(1) and taken a broader interpretation of the scope of hardship factors under section 15(2) despite the language of both sections and also contrary to what was previously thought to apply for section 15(2) by a highly respected judge of this Court. If I am proven incorrect in these conclusions, turning to the definition of a discriminatory practice under the CHRA appears the only alternative to avoid what appears to be an injustice to the younger pilots if the MRP is struck down.

[345] In addition, even though this issue was not raised by the parties, I believe that I am correct in concluding that it is an overriding error in principle to decide a matter on an incorrect characterization of a fundamental issue before the Tribunal, regardless of whether the issue was argued or not. Similarly, because there was no probative evidence of a differential impact from the elimination of a mandatory retirement rule in any of the previous CHRT and Federal Court decisions treating this subject, I do not feel constrained by their reasoning or decisions.

[346] Finally, I would not be so far from shore on any of these tacks if I did not believe that the new evidence on adverse differential impact is significant new evidence affecting the field of mandatory retirement for two reasons. Firstly, I strongly suspect that differential impacts will occur in all work places where good jobs are scarce and there is a correlation in advancement and compensation with jobs opening up. In other words, the negative effect of extending careers does not require a perfect "chow line" workplace structure, such as is the case for Air Canada pilots. The uniqueness of their situation merely allows for a precise calculation of the effects of extending careers. This brought to light an unknown negative consequence of eliminating MRPs, affecting not just entry-level workers, but likely all employees in an organization, which should have general application beyond a workplace driven entirely by seniority.

[347] Secondly, the adverse differential impact evidence should call into question some of the conclusions from previous jurisprudence on MRPs that were rendered without the benefit of the complete evidence on adverse differential impact. Once it is understood that the issue in mandatory retirement rules is not just making way for younger unemployed workers, as was argued in *McKinney*, but also avoiding the imposition of unfair differential treatment on all workers on the job

who follow those who would obtain windfall benefits by extending their careers, the past jurisprudence needs to be reconsidered because its pronouncements were based on incomplete facts.

[348] Furthermore, these conclusions are significant and may extend into other areas which are presently the subject of controversy in our society. For example, I would think that this evidence and the Courts' conclusions on MRPs are relevant to the debate of extending retirement ages to cover pension shortfalls. The focus to date has largely been on concerns over having sufficient funding to pay the pensions of the mass of Baby Boomers who are in the process of retiring. The evidence in this case suggests that consideration should be given to the impact of these initiatives on persons already in the workforce, as well as those seeking to gain entry. By that I mean that Mr. Salamat's evidence suggests that all workers, and particularly the younger generation, may be forced to subsidize the older generation by extending the careers of older workers to pay their pensions.

[349] As discussed below, I find that the *McKinney* decision of the Supreme Court supports these initiatives to fund pensions by describing any MRP as *per se* discriminatory and therefore in principle not worthy of maintaining. This case provides the opportunity to revisit the characterization of a mandatory retirement rule as discriminatory. Without such a reconsideration, the significant momentum to extend workers' careers in areas of scarce good jobs, already generated by past court decisions, will continue unabated. In light of Mr. Salamat's evidence, I believe that it is arguable that eliminating retirement rules in the area of scarce good jobs may cause greater hardship to younger workers than gains made by extending older workers' careers judged by equitable measures of vulnerability and need.

[350] By all present accounts the younger generation, in the area of scarce good jobs at least, are facing more difficult economic challenges than the older generation at the age of retirement. Moreover, the financial insecurity of members of the younger generation may be having a profound impact on the fundamental institutions of our society for example by delaying marriages and the raising of families. I realize that these observations are perhaps too controversial to be taken as proper judicial notice. But this is a realm that has relied heavily in the past on judicial notice, some of which I find highly controversial and indeed inapplicable to Canadian society in the 21st century. One of the possible benefits of this decision may be to obtain some hard evidence on generational inequalities in the Tribunal's redetermination.

[351] Accordingly, in addition to my directions, I propose to consider some of the issues that I see arising for the Tribunal in considering whether the MRP in the collective agreement could properly be described as a discriminatory practice under the *CHRA*.

(2) Scope of "Employment Opportunities" in Section 10 of the CHRA

[352] One proposition that I considered but rejected was that the wording of section 10 of the CHRA may be interpreted to conclude that an MRP in a collective agreement causes no deprivation of an "employment opportunity".

[353] In considering this issue, I reject the application of section 7 to establish *prima facie* discrimination. The reference is only to "employees" which I take to mean that its application is only to employers. To assist in analysis of this issue, section 10 of the Act is repeated below:

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 from any employment opportunities on a prohibited ground of discrimination. [Emphasis added]	10. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite et s'il est susceptible d'annihiler les chances d'emploi ou d'avancement d'un individu ou d'une catégorie d'individus, le fait, pour l'employeur, l'association patronale ou l'organisation syndicale : a) de fixer ou d'appliquer des lignes de conduite; b) de conclure des ententes touchant le recrutement, les mises en rapport, l'engagement, les promotions, la formation, l'apprentissage, les mutations ou tout autre aspect d'un emploi présent ou éventuel. [Je souligne]

[354] It is arguable on the language of the provision that the entering into of the agreement by ACPA and Air Canada was not for the purpose of depriving union members of employment opportunities. Rather, it was intended to entitle the union members, over the course of their careers, to enjoy generous employment opportunities, in particular including significant income to pilots in the latter years of their careers, along with the ability to retire with excellent pensions and other benefits.

[355] In considering the interpretation of the employment opportunities resulting from the collective agreement, it seems reasonable to submit that the Court should not adopt a timeframe perspective at the end of the pilots' careers. This results in the characterization of the situation as one of deprivation going forward. A more realistic timeframe of the pilots' employment opportunities should be from the perspective when they joined Air Canada. At that time

employment opportunities were viewed as an entitlement over a career with a definite and beneficial endpoint.

[356] The difficulty with this line of reasoning is that it depends upon establishing that the collective agreement including the MRP is an ameliorative arrangement. The meaning of employment opportunities includes employment. Therefore, a deprivation of these opportunities occurs at age 60 on account of an age rule in the collective agreement. I do not think the term "opportunity" can exclude from its scope a situation of the termination of work because of an age rule.

[357] Therefore, the success of this argument would depend entirely on the characterization of the collective agreement as an ameliorative set of rules intended to distribute benefits equally among workers over a time period with a definite endpoint. It is only on this basis that the concept of deprivation can be challenged and turned into an entitlement, and with that the Court's perspective in time changed from the end to the beginning of the agreement.

[358] If an ameliorative arrangement, then the explanation is that there is no substantive discrimination. Basically by that argument, a rule is not discriminatory if it is a meritorious deviation in treatment of the complainants; in this case to treat all pilots the same and in a mutually beneficial manner, including their retirement at a pre-determined age. If that is the legal result and the basis for changing the time perspective to see the "employment opportunity" as an entitlement as opposed to a deprivation, I think it is better to call a spade a spade. By this I mean it is preferable to explain the underlying generally applicable rule why it is not discriminatory based on legal

principles, rather than say on the words of the statute that it is not a deprivation of an employment opportunity based on the specific facts.

(3) Formalistic versus Substantive *Prima Facie* Discrimination

[359] The foregoing analysis goes to the heart of the issue of discrimination: whether its meaning may be interpreted on a substantive basis as opposed to a formalistic approach, which appears to have been the methodology adopted by the Tribunal. Its brief reasons on discrimination are set out at paragraphs 2 and 3 of its decision as follows:

> [2] To succeed in their complaints, the Complainants must establish a *prima facie* case of discrimination and once having done so, the onus shifts to the Respondents to establish a defence on a balance of probabilities.
>
> [3] Under the terms of the collective agreement and pension plan between Air Canada and ACPA, Air Canada pilots are required to retire on the first day of the month following their 60th birthday. Amended Schedule A, Complainants Employment History (January 4, 2010) provided by Air Canada, lists each complainant's name; date of birth; date of 60th birthday; and date of retirement. This shows that all of the complainants were retired on the prescribed date. Their employment was terminated solely because of their age. This is not disputed by the Respondents. Accordingly, the Complainants have established a *prima facie* case of discrimination.

[360] The Tribunal's decision adheres to the standard practice of requiring an initial determination of *prima facie* discrimination, after which arguments of justification may be considered. The methodology employed is formalistic in defining discrimination. By that I mean that it rests on the notion that any departure from identical treatment of individuals on the basis of an enumerated or analogous ground violates equality and therefore demands justification.

[361] The Supreme Court has repeatedly rejected a formalistic approach to defining discrimination for the purposes of applying section 15(1) of the *Charter*. Instead numerous cases such as *Law*, *Kapp*, and *Withler* have emphasized that the differential treatment must be shown to discriminate in a substantive sense to be found discriminatory for the purposes of section 15(1).

[362] I use as an example the Supreme Court's most recent restatement of the section 15(1) *Charter* test in *Quebec v A*, cited above, requiring substantive discrimination, made by Lebel J at paragraph 154. I choose to cite this passage because it also raises caveats about the overuse of judicial notice, which is another consideration I discuss below.

> 154. To resolve the third issue and thus determine whether the differential treatment discriminates in a substantive sense and brings the purpose of s. 15 (1) into play, the court must undertake a full contextual inquiry concerning the circumstances of the claimant's claim. This inquiry must be undertaken from the point of view of a reasonable person in circumstances similar to those of the claimant who takes the relevant context into account. Whereas the claimant must prove on a balance of probabilities that the impugned provision discriminates in a substantive sense, the court can take judicial notice of certain facts or matters but must be careful not to use judicial notice to recognize social phenomena that may not truly exist.
>
> [Emphasis added]

[363] There is some debate as to the extent to which a formal *Charter* discrimination analysis should apply in the human rights context. In this regard, it is necessary to consider the recent Supreme Court decision of *Moore v British Columbia (Education)*, 2012 SCC 61, [2012] 3 SCR 360 [*Moore*]. This was an appeal from the decision of the British Columbia Court of Appeal (2010 BCCA 478), wherein a debate had ensued as to the application of substantive discrimination *Charter* principles to establish *prima facie* discrimination under section 8 of British Columbia's *Human Rights Code*, RSBC 1996, c 210.

[364] The issue in *Moore* was circumscribing the universe of people potentially entitled to equal treatment in relation to the subject matter of the claim (special education) and to decide whether reference should be made to other children with special education needs or to the general education population as a matter of achieving substantive equality.

[365] Rowles JA, whose dissent was upheld by the Supreme Court, described the role of a *Charter* analysis in determining discrimination under a human rights code as follows at paragraphs 111 and 112 of her reasons:

> VI. Comparator Analysis
>
> [111] A considerable amount of argument on this appeal concerns whether a formal comparator group analysis is required, given that this claim is made under the Code (as opposed to the Charter), and that it is an "accommodation" claim (as opposed to a claim for identical treatment). In my opinion, nothing much turns on this question.
>
> [112] The detailed comparator group analysis is a product of s. 15 Charter jurisprudence. It began in Andrews, where McIntyre J. stated that equality "is a comparative concept" (at 164), was first formalized by Law, and then subsequently developed by cases such as Granovsky v. Canada (Minister of Employment and Immigration), 2000 SCC 28 (CanLII), 2000 SCC 28, [2000] 1 S.C.R. 703 [Granovsky], and Hodge v. Canada (Minister of Human Resources Development), 2004 SCC 65 (CanLII), 2004 SCC 65, [2004] 3 S.C.R. 357 [Hodge]. Traditionally then, a formal comparator group analysis was not done for statutory human rights claims, and explicit mention of comparator groups remains conspicuously absent. However, in Gibbs, which predated Law, Sopinka J. for the majority engaged in a form of comparator group analysis in respect of discrimination under Saskatchewan's Human Rights Code, S.S. 1979, c. S-24.1. As well, Huddart J.A. in the Teachers case held that "[r]easoning by analogy from the analysis developed to consider alleged breaches of s. 15 of the Charter, implicit in the establishment of prima facie discrimination [under the Code] are considerations of the appropriate comparator ..." (para. 17).
>
> [Emphasis added]

[366] At paragraph 89 of her reasons, Rowles JA noted that the characterization of the service that best defined the comparator group was public education generally because this "best accords with the purposes of the Code, substantive equality and equality jurisprudence generally".

[367] Rowles JA's decision on the appropriate comparator group was unanimously upheld, with Abella J writing for the Supreme Court. However, no comment on the issue of the application of substantive discrimination accompanied Justice Abella's reasons, which she summarized at paragraph 30 of the Supreme Court's decision as follows:

> [30] To define 'special education' as the service at issue also risks descending into the kind of "separate but equal" approach which was majestically discarded in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). Comparing Jeffrey only with other special needs students would mean that the District could cut all special needs programs and yet be immune from a claim of discrimination. It is not a question of who else is or is not experiencing similar barriers. This formalism was one of the potential dangers of comparator groups identified in Withler v. Canada (Attorney General), 2011 SCC 12 (CanLII), [2011] 1 S.C.R. 396.

[368] I do not interpret the Supreme Court's decision as rejecting the application of *Charter* principles or the requirement that substantive equality constitute a component of *prima facie* discrimination where appropriate; as stated by Rowles JA, applying the general education population as the comparator best accorded with "substantive equality".

[369] But that conclusion does not provide much help. The more difficult question is whether substantive equality *Charter* principles should be used to determine whether a *prima facie* situation of discrimination arises for a rule said to serve an ameliorative purpose for the equal distribution of benefits among workers. To properly answer this question, I think, depends upon providing an

explanation why it would be inappropriate not to resort to *Charter* principles of substantive discrimination to determine the content of *prima facie* discrimination in the specific context in this matter.

[370] In searching for an answer to support the argument that *prima facie* discrimination under the CHRA should include a substantive element, I turn to an article by Professor Donna Greschner, "Does Law Advance the Cause of Equality?" (2001) 27 Queen's LJ 299. This article was cited with approval by the Supreme Court in *Kapp* to support its reasoning to vary the focus of a discrimination analysis towards that of the perpetuation of stereotypes and prejudice. I find the article useful in that the author provides an explanation as to why, and therefore when, substantive as opposed to formal equality should be required in a section 15(1) *Charter* analysis:

> 4 In Law and other recent cases, the Court has stated that the goal of section 15 is to promote substantive equality. [. . .]
>
> 5 To begin, what does substantive equality mean? The term is used in contrast, usually positive contrast, to formal equality. Hence, at a minimum, substantive equality must mean something different, and better, than formal equality. Thus, what does formal equality mean?
>
> […]
>
> 16 However, the two-step approach is formalistic. It rests on the notion that any departure from identical treatment of people, on the basis of an enumerated or analogous ground, violates equality and therefore demands justification. The two-step approach contains only one basic question, which typically has a fairly easy answer: does the impugned law create a distinction (or fail to draw a distinction) on the basis of an enumerated or analogous ground? In almost every case, protestations about contextualism notwithstanding, one can answer that question by merely examining the words of the statute. [...]
>
> […]

> 18 In my view, labelling every distinction on enumerated or analogous grounds as a violation of equality (the first step of the two-step approach) is inconsistent with substantive equality itself. […]
>
> 19 The formalist approach to section 15 also cheapens rights talk. It labels any deviation from identical treatment, even for the most meritorious reasons, as an infringement upon constitutional rights. […]
>
> [Emphasis added]

[371] Professor Greschner provides a double-barrelled explanation for why a substantive discrimination analysis should be applied. Firstly, it is illogical that a meritorious deviation be considered *prima facie* discrimination. As already pointed out, laws are intended to prevent injurious conduct. They should have no application to meritorious behaviour resulting from an ameliorative rule. An ameliorative retirement rule would fit the description of a meritorious deviation.

[372] Secondly, discrimination is a highly opprobrious, and therefore effective, label used to discourage a type of behaviour rejected by our society. It should not be cheapened by overuse where common sense suggests no discrimination has occurred. Like crying wolf too often, the term will lose its punch and legitimacy as an effective deterrent to discriminatory conduct.

[373] An example of cheapening rights talk I think is occurring in this case by telling the younger pilots that the older pilots suffered "discrimination" by the retirement rule. One scoffs at the suggestion that a rule which was intended to ensure that all pilots would be treated equally, and which when eliminated results in windfall benefits to the complainants at the expense of all of their colleagues, was based on a *prima facie* stereotype of prejudice against older pilots. Equally it is

hard to accept that the rule perpetuated a disadvantage to well-off senior pilots of the Baby Boomer generation because they were victims from among a disenfranchised and destitute group that suffers age discrimination in the 21st century.

[374] If on the one hand, an explanation exists why substantive discrimination factors should be considered to find a *prima facie* discriminatory practice under the CHRA, conversely I can think of no policy ground or explanation why the courts should not resort to a substantive definition of discrimination so as to avoid mislabelling a genuinely meritorious deviation as discriminatory.

[375] Moreover, logically, I cannot see how section 15(1)(*c*) of the CHRA can be labelled discriminatory for *Charter* purposes based on permitting an impugned offending rule (a retirement provision), while the retirement rule is also found to be discriminatory under the Act, unless the same principles apply for both determinations. I assume that discrimination for *Charter* purposes does not exist "in the air", i.e. where no discriminatory conduct can be demonstrated on the facts of the case upon which a pronouncement on *Charter* discrimination is made. This logically means that the retirement provision must be found to be discriminatory under the Act and under the *Charter* on the same principles. I believe that this was another point made in *Meiorin* which was in part rationalized upon a principle that there should not be too extensive a dissonance between human rights analysis and *Charter* analysis. See *Meiorin* at paras 47 to 49.

[376] There is a third reason that an ameliorative rule should not be branded as *prima facie* discriminatory. It does not occur in this situation, but arises in more challenging circumstances involving incompatible fundamental rights. As was pointed out in McKinney, because rights

involving age in the workplace tend to be somewhat nuanced, they do not fall into the category of those requiring more stringent protection. Other rights relating for example, to race, religion or gender where historical patterns existed of discriminatory stereotyping and prejudice require more vigilance against intrusion by justification.

[377] When incompatibility arises where these rights clash, such as occurs for example when a gender based rule is in conflict with a religious right, I think a strong case can be made that such issues should not be determined on the principles of hardship. Rather the claimant should demonstrate that he or she was the subject of substantive discrimination before any issue of justification by hardship arises.

[378] This conclusion is based on two premises. Firstly, formalistic discrimination does not establish that discrimination has in fact occurred. That is because substantive discrimination involves harmful rules of distinction, which determination is not necessarily the formalistic test. A human rights procedure that avoids consideration of the substantive discrimination requirement and moves directly into the issue of justification by hardship, eliminates or severely diminishes the opportunity to argue that the rule is not discriminatory. This would be all the more so if hardship factors were limited to safety, health and costs as per section 15(2) of the CHRA. If the literal interpretation of this provision is sustained, arguments based on upholding the values of competing rights such as those involving gender for example, would be excluded from consideration.

[379] Secondly, shifting the focus from the issue of discrimination, to hardship usually entails matters of accommodation. This issue places an ameliorative rule at a disadvantage by the generous

hardship accommodation principles that are designed to seek a middle ground of compromise, which normally is to be encouraged. However, a pattern of accommodation over a period of time, I think, will lead to the undermining of the fundamental right by the process of compromise. None should have been made in the first place, where no substantive discrimination occurred.

[380] In a democratic society, some values must take precedent over others. It serves no purpose therefore to avoid the hard choices when they clash if the results are pernicious to the principles upon which our society is founded. Avoidance of these decisions cannot occur where the prima facie discrimination is required to be substantive.

[381] With this background, I do not understand that discrimination or a "discriminatory practice" as defined in the CHRA is in fact discriminatory if the test applied is merely formalistic and does not amount to substantive discrimination, thereby allowing for the application of appropriate *Charter* principles for the purpose of the Court's analysis.

[382] On that basis, it would be an error to interpret the CHRA as allowing a claimant to establish a discriminatory practice involving a mandatory retirement rule where on the legal onus the claimant has not established substantive discrimination.

[383] That is not to say that the Tribunal was incorrect in concluding that the complainants had made out a case of *prima facie* discrimination, and that the onus shifted to Air Canada and ACPA to demonstrate that their conduct was not discriminatory. Establishing a first stage formalistic case of discrimination shifts the evidentiary onus to the respondents who, unless they establish by evidence

the ameliorative effect of the rule, are left with the *prima facie* finding of discrimination. That is what happened here when no challenge was made to the finding of *prima facie* discrimination.

[384] My point however, is that it would appear that the respondents could have met that evidentiary onus by proving, on a "balance of probabilities" onus in their favour, that the complainants were not the subject of substantive discrimination in being required to retire at the age of 60. Only after that issue was determined against them would they have had the further onus of establishing justification using hardship principles, on which issue the legal onus would remain with them throughout.

(4) Mandatory Retirement as an Essential Component of a Larger Ameliorative Benefits Scheme

(a) Differing Factors to Determine Discrimination

[385] The Supreme Court has pointed out that where a law has an ameliorative effect, affecting various groups, the impact on others must be considered in determining whether the distinction in treatment perpetuates a prejudice or stereotype.

[386] In *Withler*, the Supreme Court noted the need to consider different factors depending upon the circumstances of the alleged discrimination. These included considerations such as whether the impugned law was part of a larger benefits scheme, the ameliorative effect of the law on others and the multiplicity of interests it attempted to balance, which the Court indicated should colour the discrimination analysis. The point is first made at paragraph 38 of the Court's reasons and amplified upon at paragraph 67 as follows:

> [38] Without attempting to limit the factors that may be useful in assessing a claim of discrimination, it can be said that where the discriminatory effect is said to be the perpetuation of disadvantage or prejudice, evidence that goes to establishing a claimant's historical position of disadvantage or to demonstrating existing prejudice against the claimant group, as well as the nature of the interest that is affected, will be considered. Where the claim is that a law is based on stereotyped views of the claimant group, the issue will be whether there is correspondence with the claimants' actual characteristics or circumstances. Where the impugned law is part of a larger benefits scheme, as it is here, the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis.
>
> […]
>
> [67] In cases involving a pension benefits program such as this case, the contextual inquiry at the second step of the s. 15(1) analysis will typically focus on the purpose of the provision that is alleged to discriminate, viewed in the broader context of the scheme as a whole. Whom did the legislature intend to benefit and why? In determining whether the distinction perpetuates prejudice or stereotypes a particular group, the court will take into account the fact that such programs are designed to benefit a number of different groups and necessarily draw lines on factors like age. It will ask whether the lines drawn are generally appropriate, having regard to the circumstances of the persons impacted and the objects of the scheme. Perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required. Allocation of resources and particular policy goals that the legislature may be seeking to achieve may also be considered.
>
> [Emphasis added]

(b) The Ameliorative Purpose of the Mandatory Retirement Provision in the Collective Agreement

[387] In the *Vilven* litigation, the Tribunal in its first decision (2007 CHRT 36, *Vilven Tribunal #1*) discussed the nature and purpose of mandatory retirement policies in Air Canada's collective agreements, in various paragraphs commencing at 99 and ending at 110. Those of relevance are as follows:

[99] Mandatory retirement policies are usually in place where the employees have considerable bargaining power, most commonly through trade union representation. Indeed the overwhelming majority of mandatory retirement policies are found in unionized workplaces. Labour economists Jonathan Kesselman and Lorne Carmichael, testifying on behalf of the Commission and Air Canada respectively, agreed that jobs in unionized workplaces are considered to be the "good jobs", that is, jobs that pay well, have a high degree of security, operate with a strong seniority system and have good pension plans.

[100] In the present case, ACPA and Air Canada agreed to retirement at age 60 in exchange for the rich compensation package, including a pension plan that put Air Canada pilots in an elite group of pensioners. Mr. Harlan Clarke, Manager Labour Relations Flight Operations at Air Canada, identified an important characteristic of a mandatory retirement policy, namely, 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. Rather, retirement at age 60 for pilots is the fully understood and anticipated conclusion of a prestigious and financially rewarding career.

[101] The complainants testified that they were fully aware, when they began their employment with Air Canada, that they would be required to retire at age 60. They testified that becoming a pilot with Air Canada was every pilot's goal; the pay was excellent, the work was interesting and there was significant prestige associated with the position. However, they also knew that this would not last indefinitely and that all pilots at Air Canada were required to retire at age 60.

[…]

[106] According to Professor Carmichael, the complainants, throughout their careers at Air Canada, reaped the benefit of the mandatory retirement rule that their union had negotiated on their behalf. As a result of the departure of 60-year old pilots from Air Canada, the complainants were able to progress through their careers at a more rapid pace.

[107] In addition, the pilots' status, income, the base from which they flew, the choice of schedules and the pension plan benefits they received, among other things, were negotiated on the basis of the

> mandatory retirement provision. Having reaped the benefit of mandatory retirement, it should not be perceived as unfair to require the complainants to ultimately bear the burden of that policy.
>
> [108] The complainants may be unhappy about ending their rewarding careers as pilots with Air Canada. But that situation cannot be viewed in isolation. It must be seen in the context of a system that was designed to assign the responsibilities and benefits of being an Air Canada pilot over different stages in the pilots' careers. All pilots in Air Canada understand that they will share these benefits and burdens equally at the appropriate stages in their careers.
>
> [109] The denial of the right to challenge the final stage of that system - retirement at age 60 - as a result of s. 15(1)(c) does not communicate the message that the complainants are not valued as members of society, nor does it necessarily marginalize them. It 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.
>
> [110] For these reasons, the Tribunal has concluded that the complainants' right to equality under s. 15 of the *Charter* has not been violated by s. 15(1)(c) of the *CHRA*. […]
>
> [Emphasis added]

[388] The Tribunal's findings, which were not challenged, clearly point to the collective benefits achieved by ACPA's members by the terms of the collective agreement. These included generous pension and other benefits on retirement.

[389] Thus, considering the factors described above in *Withler*, it is apparent that the Air Canada MRP is part of a larger benefit scheme designed to meet the best collective interests of all of the union's members. The collective agreement and the included pension scheme can therefore be seen to have an ameliorative effect on the members and to attempt to serve and balance a multiplicity of interests, including the varying needs of the younger and older workers.

[390] It will accordingly be necessary to draw lines on factors like age. The question for the Court is whether the lines drawn are generally appropriate, having regard to the circumstances of the persons affected and the objects of the scheme.

[391] It is implicit that one of the purposes of the pension scheme was to allow pilots to progress through their careers more quickly. This facilitated the rapid accrual of salary and benefits while allowing for an early retirement so as to avoid having to work longer to achieve the same financial results, as demonstrated by Mr. Salamat's data.

[392] Accordingly, by extending the age of retirement, the very purpose of the collective agreement would appear to be thwarted. For instance, the younger pilots would have to work for three additional years, effectively at no salary, to maintain the same total earnings as the mandatory retirement provision would have leveraged for them at age 60.

[393] Seen in this context, I believe that a strong argument can be made that the distinction said to act against the complainants' interest should be seen not as perpetuating a stereotype or prejudice. Quite the opposite, it would seem that the purpose of the age 60 mandatory retirement provision was to benefit the complainants by enabling them to retire early having enjoyed generous working conditions, salary and benefits, with those salary and benefits continuing in the form of pension benefits after retirement.

[394] Moreover, it was certainly not the intention of the union to make the working conditions so exciting, interesting, or fun that the pilots would regret the higher salary and benefits obtained over their career, if this is the basis for their loss of esteem as was the evidence in *Vilven Tribunal #1*.

(c) The Vilven Tribunal's Conclusion of "No Unfairness"

[395] Even though no adverse differential impact had been demonstrated, the Tribunal in *Vilven Tribunal #1* concluded that the outcome of the complainants being required to adhere to the MRP provision would "not be unfair". This appeared to refer to the fact that the complainants had taken the benefit of their careers advancing more quickly because other pilots before them had retired at age 60 in accordance with the collective agreement. However the Tribunal stopped there and made no mention of the windfall benefits which would flow to the complainants by being the first not to adhere to the collective agreement, as this point only came out through Mr. Salamat's evidence.

[396] As seen above, the Tribunal used the term "unfair" to describe the result of a party taking the benefit of other persons' adhesion to an agreement, and when the party's term under the agreement was completed, changing or ignoring the terms to suit its purposes. Under normal circumstances our sense of fairness does not appreciate agreeing to something to gain benefits and then scrapping the agreement once the benefits are obtained so as to satisfy our self-interest. It is the sense of not accepting the sanctity of the agreement by which the complainants benefited that led the Tribunal to conclude in *Vilven Tribunal #1* that sticking to the agreement was not unfair, in addition to not offending the complainants' dignity since termination was not unexpected.

[397] However, because there was no evidence of an adverse impact on the comparator pilots in *Vilven Tribunal #1*, the mandatory retirement provision was said to perpetuate a disadvantage that constituted a discriminatory practice. The Court in *Vilven* thereby concluded that it was the agreement that was unfair in its treatment of older workers, not the complainants' challenge to an agreement that they had finished benefiting by.

[398] One aspect that does not appear to have been referred to in this discussion is that the collective agreement was set up specifically to favour older workers under a rigid seniority regime. As I understand the scheme, this was done by providing older pilots with highly generous economic benefits and better working conditions as they approached the end of their careers. This was made possible by the pilots receiving considerably less in the way of returns, while requiring more effort to achieve them, when younger. In other words, the generous benefits and working conditions made available to older pilots depended on the effort and hardship put in as younger workers.

[399] Any claim therefore, for additional benefits by staying on after the agreed-upon retirement date would not have been "earned". It would be similar to making contributions X to an RRSP to produce Y results over 35 years. But when the time comes to withdraw funds after 35 years, the pilot asks for Y, plus an additional amount on top of that.

[400] Nor is it arguable that an exception should be made to the age of retirement for those pilots who entered Air Canada late and therefore may have greater needs because their pension income will not be equal to those other pilots whose careers are longer. They argue that they have not been employed long enough to have the same generous benefits as other pilots. They have no desire to

take out more than they earned; just let them work longer to generate more pension income and be treated like other pilots who have the advantage of a longer career.

[401] However, the consequences are the same whatever the reason to extend someone's age of retirement: those that follow must work longer and subsidize the extended careers of those who work past 60. Newcomers cannot expect the rule of equal treatment to be modified to suit their circumstances when the rule was known and agreed to upon joining Air Canada and its violation has an adverse differential impact on other younger employees who jointed before they did.

[402] In a sense, therefore, it is difficult to assimilate how a regime already favouring older workers would be described as discriminatory because at age 60 it cut off the continuation of that generous situation. Termination at that age was intrinsic to the functioning of the collective agreement which based payment out at older ages on effort put in at younger ages.

(d) Fairness Reconsidered Based on the Adverse Differential Impact

[403] In any event, Mr. Salamat's evidence brings unfairness back into the picture, but framed differently. The reference is with respect to unfairness in outcome to the other pilots as opposed to being "not unfair" to the complainants. It is now apparent that the advantage gained by the complainants is not effect-neutral or without negative consequences on others. The one-off gains by these complainants from working longer would be subsidized by their fellow pilots, with the youngest pilots suffering the greatest economic and other disadvantages.

[404] It is not just that the MRP in the collective agreement is part of a comprehensive benefits scheme intended to provide equality of treatment of all members. It also cannot be altered in mid-route except by agreement of all members. Any change to the agreement introduces unfair inequality of treatment, by not only allowing older workers to gain more than others, but also to have others pay for those gains.

[405] The results will unfairly disadvantage the present and future members of the union by requiring them to pay for the claimants' advantages through delays in entry and in progression of their careers until retirement, with the youngest and the future members of the union paying the highest price.

(5) Perpetuation of Stereotypes, Prejudice or Disadvantage Against Older Workers

(a) Discriminatory Stereotypes of Older Workers

[406] A further consideration in respect of the issue of mandatory retirement provisions is to seriously question whether widespread age discrimination exists in Canada, such that it is appropriate to give the older worker the benefit of any disadvantage based on age.

[407] At paragraph 272 of her reasons in *Vilven*, Justice Mactavish concluded that it was clear from statements in Supreme Court cases that older workers, as a group, suffer from a pre-existing disadvantage, vulnerability, stereotyping or prejudice. I agree based on the jurisprudence.

[408] In particular at paragraph 271 of her reasons, she had referred to statements from previous cases to the effect that discriminatory stereotyping existed against older people "who are presumed

to lack abilities that they may in fact possess" (*Gosselin* at para 32), or are "unproductive, inefficient, and lacking in competence" and "no longer useful members of the labour force", such that "their services may therefore be freely and arbitrarily dispensed with" (*McKinney* at para 347).

[409] While the Federal Court has already experienced a reversal in challenging the conclusions of *McKinney* in the above cases, I nevertheless would respectfully suggest that conclusions on such stereotypes of older persons which are based largely on judicial notice should be revisited. They are the types of conclusions which would be controversial in today's society and evidence should be available to properly support any conclusion on this subject.

[410] In my view, the daily experience of members of the older generation (Baby Boomers) would suggest that whatever the stereotypes of the past, there has been a wholesale positive attitudinal change by the older worker and by the rest of society which would strongly contradict any suggestion that members of this generation can any longer be labelled as victims of age discrimination in the workplace.

[411] The older Canadian generation enjoys unheard of advantages in comparison to the generations that preceded it. These advantages are expressed in terms of the Baby Boomers' wealth, their role in decision-making, their health and physical condition, and their expanded level of activity in society. Most of all, the older generation exhibits confidence, self-reliance and self-importance which are the attributes of being the most populous and self-indulgent generation ever, one which has seen a lifetime of positive economic and social growth beyond anything experienced by past generations.

[412] Indeed, the new-found vitality, activism and longevity of the older generation probably represent its best argument for extending its work career. But that is entirely a different foundation than describing the most prosperous and powerful generation in the history of humankind as victims of negative stereotyping or prejudice, or viewed as unproductive, incompetent or vulnerable workers.

[413] Perhaps more to the point, I repeat that there is no evidence that the older pilots at Air Canada suffer from any of the negative attitudinal stereotyping or prejudice of the past. Their entire situation is governed by the collective agreement and has nothing to do with attitudes that diminish their abilities or competence to fly airplanes.

[414] On this point, the CHRT concluded in *Vilven Tribunal #1* (2007 CHRT 36) that there was no indication that the complainants had experienced age-related disadvantages or negative stereotyping, which finding of fact was not challenged. Its reasons on this point are set out below:

> *Does the distinction created by s. 15(1)(c) contribute to or reinforce stereotyping or pre-existing disadvantage experienced by the complainants?*
>
> [92] One of the most compelling factor favouring a conclusion that differential treatment imposed by legislation is discriminatory is pre-existing disadvantage or vulnerability to stereotyping (Law at para. 63). While it is clear that airline pilots, as pilots, do not constitute a group which suffers from negative stereotyping or pre-existing disadvantage, the more appropriate focus of the analysis here is 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.
>
> [93] The disadvantages suffered by older workers have been noted in the case law. For example, in McKinney, La Forest J. stated that barring 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 p. 299). Moreover, while social security and private pension schemes may afford some financial redress, many older people have need of additional income, a situation that is becoming apparent as people live longer (at p. 300).
>
> [94] In her dissenting reasons in McKinney, Wilson J. noted that there is a stereotype that older people are unproductive, inefficient, and lacking in competence. (at p. 413)
>
> [95] There was no indication that the complainants experienced these age-related disadvantages or negative stereotyping. On the contrary, the evidence was that as senior pilots, the complainants 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.
>
> [96] Very soon after their retirement from Air Canada, both were able to get work as pilots with other airlines that did not have mandatory retirement policies. Mr. Kelly testified that when he was returning his Security Pass to Air Canada following his last flight, he ran into a former colleague who offered him employment with Skyservice Airlines. He readily accepted the offer.
>
> [97] The acceptance of employment with Skyservice meant that Mr. Kelly was able to supplement the $124,000 income that he was receiving from his Air Canada pension with what he earned as a pilot with Skyservice. At $72,000 per annum, Mr. Vilven's retirement income was less at retirement than Mr. Kelly's because Mr. Vilven started work at Air Canada later. However, Mr. Vilven was able to supplement his pension income with the earnings he received working as a pilot with Flair Airlines.
>
> [Emphasis added]

(b) The Impact of Retirement on Pilots

[415] I also have difficulty accepting the severity of the impact of retirement on the older pilots in terms of maintaining a sense of dignity and self-worth.

[416] Retirement is something every worker will face. Accordingly, the adverse experience of its impact cannot be avoided, but at best postponed. The complainant pilots never had any expectation of working beyond age 60; this was understood on the day they joined Air Canada. Nor could they have regrets about not achieving their goals, with the seniority system having moved them up into the upper ranks of the organization. They are generally in good economic circumstances with a wide range of options open to them to overcome some of the challenges of a change of circumstances. Most of all, if they want to continue to fly commercial airplanes, the evidence indicates that they have no trouble finding work.

[417] This is apparent from the testimony about loss of self-esteem caused by retirement from good jobs of the complainants in *Vilven*. The best that they could offer was that they missed the exciting work, prestige and friendships formed as an Air Canada pilot. These disadvantages mostly reflect the excellent working conditions of the positions that they held in Air Canada. This would include for example, being able to earn the maximum salary of well over $200,000 per annum which is available to pilots at the end of their careers while operating on a compressed 8-day work schedule, all thanks to the collective agreement.

(c) McKinney's Rejection of Making Way for the Younger Worker

[418] In *McKinney*, the Court recognized that improving the prospects for younger members of the labour force was one of the predominant purposes of mandatory retirement provisions in legislation. It also recognized that generally older workers were in a better position to protect themselves from the vicissitudes of unemployment than younger persons. The Court nevertheless accorded no weight to the legislature's views or to the plight of the younger worker. It concluded

that "the evidence on this is conjectural". The factual foundation is different in the present matter in that Mr. Salamat's evidence strongly suggests the financial prejudice, not only to the younger generation, but to the younger members of the workforce by the fact of extending the careers of the older pilots.

[419] The Supreme Court placed the protection against forced retirement of older workers on a higher plane by its outright rejection of the concept of making way for the younger worker. The essence of the Court's conclusions is stated at paragraph 97 of *McKinney* as follows:

> 97 As for the objective of reducing youth unemployment, it seems to me that such an objective should not be accorded much weight. If the values and principles essential to a free and democratic society include, according to Oakes, "respect for the inherent dignity of the human person" and "commitment to social justice and equality", then the objective of forcibly retiring older workers in order to make way for younger workers is 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.
>
> [Emphasis added]

[420] In my view, this passage with its forceful language spelled the death knell for the survival of any legislative mandatory retirement provision in Canada. It is also cited in cases where the issue of the rights of the older versus the younger worker are at play, such as in these cases. I would, with respect, offer two comments on the Court's reasoning.

[421] First, the Court appears to be declaring that the concept of forcibly retiring older workers in order to make way for younger workers is *per se*, formalistically, discriminatory. This cannot be a

complete statement of the reasoning because the Court has declared on numerous occasions that a contextual analysis that comprises all aspects of the problem is required.

[422] Secondly, I am not aware of anyone suggesting that one generation's right to work should be viewed as less important or less valued to society. Rather the Court's reference to "commitment to social justice and equality" hits the fundamental issue squarely on the head.

[423] The essence of the problem in terms of social justice and equity is that good jobs are a scarce resource. It also seems apparent from the increasing concern about youth unemployment that good jobs are now more scarce a resource than they were in the past. Moreover, the ineluctable march of globalization in combination with the exponential growth of technological innovation suggests that the trend towards the scarcity of good jobs is only going to get worse.

[424] As with any scarce resource, the real issue is how best to distribute it; in this case between generations. This brings into play the other reality that in many cases good jobs for the younger worker and his or her economic advancement will depend on openings being created by persons retiring from the workforce. But equally important, it appears that the extension of careers also negatively affects those already employed, having the greatest impact on the younger worker in the area of good scarce jobs.

[425] In this matter the specific scarce jobs to be distributed are senior positions at Air Canada. These had been made available in accordance with a scheme based upon the delay of promotions with major benefits at the end of careers, along with the sanctity of the collective agreement that

promoted equality of treatment of its members. Tangentially however, the scarcity of good jobs extends to pilots wishing to gain entry to Air Canada, as well as those looking for their first job as a commercial airline pilot which could eventually open up when an Air Canada pilot completely retires from commercial flying. This is more likely to happen upon their leaving Air Canada.

[426] In the end it is all about fixing on a fair age of retirement in a world of scarce jobs and economic disadvantage due to delayed careers in the context of a collective agreement that seeks to treat all employees equally based on inputs and outputs over the life-cycle of the agreement.

[427] Mr. Salamat has demonstrated that altering the line in favour of the older pilots without any other change to the seniority, pay, and benefits system is done at a cost to the younger pilot and contravenes the equity of treatment principle enshrined in the collective agreement. The opposite economic effect is obviously achieved by forcing pilots to retire early, say before age 65. But this has to be seen in the context of the collective agreement and all the circumstances touching on need, vulnerability, expectations and options that reflect the reality of the pilots' positions.

[428] Taking into consideration all circumstances relevant to the interpretation of a statute promoting fair and equitable treatment of persons, I do not see this as a case of a *prima facie* discriminatory rule that must be justified on the basis of hardship. I would think that a better conclusion would be to interpret the CHRA such that no discrimination arises by maintaining a collective agreement provision of retirement for Air Canada pilots at age 60 negotiated with the employer for an ameliorative purpose intended to ensure an agreed upon scheme to achieve benefits

for all pilots at Air Canada and to distribute the fruits of the agreement fairly and equally amongst the union's members without exception.

(6) Conclusions on Revisiting Whether the Age 60 Rule of Retirement is Discriminatory

[429] I have concluded that Mr. Salamat's evidence demonstrating an adverse differential effect by the elimination of the MRP in the collective agreement requires me to supplement my direction to the Tribunal to permit ACPA and Air Canada to argue that the age 60 retirement rule is not discriminatory.

[430] On this basis it should be understood that the evidence on the adverse differential impact is relevant to both issues of discrimination and hardship. Nevertheless, the analysis of each issue, albeit using similar evidence, must be conducted separately, commencing with the discrimination analysis. Moreover, the hardship analysis would include a consideration, if after determining that undue hardship would result from the elimination of the MRP, whether the characteristics of the age discrimination meant that the importance of promoting freedom from it could not justify a lower standard. This entails a consideration of much of the discrimination analysis described above.

[431] The Tribunal may have regard to my foregoing remarks on the subject, but must understand that its decision must be based upon the evidence adduced before it. In that regard, the Tribunal exercises a full uninhibited discretion to decide the case in accordance with the evidence before it, particularly given that the *Meiorin* test has not previously been applied to a union's representation rights as in this case.

V. DECISIONS ON THE APPLICATIONS OF THE COMPLAINANTS, AIR CANADA AND ACPA

[432] First, the application of the complainants is allowed and the decision of the Tribunal in respect of normal age of retirement is set aside and remitted to the same panel for reconsideration. Upon reconsideration, the Tribunal is directed to apply the factors of the test in *Vilven* disjunctively as described above. It is also directed to determine attributes of similarity of pilots of comparator airlines and those of Air Canada based on what pilots actually do, e.g. are the attributes of positions similar for pilots flying large and small planes in terms of the level of skill, knowledge and responsibilities each requires?

[433] Secondly, I dismiss Air Canada's application seeking to set aside the Tribunal's decision that it had not established that the mandatory retirement provision in the collective agreement is a BFOR within sections 15(1)(*a*) and 15(2) of the CHRA.

[434] Thirdly, the Tribunal's decision that ACPA had not established that the mandatory retirement provision in the collective agreement is a BFOR under sections 15(1)(*a*) and 15(2) of the Act is set aside and returned to the same panel with the following directions:

a. ACPA and Air Canada may lead evidence and argue that the age 60 retirement rule in the collective agreement is not discriminatory.
b. Section 15(1)(*a*) of the CHRA regarding a BFOR defence applies to employee organizations.
c. The hardship factors in section 15(2) of the CHRA are not limited to safety, health and costs.

d. The Tribunal is to apply the four-step hybrid *Meiorin* test as described at para 220 above.

e. In determining whether hardship is occasioned to the comparator pilots by the elimination of the mandatory retirement provision in the collective agreement, the Tribunal will give due consideration to areas of concern of the Court described above, including permitting the introduction of admissible evidence on the effect of pensions in the determination of any adverse differential effect caused by the elimination of the mandatory retirement rule from the collective agreement.

f. If undue hardship is established to the comparator pilots, the Tribunal shall not dismiss the complaint against ACPA unless satisfied that the importance of upholding age discrimination in all the circumstances is such that it cannot justify a lesser standard.

g. As ACPA and Air Canada are jointly liable for having adopted the age 60 retirement provision, a dismissal of the complaint against ACPA results in the dismissal of the complaint against Air Canada.

h. Applications T-971-12 and T-979-12 are dismissed without costs.

VI. COSTS

[435] No costs are ordered in any of the applications.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application in T-1428-11 is allowed and the decision of the CHRT in respect of normal age of retirement is set aside and remitted to the same panel for reconsideration. Upon reconsideration, the Tribunal is directed to apply the factors of the test in *Vilven* disjunctively as described above. It is also directed to determine attributes of similarity of pilots of comparator airlines and those of Air Canada based on what pilots actually do, e.g. are the attributes of positions similar for pilots flying large and small planes in terms of the level of skill, knowledge and responsibilities each requires?
2. The application in T-1453-11 is dismissed.
3. The application in T-1463-11 is allowed and the CHRT's decision that ACPA had not established that the mandatory retirement provision in the collective agreement is a BFOR under sections 15(1)(*a*) and 15(2) of the Act is set aside and returned to the same panel with the following directions:
    a. ACPA and Air Canada may lead evidence and argue that the age 60 retirement rule in the collective agreement is not discriminatory.
    b. Section 15(1)(*a*) of the CHRA regarding a BFOR defence applies to employee organizations.
    c. The hardship factors in section 15(2) of the CHRA are not limited to safety, health and costs.
    d. The Tribunal is to apply the four-step hybrid *Meiorin* test as described at para 220 above.

e. In determining whether hardship is occasioned to the comparator pilots by the elimination of the mandatory retirement provision in the collective agreement, the Tribunal will give due consideration to areas of concern of the Court described above, including permitting the introduction of admissible evidence on the effect of pensions in the determination of any adverse differential effect caused by the elimination of the mandatory retirement rule from the collective agreement.

f. If undue hardship is established to the comparator pilots, the Tribunal shall not dismiss the complaint against ACPA unless satisfied that the importance of upholding age discrimination in all the circumstances is not such that it cannot justify a lesser standard.

g. As ACPA and Air Canada are jointly liable for having adopted the age 60 retirement provision, a dismissal of the complaint against ACPA results in the dismissal of the complaint against Air Canada.

4. Applications T-971-12 and T-979-12 are dismissed without costs.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-1428-11
STYLES OF CAUSE:	ROBERT ADAMSON, et al v AIR CANADA, et al
	T-1453-11 AIR CANADA v ROBERT ADAMSON, et al
	T-1463-11 AIR CANADA PILOTS ASSOCIATION v ROBERT ADAMSON, et al
	T-971-12 AIR CANADA v ROBERT ADAMSON, et al
	T-979-12 AIR CANADA PILOTS ASSOCIATION v ROBERT ADAMSON, et al
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