T.D. 1/97
Decision rendered on January 10, 1997

CANADIAN HUMAN RIGHTS ACT
R.S.C., 1985, c. H-6 (as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

PETER CRANSTON, HARVEY POWELL, ROBERT BISSON, DONALD J. ALLIN, JOHN THORPE, JOHN G. BURKE, DENNIS BISSON, LORNE VICKERS, JACQUES H. BRULE, Wm. N. DEVINE, DONALD WILLIAMS, LYMAN H. GILKS, ROBERT GRAHAM, JOHN WOODLEY, GARY BROWN, PIERRE LALIBERTE, ROBERT CASKIE, JOHN D. SQUIRES, MARCEL LAROCHE, PAUL CARSON, DAVID FALARDEAU, Wm. L. MACINNIS, A.M. CHIASSON, JOE CZAJA, LEONARD MURRAY & Chas. L. EMPEY

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

HER MAJESTY THE QUEEN
IN RIGHT OF CANADA

Respondent

TRIBUNAL DECISION

TRIBUNAL: Anne L. Mactavish - Chairperson
Reva Devins - Member
Murthy Ghandikota - Member

APPEARANCES: René Duval and Hélène Sioui Trudel,
Counsel for the Canadian Human Rights Commission

Joseph de Pencier and

Major Ed Gallagher, Counsel for Her Majesty The Queen

Peter Cranston on his own behalf
and on behalf of the Complainants

DATES AND LOCATION: August 19, 20 and 21, 1996
OF HEARING Ottawa, Ontario

TABLE OF CONTENTS

I. BACKGROUND

This case involves complaints of age discrimination made under sections 7 and 10 of the Canadian Human Rights Act ("CHRA"). The case, which arises out of events occurring primarily in 1984 and 1985, has had a long and tortuous history. A Tribunal was originally appointed to hear these complaints in 1988. These proceedings ended without a decision following a successful application by the Canadian Human Rights Commission ("CHRC") for certiorari and prohibition. A second Tribunal was then appointed. This panel heard 29 days of evidence and argument during 1991. In a decision rendered in 1992, the second Tribunal unanimously dismissed the complaints.

The "CHRC" then sought judicial review of the Tribunal decision in the Federal Court, Trial Division. On April 5, 1994, the Honourable Mr. Justice Cullen allowed the application and remitted the matter back to a differently constituted Tribunal for reconsideration in accordance with the reasons of the Federal Court. The Respondent then appealed Mr. Justice Cullen's decision to the Federal Court of Appeal. The Federal Court of Appeal unanimously affirmed the decision of the Trial Division, with the added proviso that the new Tribunal hearing the matter do so on the basis of the existing record, without receiving additional evidence.

As a result of a perceived difference between the reasons of the Federal Court of Appeal and the formal judgment, the matter was further remitted to the Federal Court of Appeal for clarification. On May 15, 1996, Mr. Justice Hugessen ruled that while the reasons of the Federal Court of Appeal are for the guidance of this Tribunal, and are binding as to any questions of law which were decided therein, they do not settle any questions of fact before this Tribunal, or otherwise fetter our discretion. The hearing proceeded on this basis.

II. THE COMPLAINTS

The 26 Complainants were employees of the Executive Flight Service of the Department of Transport. Twenty of the Complainants were employed as pilots and six (Messrs. R. Bisson, Burke, Brule, Chiasson, Empey and Gilks) as flight attendants. Each filed complaints against the Department of National Defence ("DND") and the Department of Transport ("DOT"), although the complaints were subsequently amended to change the name of the Respondents in all cases to Her Majesty the Queen.

The complaints are essentially the same in each case. Insofar as they relate to DND, the allegation is that DND has discriminated against the Complainants on the basis of age, contrary to section 7 of the CHRA. In addition, the Complainants allege that DND has pursued a policy or practice

that deprives or tends to deprive a class of individuals of an employment opportunity on the ground of age, contrary to section 10 of the CHRA.

With respect to the complaints originally filed against DOT, the Complainants allege that DOT entered into an agreement which deprives or tends to deprive a class of individuals of employment, contrary to the provisions of section 10 of the CHRA.

III. THE EVIDENCE

a) The Prime Minister's Directive

Prior to 1986, the federal government provided air transportation to Cabinet Ministers and other dignitaries using aircraft and personnel supplied by either the Executive Flight Service of DOT or by the Canadian Armed Forces ("CAF"). DOT provided the majority of the flights (85-90 per cent - Cranston testimony, Transcript Volume 1, Page 22). (Unless otherwise noted by date, transcript references are to the transcript of the second Tribunal hearing.) The two flights each operated at Uplands Airport in Ottawa, on the civilian and military sides of the air field respectively.

It is common ground that the service provided by DOT was extremely competent and professional, and that the Executive Flight Service had an exemplary safety record. The Executive Flight Service pilots were highly experienced individuals, who clearly loved their prestigious and exciting jobs. These positions involved a great deal of flying, which made them particularly attractive to the pilots.

It appears that there was a longstanding rivalry between DOT's Executive Flight Service and the CAF, and that the CAF had been attempting for many years to take over responsibility for Cabinet transportation (Squires testimony, Transcript Volume 8, Page 1265).

On November 2, 1984, Prime Minister Brian Mulroney directed that the Executive Flight Service then under the jurisdiction of DOT be transferred to DND. The reasons given for this directive were "factors of economy and efficiency" (Exhibit R-1, Volume 1, Tab 1). The Prime Minister further directed that the transfer be carried out in an equitable and fair manner so as to impose the least possible hardship on personnel.

It is noteworthy that the Prime Minister's directive indicates that the jurisdiction for the Executive Flight Service was to be transferred to DND as opposed to the CAF. DND has both military and civilian components.

The military side, being the Canadian Armed Forces, is led by the Chief of Defence Staff who, in turn, reports to the Minister of National Defence.

The civilian side reports through the Deputy Minister of Defence to the Minister (Mainguy Testimony, Transcript Volume 18, pp. 2759-2764).

On November 9, 1984, the Minister of Transport, Don Mazankowski, wrote to the Deputy Minister of Transport with respect to the Prime Minister's directive. Mr. Mazankowski's memo directed that the transfer proceed forthwith, and also provided, inter alia, that:

"Pilots presently employed by the Department of Transport and more particularly those who work with the Canadian Air Administration are to be integrated into the Department of National Defence for Executive Flight Services if they so desire and are to be given full credit for their prior service" (Exhibit R-1, Volume 1, Tab 3).

It is clear from these documents, and from the evidence of the Complainants that the expectation was created in the minds of many of the Complainants that they would be able to continue their jobs providing executive flight services within the new organization under the auspices of DND.

This expectation was undoubtedly reinforced by the discussion that took place between two of the pilots (Messrs. Falardeau and Vickers) and the Prime Minister on December 11, 1984. According to Messrs. Falardeau and Vickers, in a discussion which

took place at the conclusion of a flight to Ottawa, the Prime Minister advised them that they would be transferred as a group to DND, and would continue to occupy their civilian positions alongside military personnel (Falardeau testimony, Transcript Volume 5, pp. 735-6, Vickers testimony, Transcript Volume 5, pp. 819-20).

Apart from the statement attributed to the Prime Minister referred to above, the evidence is unclear as to whether the Prime Minister intended the new consolidated flight service to be a military operation or a hybrid

military/civilian one, or indeed, whether he ever turned his mind to the issue. It is clear, however, that he intended to replace two parallel organizations with one consolidated organization, in the interests of economy and efficiency.

It was conceded by the CHRC in the hearing before this Tribunal that the Prime Minister's decision to consolidate these services was in no way related to the age of the Complainants, and that any discrimination that may have occurred took place in the context of the implementation of the decision. (Duval Submissions, Transcript, August 19, 1996, Page 70). This is consistent with the conclusions reached by both the Federal Court, Trial Division (22 C.H.R.R. D/40 at p. D/48) and the Federal Court of Appeal (192 N.R. 125 at p. 130).

b) Implementation of the Prime Minister's Directive

The transfer of a service offered by one government department to another government department is a complex matter, requiring numerous decisions on many levels as well as the invocation of various policies along the way. Insofar as this case is concerned, there were two principal decisions that had to be made which were of direct consequence to the Complainants.

These were:

a) whether the DND Flight Service would be exclusively military or a joint civilian/military operation; and

b) whether the Complainants would be employed in the new organization.

In order to carry out the implementation of the Prime Minister's Directive, a series of committees was set up, including an interdepartmental steering group made up of senior representatives of DOT, DND, Treasury Board, and the Privy Council Office and an interdepartmental working group, which group was to examine the details of the transfer. As well, internal committees were established within each of the affected departments. These various committees met regularly, and minutes of many of these meetings form part of the record in this proceeding.

One of the more fundamental questions to be determined was the nature or character of the new organization.

i) The Decision to Militarize the Service

In order to establish a mechanism whereby the transfer could be carried out in an orderly fashion, an Interdepartmental "Action Directive" was drawn up, which set out how the parties were to proceed (Exhibit R-1, Vol.1, Tab 4). The document is undated, but appears to have been prepared in late 1984. The Action Directive does not address the issue of the type of organization that would provide the consolidated service, but does provide that:

A communique will be issued outlining the intent of DOT and DND to pursue a phased approach to the transfer of responsibilities, which will include reassurances to

DOT personnel concerning their continued employment . . .

The Action Directive further provided that the Interdepartmental Working Group ("IWG") would

...examine all feasible options for the relocation of DOT personnel currently employed in executive flight services related activities.

Finally, the Action Directive stipulated that the tasking authority for all executive flights for Ministers would be taken over immediately by DND. As of January 15th, DND was to assume responsibility for the Flight Coordination Centre, and all executive flight services were to take place from CFB Ottawa. At least some of the DOT Flight Operations Officers in fact became DND employees.

It is clear from all the evidence that, from the outset, the CAF had every intention of having the DOT Executive Flight Service come under military control at the earliest possible date. At the same time, the CAF exhibited considerable resistance to the idea of DOT personnel operating as civilians within DND. Indeed, at the first meeting between the two Departments, which took place on November 21, just one day after the Ministers' press release, the following discussion took place:

The Chairman [Donald Lamont] noted that DOT personnel involved would be transferred to DND. DND expressed their concern about non-military personnel flying DND aircraft and their concern about how they would manage civilian maintenance personnel being introduced into the organization . . . DND stated that they could not envisage how the pilots and the maintenance personnel

or flight attendants could operate, as civilians, with DND as they would impose considerable personnel problems.
(Exhibit R-20).

Donald Lamont, who, in addition to being the DOT chair of the Interdepartmental Working Group, was also a member of the Steering Committee, reported that the preliminary indications from his discussions with officials from DND confirmed that the transfer of DOT pilots and maintenance personnel to DND might not be possible due to DND's 'operational considerations' (Exhibit R-21).

Mr. Lamont testified that, in his view, 'operational considerations' was a term used by DND in the absence of having any sound reasoning as to why they could not accept DOT pilots or maintenance personnel. According to Mr. Lamont, the only points cited by DND to support DND's position were the differences in salary between DOT and DND personnel, and the age of the DOT personnel. Mr. Lamont stated that he was advised that DND pilots would be retired from active flying service at the age of 40, and that it was felt that the DOT pilots, who were older, could not fit in because of the difference in age. (Transcript Volume 12, pp.1839-1840 and pp.1948-1951). At the same time as these discussions were taking place, within DND consideration was being given as to how to integrate DOT's Flight Service into DND.

DND's group with responsibility for the transfer was headed by Vice Admiral Daniel Mainguy, who was Vice Chief of the Defence Staff. The

Chairman of the Interdepartmental Working Group from DND's side was Brigadier General Jean Veronneau. Brigadier General Ron Bell was given responsibility for looking after the personnel aspects of the transfer as they related to officers.

According to Brigadier General Bell's testimony, after being given his responsibilities as outlined above, he directed a member of his staff, Lieutenant Colonel Scott, to do a study of the various options available, both in terms of civilian and military operations.

Lieutenant Colonel Scott prepared a document in late December 1984 or early January 1985 (Exhibit R-31, Tab 6).

According to Brigadier General Bell, Lieutenant Colonel Scott's paper was speculative in nature, and was compiled with very little external

information as it was prepared right at the beginning of the process. Brigadier General Bell described it as a 'straw man', the work of:

> ...an intelligent senior officer who understands personnel implications and operational implications, will take the information that is currently available; will come up with options which are to stimulate discussions; and may come up with, from our view point, these are the best options. That does not mean to say that it is going to be accepted but at least it begins to channel some thinking.
> (Transcript, Volume 20, page 3008).

No more in-depth analysis of the implications of the various options was prepared, as, according to Brigadier General Bell, "circumstances overtook".

Although the paper considers various permutations and combinations of the various options, in reality, the possibilities for the manning of the executive air lift were determined to really only amount to three. These options, which could be implemented singly or in combination, were:

a) full military manning;

b) employment of DOT personnel as members of the Reserves; and

c) employment of DOT personnel as civilians.

The paper concludes that there were problems with all three options, which it summarized as follows:

a. Full Military Manning

(1) Absorption of release of TC personnel (sic) may be difficult and may not be considered to be in keeping with PM direction to [illegible] personnel disruption.

(2) CF training of personnel to meet the requirement is not a major problem for Challenger operations but would take an undetermined but long period for JetStar pilots and technicians. Regardless, there would be degraded service in the interim unless TC continued JetStar operations pending the availability of trained CF personnel.

b. Employment of TC Personnel as Reserves

(1) This option is marginally acceptable from a

military viewpoint with particular problems noted because of the age of the TC pilots. Also training TC pers on CF equipment and methods could be a major problem.

The major drawback would likely be in getting sufficient motivated TC personnel to do the job. They would get paid less to work longer, while wearing a uniform and being subjected to the code of service discipline. It is anticipated that most TC personnel would refuse this option, requiring extra Regular Force personnel to take up the slack and leaving TC with the absorption or release problem.

c. Employment of TC Personnel as Civilians

(1) The main problem with transfer of civilians to DND would be the adverse impact on military morale, with attendant friction and loss in efficiency and the complex administrative implications. These would be major management problems, difficult to solve with civilians having vested rights to higher pay and collective bargaining agreements providing overtime pay etc, doing the same job as their less well compensated military counterparts.

(2) The least disruptive means of employing TC civilians would be secondment in that the TC pers would be "on loan" for a limited period during operation of the JetStars after which CF personnel would take over the jobs.

(3) Training could be a problem if non-executive airlift pilots are transferred;

(4) Maintenance personnel would find CF procedures restrictive.
(Exhibit R-31, Tab 6, pages 2-4, emphasis added)

In the body of the paper, there is an elaboration on the concerns with respect to age. As far as DOT personnel enrolling in the Reserves is concerned, the paper states that there would be a problem for military personnel if DOT employees were allowed to serve past 45 years of age, as CAF Captains are released at 45 or even earlier. It suggests that this inequality would create friction. Insofar as the DOT employees were concerned, the paper states that age would also create a problem if military standards were applied, as most of the pilots would be ineligible for service. It suggests that if this rule were relaxed, there would be an adverse reaction from military personnel.

It is important to understand the significance of the distinction drawn in the paper between JetStar pilots and those flying Challenger aircraft. The Executive Flight Service within DOT utilized both types of

aircraft, and had pilots and maintenance personnel qualified on each. The CAF utilized Challenger aircraft, amongst others, but had no pilots or maintenance personnel trained for use on the JetStar. This presented additional difficulties in the integration of the two services.

Lieutenant Colonel Scott's staff paper concluded that the best option was a phased solution allowing for the gradual transfer of responsibility from DOT to DND, which approach would minimize adverse personnel impact within both DND and DOT. Under this arrangement, DOT personnel would continue to man the JetStars until the aircraft were phased out, thereby permitting service to be maintained and avoiding the need to train military personnel on aircraft which had a limited time left in service (Exhibit R-31, Tab 6, pages 5-6).

In order to achieve this goal Lieutenant Colonel Scott recommended that the JetStar pilots and flight attendants be seconded to DND, to carry out their responsibilities on a contractual basis (ie. as civilians) until the JetStars were phased out.

Donald Preston was the Regional Director of Civilian Personnel Administration (Ottawa) with the Department of National Defence. As such, he was responsible for personnel issues relating to civilian employees of DND in the Ottawa region. Mr. Preston was the civilian personnel advisor

to the DND committee working on the transfer. Mr. Preston was asked to respond to the options set out in Lieutenant Colonel Scott's staff paper.

In addressing the personnel implications of the transfer of DOT employees to DND, from a civilian perspective, Mr. Preston concluded that it could be done, and that it wouldn't cause that much trouble for DND. (Preston testimony, Transcript Volume 18, pages 2774-2775, and Exhibit R-31, Tab 2) Brigadier General Bell testified as to what happened next:

Q. When you received this document at Tab 6 of Exhibit R-31, what did you do with it?

A. I studied it with interest and also made sure that the operational people, the Director-General had an opportunity to look at it as well, because there was significant operational implications. In fact, probably more operational implications than any other.

Q. Did you reach any conclusion as to what should follow the generation of this report?

A. Based on this report and further discussion with Veronneau's group, we felt that the operation should be a military operation.

Q. And why was that?

A. There were numerous inconsistencies in our minds, with an effort to try to bring civilians over and set up a separate civilian organization within the military -- within 412 Squadron to be exact.

Q. Can you tell us what those inconsistencies were?

A. There were a number that I can remember off the top of my head. We noticed a vast disparity in the terms of service between the two. The military terms

of service, of course, are quite different from civilian terms of service in the government. There were no unions involved. The pay differences were remarkable. If I can just sort of give an average, the

Lieutenant Captain level, which was the predominant group in 412 Squadron, were in the $30-35,000 bracket.

The administrative flight service pilots were up to $61,000 with a possibility of overtime. There were obviously numerous union agreements which the military didn't have. And there was a large age difference between the groups.

Q. Was the age difference one which you identified in early January of 1985?

A. Certainly it is one of the factors, yes.

Q. And what difference did that make in your mind, this age differential?

A. Only because I was looking at it as a group. I looked on the 20 pilots and the administrative flight services as a composite group and the initial intention had been from their viewpoint, I believe, certainly the way we looked at it, that they would come over as an entity.

And it was therefore significant to see how many fitted into our military rules and how many fell outside in terms of age, recognizing the military retires people at 55.
(Transcript Volume 19, pp. 2860-2863, emphasis added)

Clearly, by January 4, 1985 the decision had been made within DND that the Executive Flight Service would ultimately become a military service, although consideration would be given to an interim arrangement to permit the phase out of the JetStar aircraft (See Exhibit R-31, Tabs 3 and 5). It is certainly arguable that this result was a foregone conclusion.

When asked whether any of his staff expressed views to him prior to January 7, 1985 as to what the Executive Flight Service should look like upon completion of the transfer, Vice Admiral Mainguy responded:

"Well, I don't think there was any doubt in anybody's mind that the decision having been made for the transfer to take place, and all flying in DND being conducted by military people, I don't think there was any doubt in our minds that it was intended that it eventually become a military operation. And I think

that the staff reinforced that and I agreed..."
(Transcript, Volume 18, page 2739)

At a meeting of the DND working group held on January 4, 1985, it was noted that Lieutenant Colonel Scott's paper recommended that DND should not consider personnel options that included either the option of "C" class service (Military Reserves) or absorption into a civilian organization

within DND. This was agreed to (Exhibit R-31, Tab 5, page 2). With respect to the flight attendants, the minutes of that meeting note that using civilian flight attendants at 412 Squadron would likely not pose any insurmountable problems.

The first meeting of the Interdepartmental Working Group took place on January 7, 1985. At this meeting, Vice Admiral Mainguy made DND's position clear, affirming that DND's long term goal was a fully military Executive Flight Service (Exhibit R-31, Tab 3, page 2; Mainguy testimony, Volume 19, page 2831; Bell testimony, Volume 19, page 2927).

It was evident at this point that DOT and DND were approaching this problem from fundamentally different perspectives: DND being unwilling to accept the DOT personnel, and DOT viewing the responsibility for dealing with these individuals as a DND problem (Exhibit R-30, Tab 3, page 2,; Bell testimony, Volume 19, page 2933).

The DOT representatives on the relevant committees lobbied strenuously for the Executive Flight Service employees to be able to move over to DND. These efforts were, however, ultimately unsuccessful as a result of DND's refusal to accept the employees.

While no final agreement may have been arrived at, by late January, 1985 it appears that the decision had been reached that the new flight service would ultimately be a military one, and that DOT had accepted the fact that the DOT pilots would not be acceptable to DND for 'military operational reasons'. The status of the flight attendants at this point is less clear, as it seemed that there was still some possibility that they might be absorbed into DND. What was now under consideration were the transitional arrangements necessary to ensure that the JetStar aircraft were properly manned and serviced for the duration of their useful lives (Exhibit R-1, Tab 7). At this point, it was anticipated that the JetStars would remain in service for another three years.

ii) The January 30 Meeting

On January 30, 1985 a meeting was held of the Executive Flight Service pilots, which meeting was chaired by Don Lamont. Also in attendance were representatives of DND, including Brigadier General Bell and Donald Preston, as well as DOT personnel officers and union representatives. The purpose of the meeting was to advise the pilots of the status of the negotiations.

Numerous witnesses testified as to what was said in the course of this meeting. It is apparent that there may be some confusion in the witnesses' recollections between what transpired during this meeting, and what may have been said in a subsequent meeting held on April 26th. Given the passage of time that occurred between the events in question and the time that the witnesses testified, this confusion is hardly surprising. For this reason, however, greater reliance will be placed on the notes that were prepared by the Complainant William Devine during the course of the meeting (Exhibit R-16), and the minutes that were prepared by Mr. Lamont shortly after the meeting
(Exhibit R-1, Tab 9).

The operative portion of Mr. Lamont's minutes states:

Mr. Hunter [DOT personnel] stated that, while no final decisions had been made, the main option being considered at present was for DOT to operate the two Challengers until 31 December 1985 and the JetStars for a period of not less than three years. He also stated

that it was the intention of Transport Canada that no personnel should be laid off as a result of the transfer. BGen Bell stated that although many options were explored for transferring the executive pilots to DND, including employment as Class C employees, there appeared to be no feasible method of transferring the pilots. He mentioned that it would not be in the long term interest of either the executive pilots or the 412 squadron pilots to consider such a transfer. One problem, among many others is that PSSA retirement benefits cannot be transferred directly to CFSA. Also, the age factor of the two groups of pilots was mentioned.
(Emphasis added)

Mr. Devine's notes are in more of a transcript format, and are considerably more detailed, although they do not purport to be a verbatim record of what was said (Devine testimony, Transcript Vol.6, p 942). Mr. Devine's notes regarding the same portion of the meeting state:

Hunter - There's been no decisions yet on methods to be used to transfer the DOT task to DND. Options have been looked as such as exec flt pilots becoming civilian employees of DND, DOT retaining operation of its A/C, the Challengers until end of '85 & Jet* for another 3 yrs minimum. Pilots would still hv access to vacant DOT pos'ns.

Gen. Bell - We've looked at exec pilots going back into the Svc either as Reg Force or as Class "C" & it wouldn't be a good operation. Class C max age is 55. Pay scales would be much lower. Capt Rank would be the max. Not acceptable. Can't see the mix between young 412 types being senior to older more experienced exec pilots. No portability of pension from DOT to DND. Prefers contractual approach where DOT supplies A/C & crews & DND would pay the costs.(emphasis added)

Mr. Devine's notes also record Mr. Hunter as saying that the three years of JetStar operation was "very firm".

Reference should also be made to a memo prepared by Brigadier General Bell the day after the meeting wherein he notes that the pilots were "shocked" by the news of the transfer (Exhibit R-32, Tab 5). Brigadier General Bell explained that his impression was that the pilots were not previously aware how far the negotiations had advanced (Transcript Volume 19, p.2882). During the course of his testimony, Brigadier General Bell was asked to elaborate on his comments regarding "the age factor":

Q. And did you discuss, apart from hardship, did you describe the nature of the hardship that you foresaw?

A. Yes, I did.

Q. What was the nature of the hardship which you expressed to the pilots that you foresaw?

A. Well, I think I elaborated a little already, but obvious (sic) there is specifics in the way they were operating at present, which was a much more protected system in terms of their own rights to decide what they wanted to do, whereas the discipline that operates in the military is much more rigid as you know, and the terms of service, in other words, let's broadly say that.

Certainly the pay, after the protection period, and they might well have been protected for one year because of prevailing rules, but beyond that most of them would probably have been at the Captain rank level, because you don't bring people over as Majors and make them Executive directly.

So, their pay would have dropped drastically. The Captain level of pay at the time was around $35,000.

As I have already indicated to you, my recollection was that their pay levels were up to $61,000 and with overtime, probably beyond 70 in some cases. Nevertheless, what an appreciable difference.

And also it was my belief that with very young pilots the jet flight, for example, had most of the young pilots in 412 Squadron. Their average age was around 30-31. And the administrative flight service people who were appreciably older.

But mixing the two together would create certain problems for both the young fellows and the older fellows.

Q. Looking at the matter from the perspective of the young fellows for a moment, what problems did you foresee and express, if you did, to this group of pilots?

A. Well, we have got to get this in the right context. Are you talking as Class "C" or as a civilian sitting in the right hand seat?

Q. Did you address that distinction in this meeting?

A. Yes.

Q. And in terms of civilians sitting in the right hand seat then, let's deal with that. What was your perception?

A. Well, my perception there, of course, is the young Captain who is earning appreciably less, has completely different terms of service, complete (sic) different requirements, I think would resent enormously, having

someone with him who was earning twice as much as he did, did not have to conform in the same manner as he did.

And I think the age difference creates difficulties because the young fellow is less willing to assert himself. By trying to train these young guys to assert themselves as Captains to make difficult decisions to make difficult decisions, I just felt that I would find it difficult to tell if someone had 30 years of flying experience, leave me alone, I am trying to learn to do this. And I think it would be equally difficult for the vastly experienced individual who might have to sit as second to that young military Captain of the aircraft and not poke his finger into what was going on.

It was only one of a number of considerations, and it certainly shouldn't be over-emphasized.

Q. And did you put that proposition to the group of pilots of the terms that you have just explained?

A. Yes, I did, very much so.

Q. Dealing for the moment now with the second situation, the Class "C" reserve --

A. Yes.

Q. -- military situation, did you express any views about the age differential in that context?

A. Well, there of course, the certain parts of the difficult (sic) would be alleviated because those individuals would be military if they came over as Class "C".

So, my perception was that it was doable, certainly in the military context. It might still create some problems, but I felt it was doable.

Q. And did you tell that to the pilots at that meeting?

A. Yes, I did.

Q. And I suppose to square the circle, did you indicate to the group that you could not see the mix between young 412 types being senior to over more experienced executive pilots?

A. That's a cryptic statement, but if it connotes all those other things I have said, yes.

Q. Did you use those precise words?

A. That's a long time ago. If I did, and you understand that in the terms of which I have just spoken, yes. (Transcript, Volume 19, pp. 2884-8, emphasis added)

Donald Preston, who was also present at the meeting, also testified on behalf of the Respondent. In response to questions from Respondent's counsel, Mr. Preston stated:

Q. Now, the last sentence of that paragraph reads: "Also, the age factor of the two groups of pilots was mentioned." Do you recall if age was mentioned at that meeting?

A. I remember age was raised at one of the meetings, the minutes would seem to indicate that it was this one, that one of the possible problems of having a mixed crew would be that the military pilots were usually young Captains or Majors, and they would be the

senior pilot. If the Transport people came over they would find themselves subordinate to younger, junior people and that might cause some concern or problems for them.

Q. Did General Bell indicate what the nature of the problem might be?

A. Other than - - no, just the assumption that older people might find it difficult to take orders from younger people, rather than the other way around, when they were used to being in command themselves.

Q. Did General Bell indicate whether that was a factor that was prohibitive in the sense that it prevented the people from transferring?

A. No,it was just one of the problems that could arise from having a mixed crew.
(Transcript, Volume 18, pp.2788-9, emphasis added)

iii) The Challenger Acquisition:
As noted previously, the proposed transitional arrangements were predicated upon the assumption the JetStars would remain in service for another three years. However, at the same time that these negotiations were being carried out, the government was actively considering acquiring additional Challenger aircraft.

It was clearly understood within DND that the acquisition of additional Challengers would have significant consequences for the DOT pilots. Indeed, in a memo dated February 11, 1985, Brigadier General Bell notes that the early acquisition of additional Challengers, together with the concurrent phase out of the JetStars would make it "virtually impossible" to avoid hardship for the DOT personnel involved in the Executive Flight Service (Exhibit R-32, Tab 6).

A briefing note was prepared for the Minister of National Defence by Brigadier General Bell, amongst others. The note is dated March 5, 1985, and reviews the status of the negotiations to date. Interestingly, no mention is made of the possible acquisition of the Challenger aircraft or the ramifications that such a purchase would have for the DOT personnel.

The note does, however, restate DND's position that integration of the DOT personnel into DND would be fundamentally incompatible with the nature of military flying operations. To support this conclusion, the note refers to the military's need to maintain preparedness for war and the need to keep operational units military, manned by military personnel under military leadership and discipline, and subject to military terms and conditions of service. After noting the extraordinary demands that may be placed on soldiers during wartime, the note observes that Canadian Forces personnel are generally under 40, and are required to meet strict medical and fitness standards. The note then provides:

8. As can be seen from the table below, there is considerable disparity between the terms and conditions of service of military and DOT pilots.

FACTOR	DOT	DND
Number of Pilots	20 (in EFS)	12 (in Jet Flt)
Average Age	51 yrs (8 of 20 over 55)	31 yrs
Retirement Age	65 yrs	All Captains (40 yrs and 50% of Majors)
Salary Range	$43-61K (majority at $61K)	$30-$40K
Overtime Pay	$7-12K	Nil
Union	Yes	No
Collective Agreement	Yes	No
Right to Strike	Yes	No
Non-Flying Duties	Collective Agreement Only	Numerous
Code of Service Discipline	No (except for certain specified circumstances)	Yes
Medical/Fitness Standards	To meet peacetime tasking	To meet possible war tasking

Operator Guidelines and Licensing, etc.	DOT regulations	DND regulations
Flight Planning Dispatchers	Provided by (to avoid use of Crew-Day)	Do-it-yourself

9. Individually, none of these disparities is impossible to overcome. Nevertheless, we believe that integration of military and civilian crews could only be achieved by changing the method of operating 412 Squadron. Moreover, it would have to be changed in a way which would prejudice its capacity to perform its military duty. The differences between the two groups would undoubtedly cause problems of discipline, morale, and perhaps flight safety.
(Exhibit R-30, Tab 4, emphasis added)

After reviewing various options, the note recommends the phased approach which had been advocated by DND throughout the negotiations.

Ministerial approval for this course of action was subsequently obtained.

While it is not clear from the evidence whether the individuals involved in preparing the briefing note were aware of the fact, on February 28, 1985 Cabinet approved the purchase of twelve Challenger jets, four of which were for use in the DND executive airlift.

The effect of the Challenger acquisition was to accelerate the phase-out of the JetStar aircraft, and to eliminate the incentive to maintain DOT personnel in their positions for the three year period previously contemplated. While the Minister, as a member of Cabinet, would have been aware of the Challenger purchase, it is by no means clear that he had any appreciation of the fact that the arrangements proposed in the briefing note (which he approved) had already been rendered obsolete as a consequence of the purchase.

iv) The April 26 Meeting

On April 26, 1985 a second informational meeting was held. In addition to the pilots, the flight attendants were also invited to attend this meeting. Once again, Departmental representatives, including Don Lamont and Brigadier General Bell were also in attendance.

No minutes appear to have been kept of this meeting, although notes kept by Brigadier General Bell and Mr. Devine were filed as exhibits (Exhibits R-32, Tab 16 and R-17). Although not referred to in Brigadier General Bell's notes, it is common ground that there was a further discussion of the issue of age at the meeting.

According to Paul Carson, one of the Complainants, there was a discussion about two of the flight attendants possibly joining the Reserves. Mr. Carson testified that this caused him to wonder why these individuals might be acceptable to the CAF, whereas the group as a whole was not. He then asked Brigadier General Bell why the group was not acceptable to the military.

According to Mr. Carson, Brigadier General Bell responded "Because the average age of the group is too old" (Transcript Volume 2, pp. 306-7).

Brigadier General Bell does not deny making the statement attributed to him (Transcript Volume 19, pp.2910-1). He explains the statement as follows:

Q. Now, at this meeting, did the question of the age of the pilots come up at all?

A. Yes, yes it did.

Q. How did it come up?

A. I am trying to remember exactly what had -- either someone raised it, the point of asking me about the significance of age, or I had made a statement along the lines that we had already discussed here about the group age of the entity, and that's the pilots, the 20 pilots, it was 51. And that coming over to the Canadian Forces to work the military as military pilots, presented problems which we had discussed at great length prior to this time. And again 51 was just the average of that total group of pilots.

When I made the statement, it was to recognize again in effect what I had said on numerous occasions when we were talking about the military, how difficult in effect it would be for many of them.

Q. ...During the course of that meeting sir, did you indicate to the individuals present that problems associated with aging make it difficult to adapt into military life?

A. ... As a general statement that could be true and I might well have said it, yes. I can't remember the exact context.

Q. Would you have used it in exactly those terms, if you can recall?

A. Can you say it again, please?

Q. Yes.

Problems associated with aging make it difficult to adapt into military life.

A. I think it is a common sense statement myself and I might well have said it.

Q. And to what problems would you have been referring at that?

A. Well, I am thinking if I was 52 or 53 years old and I was considering joining a military where I was going to retire at 55 with the demands and the extreme change of my style of life, would make it extremely difficult. And I would be totally dishonest if I didn't tell people that.

Q. What demands did you have in mind?

A. Again the disciplinary measures that the complete change in the terms of service, the loss of salaries, the disciplinary activities, the secondary duties that

were required.

And when you impose that on someone who has been used to a different way of life -- I am not saying it was any easier, but a different way of life. As you

get older it is much more difficult. Hell, I found it difficult to adapt as I was getting older. I was much more crotchety and still am.
(Transcript Volume 19, pp. 2906-8)

A number of the Complainants testified to their dismay at Brigadier General Bell's remarks, in particular Mr. Carson, who had previously been engaged in a protracted dispute with a commercial air carrier over its age requirements (Air Canada v. Carson, [1985] 1 F.C. 209).

(v) The Memorandum of Understanding

On May 29, 1985 the Minister of National Defence signed a Memorandum of Understanding ("MOU") setting out the terms of the transfer of the Executive Flight Service from DOT to DND. The Minister of Transport signed the MOU on June 17, 1985 (Exhibit R-1, Tab 14).

The MOU provides that the implementation of the MOU should reflect the principles set out in the Prime Minister's directive (ie: that it be carried out at the earliest possible time, and in an equitable and fair manner so as to impose the least possible hardship on the personnel involved). The MOU further provides for a transition period during which DOT would support DND in the provision of travel services. This was to continue no later than July 1, 1986. The JetStar aircraft were to be operated by DOT personnel until the last JetStar was retired on July 1, 1986.

There is no mention of the age of the DOT personnel in the MOU.

The transfer was effected by Order-in-Council dated September 19, 1985 (Exhibit R-1, Tab 15).

c) Relocation Efforts

Linette Cox was the Chief of Staffing and Classification for the Aviation Group at DOT. Ms. Cox gave evidence as to the efforts made to relocate the affected DOT personnel.

According to Ms. Cox, management within DOT was very concerned about these employees, and decided to treat them as special cases. An officer was assigned to work exclusively on finding new positions for the pilots and flight attendants. A system was then implemented whereby no job requiring flying experience could be staffed anywhere across the country without the job first being referred to Ms. Cox in order that she could ensure that the Executive Flight Service pilots were aware of it.

The affected personnel were interviewed, in order to determine their interests and experience. Private sector air carriers were contacted in an effort to place these individuals. Various pension options were considered and a fund established to provide retraining, where necessary.

Ms. Cox provided a list of the positions identified as possible positions for the pilots in the period from April, 1985 to June, 1986 (Exhibit R-37). While there may be some duplication in the positions listed, by any measure, the list is lengthy. Similar efforts were made for the flight attendants.

Several of the Complainants commented on DOT's efforts to find them

new positions, describing their efforts as "very helpful" (Vickers Testimony, Transcript, Volume 6, p.864) and noting that DOT "did their best" (Cranston Testimony, Transcript, Volume 1, p.134). Many of the Complainants did, in fact, secure alternate employment with DOT's assistance.

IV. ANALYSIS

These complaints must be examined in the context of section 2 of the CHRA, which sets out the purpose of the legislation. Also relevant are sections 7 and 10 of the CHRA which provide:

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

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

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

on a prohibited ground of discrimination.

and

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

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

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

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

Age is a prohibited ground of discrimination.

a) Standard and Burden of Proof

The parties are in agreement that in cases of this nature, the burden of proof is on the Complainants to establish a prima facie case of discrimination. Once that is done, the onus shifts to the Respondent to establish, in cases of direct discrimination, a justification for the discrimination, upon a balance of probabilities. In cases of adverse effect discrimination, once a prima facie case has been established, the onus shifts to the Respondent to establish, again on a balance of probabilities, that it has taken reasonable steps to accommodate the employees affected. (Ontario Human Rights Commission v. Etobicoke, [1982] 1 S.C.R. 202 at 208, and Ontario Human Rights Commission and O'Malley v. Simpson-Sears Limited, [1985] 2 S.C.R. 536 at 558-9)

A prima facie case is one which covers the allegations made, and which, if believed, is complete and sufficient to justify a verdict in the Complainants' favour, in the absence of an answer from the Respondent (O'Malley, supra., p.558).

b) Role of Discrimination

It is well established that it is not necessary that discriminatory considerations be the sole reason for the actions in issue for a complaint to succeed. It is sufficient that the discrimination be a basis for the employer's decision (Holden v. Canadian National Railway (1990), 14 C.H.R.R. D/12 at p. D/15. See also the Reasons for Judgment of the Federal Court of Appeal in this case, supra., at p. 130).

c) Nature of the Discrimination

As was noted at the outset, the transfer of a service offered by one government department to another involves many different decisions, as well

as the application of numerous policies. Where discrimination is alleged, it is necessary to consider whether such alleged discrimination would be direct or indirect in nature, as, given the current state of the law, profoundly different consequences may flow depending upon the result of that analysis.

The accepted criteria for distinguishing direct discrimination from adverse effect discrimination were articulated by Mr. Justice McIntyre in Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd., [1985] 2 S.C.R. 536:

"A distinction must be made between what I would describe as direct discrimination and the concept already referred to as adverse effect discrimination in connection with employment. Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, "No Catholics or no women or no blacks employed here." There is, of course, no disagreement in the case at bar that direct discrimination of that nature would contravene the Act.

On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force ... An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply." (at p. 551)

This principle was cited with approval by the Supreme Court of Canada in Alberta Human Rights Commission v. Central Alberta Dairy Pool et al., [1990] 2 S.C.R. 489. In Dairy Pool, the majority of the Supreme Court went on to hold that:

"Where a rule discriminates on its face on a prohibited ground of discrimination, it follows that it must rely for its justification on the validity of its

application to all members of the group affected by it.

There can be no duty to accommodate individual members of that group within the justificatory test because, as McIntyre J. pointed out, that would undermine the rationale of the defence. Either it is valid to make a rule that generalizes about members of a group or it is not. By their very nature rules that discriminate directly impose a burden on all persons who fall within them. If they can be justified at all, they must be justified in their general application. That is why the rule must be struck down if the employer fails to establish the BFOQ. This is distinguishable from a rule that is neutral on its face but has an adverse effect on certain members of the group to whom it applies. In such a case the group of people who are adversely affected by it is always smaller than the group to which the rule applies. On the facts of many cases the "group" adversely affected may comprise a minority of one, namely the complainant. In these situations the rule is upheld so that it will apply to everyone except persons on whom it has a discriminatory impact, provided the employer can accommodate them without undue hardship." (at pp. 514-515)

and further stated:

"... once a BFOR is established the employer has no duty to accommodate. This is because the essence of a BFOR is that it be determined by reference to the occupational requirement and not the individual characteristic. There is therefore no room for accommodation: the rule must stand or fall in its entirety."

"... The end result is that where a rule discriminates directly it can only be justified by a statutory equivalent of a BFOQ, i.e., a defence that considers the rule in its totality. ... However, where a rule has

an adverse discriminatory effect, the appropriate response is to uphold the rule in its general application and consider whether the employer could have accommodated the employee adversely affected without undue hardship." (at pp. 516 and 517)

d) Application of the Law to the Facts

There is no doubt that the federal government has the right to organize its affairs and to change the duties of its employees as it sees fit. This prerogative has now been codified in the Public Service Rearrangement and Transfer of Duties Act, R.S., c. P-34. The power to allocate resources must, however, be exercised according to law, and cannot override a statute of the special nature of the CHRA (Canada (Attorney General) v. Uzoaba, [1995] 2 F.C. 569 at p. 577. See also Kelso v. The Queen, [1981] 1 S.C.R. 199 at p. 207 and the Reasons for Judgment of Cullen J.

in this case, supra., at p. D/46).

As was noted earlier in this decision, in this case there were two decisions that had to be made that were of direct consequence to the Complainants, each of which was potentially tainted by discriminatory considerations. The decisions, which overlap somewhat, were:

a) whether the DND Flight Service would be exclusively Military or a joint civilian/military operation; and

b) whether the Complainants would be employed in the new organization.

Each of these will be considered in turn.

i) The Decision to Militarize

Dealing firstly with the issue of whether the service would be wholly military or not, it is the Tribunal's view, having regard to the evidence as a whole, that from the moment the Prime Minister issued his directive the CAF made concerted efforts to ensure that the flight service would ultimately become fully military, for reasons quite independent of any consideration of the personal characteristics of the Complainants. There had been a longstanding 'turf struggle' between DOT and the CAF, with the CAF having coveted the opportunity to provide transportation to Cabinet

Ministers and other dignitaries, and the profile and prestige associated with that task, for some time. No doubt, the Forces welcomed the opportunity to gain exclusive jurisdiction over the service.

The parties are in agreement that if the Tribunal concludes that, absent any consideration of age, the decision to make the flight service an exclusively military operation would, in all likelihood, have been the same, this would not relieve the Respondent from liability if age was nevertheless a basis for the decision to militarize the service, although it may have an impact on the issue of damages.

Although we have found that DND approached the discussions with the pre-established goal of making the service a military one, once DND actually turned its mind to the issue of how to integrate the two services, there were clearly a number of other factors that went into the ultimate decision to make the flight service exclusively military. There were no other situations where civilians flew military planes. Factors of economy and efficiency were also considered. There was insufficient evidence before the Tribunal to determine whether the militarization of the flight actually resulted in any cost savings, although the suggestion was made that it did not. Whether it did or not, and whether the consolidation of the flights was ill-advised or not is not for this Tribunal to determine.

On this issue, our mandate is limited to determining whether the decision to militarize the flight service was tainted by considerations of age, or whether it adversely affected the Complainants based upon their age, and if so, whether the Respondent has discharged the onus on it with respect to justifying the discrimination, if it discriminated directly, or establishing the requisite level of accommodation, in the event the discrimination is indirect.

The differences between military and civilian pilots, including the differences in their terms and conditions of service, were also significant factors considered by DND in its deliberations on the question of how to integrate the two services. Indeed, as was noted in the extract of Brigadier General Bell's testimony reproduced at pages 13 and 14 of this decision, he conceded that these differences were factors in the decision to make the Flight Service an exclusively military operation. One of the differences identified by Brigadier General Bell that was considered in

reaching this decision was the large age difference between the two groups.

This is also reflected in Lieutenant Colonel Scott's paper and in the briefing note for the Minister of National Defence. As was noted in Holden, supra., and by the Federal Court of Appeal in this case, it is not necessary for the discriminatory consideration to be the sole reason for the decision in issue, it is sufficient if it forms a basis for the decision. Although we think that the outcome would have been the same without any consideration of the age of the Complainants, we are satisfied that in this case the age of the Complainants was a basis for the decision to militarize the service.

Having made assumptions about the Complainants' ability to do the job and to fit into the new organization, based, inter alia, upon their age, the Respondent has discriminated directly against the Complainants (see Central Alberta Dairy Pool v. Alberta Human Rights Commission, [1990] 2 S.C.R. 489 at 513). As a consequence of the conclusion that the decision to militarize the service was tainted by considerations of age, we have found that the decision was not neutral, and it is therefore unnecessary to consider the issue of adverse effect discrimination. The question rather is whether such discrimination can be justified under section 15 of the CHRA.

However, before determining whether the Respondent has established age as a bona fide occupational requirement ("BFOR"), it should be noted that the fact that it was the average age of the group that was considered, as opposed to the ages of the individual Complainants, does not affect the Respondent's liability in this case. It is clear that one can be the victim of discrimination based upon the personal characteristics of others (Re Singh, [1989] 1 F.C. 430 (F.C.A.), at p. 440).

ii) Bona Fide Occupational Requirement

Having concluded that age was a factor that led the Respondent to decide to militarize the flight service, the question then is whether the Respondent can establish age as a bona fide occupational requirement.

Section 15(a) of the CHRA states that:

It is not a discriminatory practice if

a) any refusal, exclusion, expulsion, suspension, limitation, specification, or preference in relation to employment is established

by an employer to be based upon a bona fide occupational requirement. In order to succeed in establishing a particular job requirement as a BFOR, an employer must satisfy both an objective and subjective test:

"... To be a bona fide occupational qualification and requirement, a limitation ... must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economic performance of the job without endangering the employee, his fellow employees and the general public." (Etobicoke, supra., at p. 208)

The law with respect to BFOR's has recently been restated by the Supreme Court of Canada in Large v. Stratford (City), [1995] 3 S.C.R. 733. While Large clarified the law as it relates to the subjective element and with respect to the role of reasonable alternatives, it does not alter the basic test for BFOR's established in Etobicoke.

We are satisfied, on all of the evidence, that the Respondent has satisfied the subjective aspect of the two-pronged Etobicoke test. Indeed, there was no suggestion by either the CHRC or the Complainants that the Respondent had not met the subjective aspect of the test. Insofar as the objective element was concerned, considerable evidence was adduced before the second Tribunal as to the nature of military responsibilities, and the training provided to members of the CAF (see, for example, the evidence of Lieutenant Colonel Ronald MacDonald and Captain McKinstry). This evidence appears to have been led to support an argument that, having regard to the need to train the Complainants in military matters and the length of time

required for that training, it simply would not have been cost-effective to bring the Complainants into the military, given the CAF's policy of compulsory retirement at age 55 (the "CRA"), or earlier in some cases.

At the time of the second Tribunal hearing the CAF's retirement policies were being challenged in the case of Martin v. Canada (Department

of National Defence). The parties agreed to be bound by the decision in Martin as it related to the validity of the CAF's mandatory retirement policies. Since that time, a Tribunal has found that the CAF had not established that retirement at age 55 or before constituted a bona fide occupational requirement, as, while there is a risk factor in the military context associated with the aging process, nevertheless, individual testing could be used to determine fitness (17 C.H.R.R. D/435). This decision was subsequently upheld by the Federal Court (Trial Division) ([1994] 2 F.C. 524), and is currently before the Federal Court of Appeal.

Before this Tribunal, Counsel for the Respondent acknowledged the binding effect of the Martin decision and conceded that the Respondent could not establish a BFOR insofar as it relates to the CAF retirement policy. The Respondent's argument focussed rather on the question of the need for cohesion
within the CAF, and the negative effect that bringing in the civilian DOT personnel would have had on cohesion and morale. In this regard, the Respondent relied upon the evidence of various CAF personnel such as Brigadier General Bell and Vice Admiral Mainguy as to the problems that would be created by the difference in the terms of service and in the ages of the two groups. In addition, the Respondent relied upon the evidence of Dr. W. Darryl Henderson. Dr. Henderson was previously a member of the United States Army, and was the Commander of the U.S. Army Research Institute for Behaviour and Social Science. In addition, he is the author of "Cohesion: The Human Element in Combat". Dr. Henderson was qualified before the previous Tribunal as an expert in organizational effectiveness, behaviour, standards of performance and cohesion. His qualifications were not challenged before this Tribunal, although certain of his conclusions were questioned.

Dr. Henderson testified as to the unique nature of military forces and the need for cohesion within such forces. According to Dr. Henderson 'cohesion' is a term which encompasses notions of morale, esprit de corps, élan, and the like. Cohesion is created when all behaviours of the group advance the goals of the organization. (Transcript Volume 21, pp. 3164-5) Cohesion is achieved by creating small, primary groups, which groups are then isolated and controlled. Outside influences are not allowed to intrude upon the group. By turning the group inward on itself, the necessary bonds are established so as to permit the group to function effectively in combat conditions. Strong leadership is key to the proper development of cohesion.

According to Dr. Henderson, it is easier to develop cohesion with young people as by the time they get to their early 20's their personalities are well-formed. Older individuals are more questioning and

less willing to accept authority.
(Transcript Volume 21, pp. 3166-7)

Dr. Henderson testified that the more homogenous the group, the greater the potential for the development of cohesion. Any difference amongst individuals can detract from that cohesion by creating what Dr. Henderson describes as 'cleavage points'. According to Dr. Henderson, where differences exist, it is essential that there be complete equity in the treatment of the various members of the group to encourage the

*

development of cohesion.

In this case, Dr. Henderson reviewed the differences between the civilian flight service and the military service as summarized in the chart reproduced at pages 25 and 26 of this decision, and concluded that there were several cleavage points that would exist if the two organizations were consolidated. These cleavage points included the differences in pay and duties. Insofar as the differences in age was concerned, in Dr. Henderson's view, this would not be a major concern as far as the relationship between soldiers and their superiors was concerned ('vertical bonding'). It could, however, interfere with the bonding between peers ('horizontal bonding') (Transcript Volume 21, pp. 3257-9). In offering these views, Dr. Henderson relied upon his general experience. He had not conducted any specific research into the effects of merging disparate groups in the military context (Transcript Volume 21, pp. 3177-8).

In cross-examination, Dr. Henderson acknowledged that differences in race, gender, religion, language and the like can all create problems "if you let them" (Transcript Volume 21, p. p. 3263). These problems can, however, be surmounted with effective leadership. Indeed, the Respondent itself acknowledged that none of the individual differences between the DOT personnel and the military were impossible to overcome (Exhibit R-30, Tab

4). Dr. Henderson also offered the opinion that women should not be placed in combat positions for historical, sociological and behavioural reasons (Transcript Volume 21, pp. 3217 - 3224, 3259-3262).

The unique nature of the CAF must be acknowledged, with its members being required to be prepared to lay down their very lives for their comrades and their country (see, for example, Canada (Attorney General) v. St. Thomas (1993), 162 N.R. 228 at p. 233 (F.C.A.). Nevertheless, it would indeed be repugnant to Canadian values if this or any other Respondent were permitted to segregate employees, whether by age, race, gender, religion or any of the other proscribed grounds set out in the CHRA, in the interests of fostering better employee relations. Human Rights jurisprudence has long established that the negative attitudes of co-workers towards members of identifiable groups will not support a BFOR defence (See, for example Imberto v. Vic and Tony Coiffure and Tony Rusica, (Ont.)(1981), 2 C.H.R.R. D/392).

The Respondent is not attempting to advance such an argument, positing rather that it was the cumulative effect of the differences between the groups that was insurmountable for the reasons articulated by Dr.

Henderson. A close view of the evidence reveals, however, that the CAF's concerns with respect to integrating the civilian DOT personnel went well beyond the concerns with respect to cohesion addressed by Dr. Henderson.

Not only were there concerns as to the differences in the terms and conditions of service between the two groups, and the effect that these differences would have on cohesion, as well there were assumptions made about the Complainants' personalities and flexibility, based upon their age. Brigadier General Bell himself testified that his concern was that problems associated with aging make it difficult to adapt to military life (Transcript Volume 19, p. 2907). He described himself as finding it more difficult to adapt as he gets older, and stated that he had become more crotchety as he aged. The clear implication is that this would also be true of the Complainants.

It is noteworthy that Brigadier General Bell never met any of the Complainants other than in group meetings. Rather he based his views solely on the information provided on paper as to the employment history of the various Complainants (Transcript Volume 19, p. 2963).

Although Brigadier General Bell's comments were made in the context of a discussion regarding the suitability of the Complainants for positions as soldiers, we are satisfied, on a balance of probabilities, that the existence of this type of attitude towards the Complainants, and the resistance on the part of the CAF to having individuals such as the Complainants flying military aircraft influenced the decision to make the flight service a military one. This conclusion is consistent with the evidence of Donald Preston previously cited, wherein he testified that one of the problems with having a mixed civilian/military crew was the assumption that older civilian pilots would have difficulty taking orders from younger military personnel.

Considering the evidence as a whole, the Tribunal is satisfied that, while the Respondent did have legitimate concerns with respect to difficulties that would be encountered if they were to attempt to merge the two groups of employees, the Respondent's own evidence establishes that these concerns, as they related to the age issue, could be overcome with strong and effective leadership. In addition, however, it is clear that there were also concerns about the ability of the Complainants to adapt to change, to work with others, and to fit in to the new organization, which concerns were based upon stereotypical assumptions related to the age of the Complainants. The Respondent has not discharged the onus upon it with

respect to justifying its reliance upon these types of assumptions. The BFOR defence therefore fails.

The Tribunal finds further support for its conclusion that full militarization of the flight service was not necessary for the preservation of military cohesion from the Respondent's own evidence. The briefing note for the Minister of National Defence (Exhibit R-30, Tab 4) identifies a so-called 'compromise option' which it indicates would be acceptable if it were the only means of reaching an agreement. The compromise option was to allow the DOT personnel to transfer as civilians to DND, and to continue to operate DOT aircraft for an interim period, on secondment back to DOT. During the interim period (which period was not defined in the note), the employees would receive priority status for appointment to other positions.

At the end of the period, the placement of those remaining would be decided jointly by DOT, DND and Treasury Board, with no assurance of continued employment in DND flight operations. This option was not recommended as being administratively complex, and as offering no advantage to the DOT personnel, as there would be no assurance of continued employment after the interim period.

It should be noted firstly that administrative inconvenience will not support a BFOR defence. More significant, however, in the Tribunal's view is the fact that implicit in this compromise position is the recognition as late in the process as March, 1985 that full military manning of the flight service was not essential to its viability or optimum operation.

The Commission argued that the phased approach should be considered a 'reasonable alternative' to the acts of discrimination within the meaning of the Large decision. We do not view the proposed transitional arrangements as a reasonable alternative as the arrangements under consideration were both temporary and uncertain in nature. Moreover, even if the Respondent had pursued the phased approach, its conduct would still have been discriminatory as, for reasons based in part on the Complainants' age, they would have been afforded something less than a full transfer to DND/CAF. As noted above, in the Tribunal's view, the willingness on the part of the Respondent to consider such an arrangement, albeit on a temporary basis, is evidence that the exclusion of the Complainants was not

necessary.

iii) The Failure of the Complainants to Try to Enlist

As was previously noted, in addition to the question of whether the flight service would be militarized, there was a second, related issue which was whether the Complainants would be employed in the military organization.

Insofar as eight of the Complainants are concerned (Messrs. Brulé, Empey, Allin, Graham, Thorpe, Gilks, Williams and Falardeau), at the time that these discussions were taking place, they had already reached what was then the compulsory retirement age for the CAF of 55. Enrollment in the Reserve force was clearly not an option for these individuals as a result of the CAF's age-based rules, which rules the Respondent has conceded it cannot justify.

Insofar as the remaining Complainants are concerned, the Respondent argues that the Complainants made it clear from the outset that they were not interested in positions in the CAF, and that the actions of representatives of the CAF must be viewed in that light. With the exception of one of the Flight Attendants (Mr. Chiasson), who actually attempted to enlist in the Reserve Force, the Respondent argues that there has not been a refusal to hire within the meaning of section 7 of the CHRA.

In support of its position the Respondent relies upon the evidence of some of the Complainants, the various discussions between the two Departments, and on a memo written by Gary Brown, one of the Complainants who was also a union representative. On December 12, 1984 Mr. Brown wrote Mr. Lamont, stating, in part:

> - Our first preference would be to continue operating our aircraft as civilians working for DND, with some guarantees of long term employment.
>
> - If DND will not accept the concept of civilian crews operating their aircraft, some of our members are willing to operate them as members of the military. This could involve enrolment in the military under some form of reserve service ...
> (emphasis added)

It is implicit in this memo that, as of December 12, 1984 (well before the issue of age was raised in any of the discussions with the Complainants) at least some of the Complainants may not have been interested in pursuing the possibility of continuing in their jobs as members of the military. Others amongst the Complainants were, however, quite interested in military careers. While the issue was not canvassed with all of the Complainants, a

number of the Complainants who were still under the age of 55 testified that they were indeed willing to pursue the possibility of enlistment in the military (see for example, the testimony of Mr. MacInnes, Transcript Volume 2, p. 276, Robert Bisson, Transcript Volume 11, p.1741, Brown testimony, Transcript Volume 8, p.1339, and Laroche testimony, Transcript Volume 5, p. 799).

Although the possibility of the Complainants joining the Reserve force was raised as a possibility in the various meetings that took place surrounding this issue, and is repeatedly referred to in the documentation, one cannot help but wonder how seriously this was pursued as an option by

the Respondent in light of the comments made at the meeting of the DND Working Group on January 4, 1985:

> ... A paper prepared by DGPCOR [Exhibit R-31, Tab 6] concluded that for several reasons including operational effectiveness, military cohesiveness and morale, DND should not consider personnel options that included either the offer of Class C service [ie. Reserve Forces] or absorption into a civilian organization within DND. The preferred option if DND were required to employ DOT personnel was for them to be seconded or employed on a contractual basis for a fixed period. There was general agreement with the position put forward by DPGCO [Brigadier General Bell] but A\DGAEM [a Colonel G. Kemp] added that it would be possible to absorb some civilians within the maintenance establishment. (Exhibit R-31, Tab 5, emphasis added)

It will be recalled that Lieutenant Colonel Scott's paper identified the age of the Complainants as one of the factors that made their absorption into the CAF through the mechanism of Reserve service problematic (Exhibit R-31, Tab 6).

Certainly the effect of the comments made by Brigadier General Bell at the meetings of January 30 and April 26 was to actively dissuade any of the Complainants who may have been considering applying to the Reserve Force from so doing. As was noted by the Federal Court of Appeal:

... the government created an employment chill which effectively removed any argument as to failure to apply for the positions from contention.(Reasons for Judgment, supra., at p. 130)

On this basis the decision relied upon by the Respondent in Villeneuve v. Bell Canada (1987), 9 C.H.R.R. D/5093 may be distinguished.

In the Tribunal's view, absent any intervening actions by the Respondent, the fact that certain of the Complainants may have ultimately decided not to apply to the Reserve force for reasons of their own could have an impact on the question of damages. The fact is, however, that the Complainants were denied the opportunity to make a meaningful decision, one in which they were able to properly balance the various competing factors in order to determine what was best for each of them as individuals, because representatives of the Respondent made it clear to them that the CAF did not want them as Reservists, in part because of their age. This amounts to direct discrimination. For the reasons previously articulated with respect to the decision to militarize the service, the Tribunal finds that the Respondent has not satisfied the onus upon it to establish that the considerations of age constituted a BFOR in all of the circumstances.

Finally, the Respondent argues that, with the exception of Mr. Chiasson, there is no evidence of the ability of the Complainants to meet the CAF's medical standards for enrollment. As was noted by the Federal Court of Appeal in Via Rail Canada v. Butterill et al., (1982) 3 C.H.R.R. D/1043 at p. 1047, proof of the ability of the Complainants to meet the

Respondent's medical standards is not an element of the case which the Complainants have to prove in order to establish liability. Liability is established when the Complainants prove that they were refused continued employment in their positions as a result of an unlawful discriminatory practice. In the event that it is established that any of the Complainants were ineligible for military service for reasons other than age, this would be a factor to consider in the computation of damages (see Basi v. Canadian National Railway Company, TD 2/88 (decision on remedy) at p.3).

iv) Liability of the Department of Transport

The complaint against DOT is based upon ss. 10(b) of the CHRA, which makes it a discriminatory practice for an employer to enter into an agreement that deprives or tends to deprive an individual or a class of

individuals of any employment opportunities on a prohibited ground. In this case, it is alleged that entering into the MOU had this effect.

It was argued that as there is but one Respondent in this case, that being Her Majesty the Queen, a single entity could not enter into an agreement with itself. This argument was dealt with by the Federal Court (Trial Division), which stated:

> That the government is not a homogenous body is a fact with which I suspect few people would dispute. It operates by departments, each making its own decisions and interacting with other departments. To argue that an agreement between two Ministers or two departments is not an agreement within the meaning of section 10 of the Act would be to ignore the reality of the workings of government, while at the same time placing a restrictive interpretation on the language of section 10 which I believe would defeat the underlying purpose of the Act. (Per Cullen J., supra., at p. 20)

In the Tribunal's view, this amounts to a question of law and as a result, the finding of the Federal Court is binding upon us. In the event that we are mistaken in this conclusion, we would note that we are in agreement with the conclusion reached by Mr. Justice Cullen. In the Tribunal's view, to accept the Respondent's argument would require us to give an unduly technical interpretation to the word 'agreement', one which would be inconsistent with the purposive approach favoured in human rights jurisprudence.

It is clear that DOT had very little influence over what occurred in this case, given its obligation to comply with the Prime Minister's directive and the intransigence of DND. It was clear, however, by the time the Minister of Transport signed the MOU on June 17, 1985 that the effect of the agreement to transfer the service would be to cause the Complainants to lose their positions, in part because of their age. The signing of the MOU was the mechanism by which this was able to occur.

While it is not necessary for us to find intent in order to find that there was discrimination, the evidence of Don Lamont makes it clear that DOT was in fact aware that the age of the Complainants was a factor in DND's decision making, and of the consequences that this would have for the

Complainants (Transcript Volume 12, p.1839 and p.1848).

The fact that DOT was unable to negotiate a better arrangement for their employees and may have had little choice in the matter does not preclude a finding of discrimination under ss. 10(b) of the CHRA (see Moore and Akerstrom v. Treasury Board et al., TD 8/96 at p. 34).

As was noted previously, a review of the MOU reveals that it is neutral on its face: that is, it does not make any mention of the age of the Complainants or of any age-based policies of the Respondent. The signing of the agreement had, however, an adverse effect on the Complainants, in part, because of their age, thus bringing it within the purview of ss. 10(b) of the CHRA.

The Respondent argues that this cannot amount to adverse effect discrimination, as adverse effect discrimination requires that the rule in question apply to employees as whole, and only have a detrimental effect on a sub-group of those employees who share a common characteristic protected by the CHRA. In such cases, the rule will be allowed to stand in its general application, however, the employer will be required to accommodate those adversely affected. In support of this argument the Respondent relies upon the decision of the Supreme Court of Canada in O'Malley, supra., at p. 551. In the present case, argues the Respondent, there is no universal rule applying to all the employees in the relevant class, ie. all DOT personnel. The Respondent argues that this fact takes these circumstances out of the ambit of adverse effect discrimination.

In the Tribunal's view the relevant group to consider in the context of an adverse effect analysis is the DOT employees who were providing executive flight services prior to the consolidation. This would include pilots, flight attendants, maintenance personnel and flight operations officers, all of whom are referred to in the MOU. The evidence establishes that at least some DOT personnel were absorbed by DND (see testimony of Walter Wright, a Flight Operations Officer whose employment was transferred from DOT to DND, Transcript Volume 11, pp. 1649 -1653). The sub-group of DOT employees that was detrimentally affected by the transfer of jurisdiction was the pilots and flight attendants who, because of a prohibited ground (ie. age), were deemed to be unsuitable for the positions. While a group defined by a shared job category will not ordinarily attract the protection of the CHRA, in this case it was the job function of the individuals in question taken in conjunction with their collective ages that was considered by DND in arriving at the conclusion that it would not accept the transfer of these individuals. As a

consequence, the execution of the MOU had an adverse impact on the Complainants' status as pilots and flight attendants, in part because they had an average age of fifty-one.

Finally, we note that ss. 10(b) of the CHRA requires that the agreement in issue deprive or tend to deprive an individual or class of individuals of an employment opportunity on a prohibited ground. In the Tribunal's view, in this case, that class was defined by both age and job function.

The Respondent also argues that to constitute adverse effect discrimination, there must be an employment rule or standard of general application. A one-time decision to transfer a service (and by extension, the agreement necessary to carry out such a transfer) does not, in the Respondent's submission, constitute such a rule or standard. This argument was addressed by both the Federal Court (Trial Division), which stated:

> Even though it was technically a one-time decision, its effects of the Mis-en-cause

> give it the same feel as a general employment rule or practice and therefore it is appropriate to give the language a broad interpretation to include these types of decisions ... To decide otherwise would render useless the decision that the Government's power to transfer duties is subject to the scrutiny of the Act ... (at p. D/50)

and by the Federal Court of Appeal:

> I do not myself see that the fact that it was a one-time decision means that it could not be a policy. It was a governing principle for all the members of the relevant group, hence a decision applied to them based upon reasons of policy, viz., that inequality of age, along with inequality of salary, would create friction ... and thereby reduce efficiency. (at p.131)

Neither Court made any specific finding on the issue of adverse effect discrimination.

We are in agreement with these sentiments. In addition we note that ss. 10 (b) of the CHRA specifically contemplates changes being made to the employment of individuals as a consequence of the entering into of agreements (ie. one-time events).

As a result, we find that the actions of DOT in entering into the MOU constituted adverse effect discrimination insofar as the Complainants are concerned.

v) Reasonable Accommodation

Having concluded that the actions of DOT constituted adverse effect discrimination, the next issue to be determined is whether the Respondent has discharged the onus upon it to demonstrate that it made sufficient efforts to accommodate the Complainants, and that to have gone any further would have resulted in undue hardship to the Respondent.

In the ordinary case of indirect or adverse effect discrimination, an employer will be required to modify or waive the rule or standard in question, insofar as it relates to those adversely affected on a prohibited ground. In this case, however, the rules or standards in issue were those imposed by DND, which rules or standards were not within the power of DOT to control. It was acknowledged by Counsel for the CHRC that the only way that DOT could accommodate the Complainants was by finding them alternate employment and that in this regard, DOT 'had tried hard' (Duval submissions, Transcript, August 19, 1996, at pp. 114-5).

The extent and genuineness of DOT's efforts in this regard was also acknowledged by the Complainants (see p. 32 herein).

Having regard to the evidence as a whole, we are satisfied that DOT made all reasonable efforts to find alternate employment for the Complainants, and that in the circumstances of this case, these efforts satisfy the onus on DOT with respect to reasonable accommodation.

V. DAMAGES

Having found liability on the part of the Respondent, it remains to be determined what, if any, damages should properly be awarded to the

Complainants.

In assessing damages, the Tribunal's jurisdiction is governed by s. 53 of the CHRA. In addition, the Courts have established that in cases of discrimination, the goal of compensation is to make whole the victim of the discriminatory practice, taking into account principles of remoteness and reasonable foreseeability (see Canada (Attorney General) v. Morgan, [1992] 2 F.C. 401, and Canada (Attorney General) v. McAlpine, [1989] 3 F.C. 530).

a) Reinstatement

Having regard to the passage of time that has occurred in this case, neither the Complainants nor the CHRC are seeking that the Complainants be reinstated.

b) Lost Wages

There are a number of preliminary issues which must be resolved before we can properly quantify the level of damages on an individual basis.

i) Period of Compensation

The Federal Court of Appeal in Morgan, supra, has affirmed, and the parties have conceded, that the Complainants are not entitled to be compensated for lost wages for an indefinite period. The court in Morgan did not fix a set cut-off point, but instructed Tribunals to set the period of compensation having regard to a careful analysis of the individual circumstances of each case.

In establishing a cap in this case, the Commission argued that the Complainants should be entitled to recover damages up to four years after the Executive Flight Service was formally transferred to DND, that is, until July 1, 1990. The Commission relied on the Respondent's admission that a three year transition period was originally considered, at least in part, to minimize the hardship on the affected employees. A minimum period of three years was therefore reasonably foreseeable with respect to potential damages, and it was submitted that a further year should be included to allow for those individuals who could not find a job within the anticipated time frame.

The Respondent argued that the cut off point should be set at July 1, 1986, the date by which all of the Complainants had in fact found alternate employment or had elected to retire.

The Tribunal accepts the Commission's argument in part. The phased approach initially favoured by DND was responsive to the anticipated difficulties that some of the Complainants might experience in finding other jobs. It was DND's belief that it could take up to

three years for all of the affected employees to be placed (Bell Testimony, Transcript Volume 20 at pp. 3022-23, and pp. 3048-49; Ex. R-32, tab 8). It was therefore foreseeable that damages could be incurred to that point.

With respect to the Respondent's argument, the Tribunal cannot accept the proposition that the period of compensation should automatically cease on July 1,1986. The Complainants had a duty to seek alternate employment, however this should not negative their entitlement to be compensated for any income lost despite their best efforts to limit those losses. If their new job paid less than the job they would have had, but for the discriminatory conduct, that

difference should be compensable.

The Tribunal does accept the Respondent's point, however, with respect to whether a fourth year should be added to the compensable period as submitted by the Commission. The Tribunal finds that on the evidence an extension is not warranted as none of the individual Complainants in fact required any additional time to find employment.

By July 1, 1986 all of the Complainants had either found new jobs or had elected to retire and therefore removed themselves from the search for work. (A detailed account of the circumstances pertaining to each individual Complainant is found in Appendix 'A'.) We are not prepared to accept the Commission's submission in the abstract, and there is no evidentiary foundation to support the submission that the three year cut-off point needs to be extended to allow for individual circumstances. Therefore, on all of the evidence, we find that a three year cap is appropriate in the circumstances of this case.

The Tribunal also finds that the three year period properly starts to run from the April 26, 1985 meeting when all of the Complainants were formally advised that they would not be transferred to DND. It was after this meeting that the Complainants concluded that they had been discriminated against and that they had effectively been denied the opportunity to continue in their positions. Following the April meeting, DOT began working with the Complainants to assist them in locating alternative jobs. Indeed many of the individual Complainants left the Executive Flight Service before the transfer of the service was finalized on July 1, 1986 (Cox Testimony, Transcript Volume 22, p. 3363; Ex. R-l, Volume 1, Tab 18). Consequently, damages will be assessed between April 26, 1985 and April 26, 1988.

ii) Comparator salary

The Commission submitted that the Complainants should be entitled to the difference between the salary they actually received and the salary and benefits they would have earned had they remained as civilian crew members of the Executive Flight Service. The Commission relies on the Respondent's preliminary consideration of a transition period which would have allowed the Complainants to work as civilian employees of DND for three years before being phased out. This, they argued, establishes that the transfer of these employees to work as civilian employees of DND was a reasonable alternative to the militarization of these positions, and the Complainants are entitled to be paid at a civilian level. This Tribunal does not view the issue of the proposed transition period as being relevant to the question of the appropriate comparator salary and the quantum of damages. As previously noted, we have concluded that the phased approach is evidence that the Complainants' exclusion based on age was not reasonably necessary to achieve the Respondent's objectives and was therefore germane to whether the Respondent had made out a BFOR defence. In our view this evidence is primarily relevant to determining liability, and is not determinative of the remedy that flows from the Respondent's discriminatory conduct.

The jurisdiction of the Tribunal is limited to awarding

compensation for "...wages ... that the victim was deprived of ... as a result of the discriminatory practice" (ss. 53(2)(c), emphasis added). In our view, the assessment of damages requires that we consider all of the surrounding circumstances. We have already found that although age was a factor in the decision to make these military positions, the result would have been the same even without any consideration of the age of the Complainants. Given this conclusion, it is appropriate in our view to compare what the Complainants actually earned with what they would have earned had they been enrolled in the CAF.

Although it was initially felt that the Complainants could continue flying as civilian pilots for three years, ultimately it was due to non-discriminatory operational considerations, that is the acquisition of additional Challenger aircraft, that this period was reduced to about eighteen months. The mere fact that the transition period could have been for a longer period does not alter our conclusion that, in any event, absent any taint of discrimination, the positions would have become military ones. To accede to the

Commission's request and allow damages based on wages lost at a civilian rate would effectively place the Complainants in a better position than they would have been had there been no discrimination.

Therefore, it is only losses which flow from the deprivation of the military positions that are compensable.

iii) Deductions from earned income

For the period following April 26, 1985 the Complainants received monies in a variety of ways. Some chose to retire and received pension income and, per the terms of their collective agreement, they, together with others who accepted a lay-off from DOT, also received severance benefits. Other Complainants found new employment within DOT and received an annual salary plus overtime and in some cases, a flying bonus.

It was argued by the Commission, and conceded by the Respondent DND (De Pencier Argument, Aug. 21, 1996, Transcript Volume 3, at pp. 351-352), that the insurance exception developed in tort law (Cunningham v. Wheeler, [1994] 1 S.C.R. 359, Canadian Pacific Ltd. v. Gill, [1973] S.C.R. 654, and Workmen's Compensation Commission v. Lachance, [1973] S.C.R. 428) applies to proceedings under the CHRA. Based on the submissions made by the parties, the Tribunal has not treated pension income or severance pay as earned income which can be set-off against the wages that would have been earned by the Complainants in military positions. We have, however, included overtime and flying bonuses, where applicable, with the individual's basic salary to yield the total earned income for the period in issue.

iv) Individual damage assessments

The evidence with respect to the applicable military salaries that would have been earned by the Complainants had they moved over to the CAF indicates that within the military, the level of pay is based on both rank and years of service. The evidence further establishes that

as either new enrollees or re-enlisted Class 'C' reservists, the highest possible rank at which the Complainants could have joined the CAF would have been Captain for the pilots, and Master Corporal for the flight attendants. In the case of individuals who were re-enrolling in the CAF, the rank held during previous military service would be a factor that was considered at the time of re-enrollment (MacDonald

Testimony, Transcript Volume 17, pp. 2483-85; Ex. R-1, Volume 4, Tabs 43-46; and Ex. R-l, Volume 4, Tab 36). For the individual Complainants, there was little, if any, evidence before us with respect to the rank held by those who had previously been members of the CAF, and only limited evidence regarding the number of years of military service that each had.

Therefore, as a starting point, the Tribunal has selected the maximum salary that the Complainants could have received for our initial assessment of damages. If no loss has been realized by the individual Complainant even when using this 'best case' scenario, then we can safely conclude that the Complainant in question suffered no loss of wages. If there is a potential loss, then the sufficiency of that Complainant's efforts to mitigate his damages must be examined.

Finally, if there is a possible loss measured against the maximum recoverable sum after reasonable efforts to mitigate have been made, then the unique circumstances which might affect the individual's actual earning power must be considered.

Using this three-fold analysis, the Tribunal has done a separate analysis for each Complainant. Detailed calculations and evidentiary references can be found in Appendix 'A'.

To summarize our findings, we have concluded that the majority of the Complainants sustained no loss in wages when their actual earnings for the period from April 1985 - April 1988 were compared with what, at best, they could have earned in the military. Indeed, for a number of the Complainants, the Commission conceded that the salary they actually earned exceeded the salary they would have earned even measured against their previous civilian salary level (See CHRC Response to Respondent's Damages Chart, re Messrs. Brown, D.Bisson, R.Bisson, Carson, Czaja, Laroche, and Squires).

For the flight attendants, the maximum accumulated military salary at the Master Corporal level over three years was $93,884.00. For the pilots, the relevant rank was Captain, and the maximum accumulated salary was $155,620.00. When assessed against these accrued sums, two of the flight attendants and thirteen of the pilots did not sustain any losses.

Specifically, of the flight attendants, Messrs. Empey ($122,834.66), and R. Bisson ($109,514.99), earned more than they would have had they been employed by the military during this time frame.

With respect to the pilots, Messrs. D.Bisson ($176,843.86), Brown ($202,706.23), Caskie ($210,979.71), Czaja ($168,193.22), Falardeau ($192,817.28), Laroche ($187,688.32), Maclnnis ($197,510.62), Murray ($194,724.08), Powell ($195,081.56), Squires ($197,629.66), Thorpe ($214,232.12), Vickers ($208,190.47), and Woodley ($193,785.80) all had earnings which exceeded the relevant military salary for the same period.

Of the remaining Complainants, two flight attendants (Messrs.

Burke and Gilks), and five pilots (Messrs. Allin, Cranston, Devine, Graham, and Williams) retired from the public service between April, 1985 and April, 1988. In the months or years prior to their retirement, each of these individuals earned more than they would have in the military (See Appendix A). The Tribunal finds that in the circumstances of these individual Complainants, the decision to retire represents a failure to mitigate their damages.

There was a comprehensive Workforce Adjustment Program in place within DOT to assist all of the Complainants in arranging alternate employment. These Complainants admitted being aware of the program (Allin Testimony, Transcript Volume 3, p. 466; Burke Testimony, Transcript Volume 4, p.638; Cranston Testimony, Transcript Volume 1, p. 134; Devine Testimony, Transcript Volume 6, p.900; Gilks Testimony, Transcript Volume 10, pp. 1580, 160002; Graham Testimony, Transcript Volume 10, p. 1496; and Williams Testimony, Transcript Volume 5, pp.714-17 and 726). Messrs. Cranston, Devine, Graham, and Thorpe indeed accepted new positions within DOT, but subsequently retired from those positions for reasons of job dissatisfaction (Cranston Testimony, Transcript Volume 1, at p. 40; Devine Testimony, Transcript Volume 6, at p.900, see also pp. 926-31 and Ex. R-10; Graham Testimony, Transcript Volume 10, p. 1470, and Thorpe Testimony, Transcript Volume 3, at pp. 516-17).

Messrs. Allin, Burke, Gilks, and Williams all retired on July 1, 1986 when the EFS was rolled into the CAF. These Complainants stated in their evidence that they were either uninterested in or felt unqualified for the positions available within DOT. Despite the availability of retraining with salary protection for one year, three of the Complainants expressly rejected opportunities if they required retraining (Allin Testimony, Transcript Volume 3, pp. 466 and 486-90; Burke Testimony, Transcript Volume 4, p.638; and Gilks Testimony, Transcript Volume 10, pp. 1580 and 1600-

02). Mr. Williams chose to only look for civil aviation jobs and admitted that he did not look at any of the available positions in DOT (Williams Testimony, Transcript Volumes 4&5, at pp. 688 and 714-17).

In arriving at our conclusion that these Complainants failed to properly mitigate their damages, the Tribunal has considered the often devastating effects that discrimination can have on an individual's self esteem. Moreover, we appreciate the enormous impact of loss of employment at age 50 plus, and understand that losing one's job in these circumstances might negatively affect one's desire to look for other work. However, without evidence of a medical disability resulting from the job loss, age discrimination does not relieve a claimant of the obligation to mitigate their damages. In this case there was evidence of significant employment opportunities that were not pursued by these Complainants.

The Commission has argued that the positions that were circulated by DOT were really not suitable for many of the Complainants. It was asserted that this was especially true for the flight attendants, and that their decision to retire must be viewed in this light. Although we are sympathetic to the difficult circumstances of some of the Complainants, ultimately the Tribunal cannot accede to this submission.

Having reviewed the evidence, the Tribunal finds that all of the

Complainants who applied for positions through the DOT Work Force Adjustment Program in fact found work. Moreover, an assessment of the individual circumstances of those Complainants who chose to retire indicates that they did so for largely personal reasons, including, in some cases, because of an unwillingness to undertake retraining.

Again, although perhaps not ideal, there were significant opportunities available to the Complainants which they chose not to pursue. We understand full well their reasons for retiring, and do not begrudge them that choice. However, having made that decision they failed to take reasonable steps to mitigate their damages and cannot now claim reimbursement for those losses.

Similarly, we have concluded that Mr. Carson, who earned somewhat less over the three years than he would have in the military (-$10,390.20), also failed to mitigate his losses. Effective August 30, 1986 Mr. Carson accepted a voluntary lay-off for admittedly personal reasons. In his testimony he conceded that he could have remained with

DOT indefinitely at a salary that was in excess of what he would have earned in the military, ie. $49,406 vs. $ 48,150, base salary (see Appendix A for detailed references). Ultimately, Mr. Carson found employment in the private sector as a pilot. Undoubtedly, like all of the Complainants who were professional pilots, his strong preference was for a flying job rather than desk work. The Tribunal understands this preference. Obviously, for any pilot a cockpit position will always be far more attractive than 'flying a desk'. Nonetheless, the job available within DOT was not demeaning nor out of keeping with his training. We therefore find that, not having satisfied the obligation on him to mitigate his damages, Mr. Carson's entitlement to compensation ceased when he chose to leave a secure position of employment in order to pursue more attractive options.

Messrs. Chiasson and Laliberté were uniquely situated and their claims must be addressed individually. Mr. Chiasson was the only Complainant to actually apply for enrolment in the military as a Class "C" Reservist. During the course of his physical examination Mr. Chiasson was told that he was unfit for military service because he was 23 kilos overweight. Mr. Chiasson did not lose the weight necessary to qualify for the armed forces and did not pursue his application to become a Class "C" Reservist after his medical (Chiasson Testimony, Transcript Volume 11, pp. 1681-83, 1697-1708, and 1719 - 20). There were other intervening health concerns which may have influenced Mr. Chiasson's decision not to pursue his military application (see Appendix A for details), however, on cross-examination he agreed that he was unsuccessful in his efforts to lose the weight needed to qualify for the armed forces (Chiasson Testimony, Transcript Volume 11 at p. 1713).

Based on this evidence, the Tribunal is led to the inevitable conclusion that Mr. Chiasson was not eligible for military service and therefore could not have retained his position as flight attendant in the CAF. This renders moot the question of whether or not he sustained any wage loss as a result of the Respondent's discriminatory conduct.

We find as a fact that Mr. Chiasson did not meet the CAF's enrolment standards and was therefore not entitled to damages for loss of wages in that job.

Similarly, Mr. Laliberté was, at the time of the discriminatory conduct, ineligible for the position in respect of which damages are sought. Mr. Laliberté had worked as a pilot for the EFS, however, in

November, 1985 his pilot's license was cancelled for medical reasons (Laliberté Testimony, Transcript Volume 1, p. 196). As a result we find that Mr. Laliberté was not qualified for a pilot position with the CAF and cannot therefore claim damages for loss of income in that position.

It should be noted that our conclusion with respect to Messrs. Chiasson and Laliberté only applies to employment related losses. The Respondent's discriminatory conduct, made manifest at the April 26, 1985 meeting, was directed to them equally as to the other Complainants. They, along with the other Complainants, were told that because of their age they would be losing their positions as Executive flight crew. The humiliation and affront to dignity which flowed from the Respondent's public statements would have been as deeply felt by all of those potentially affected, and Messrs. Chiasson and Laliberté are entitled to claim damages for hurt feelings.

This leaves only Mr. Brulé for whom there appears to be a compensable wage loss. When his actual income (with overtime) is compared with the maximum allowable salary in the CAF, he suffered a loss of $3,122.46 over the relevant period. There are number of intervening factors that could have affected the actual amount of Mr. Brulé's loss: he might have decided not to try to enlist in the Forces; he might not have been able to qualify for the military; if qualified, he might not have been enrolled at the maximum salary level; he might not have remained in the military for the full period for which compensation is being awarded, etc. Given the passage of time and the need for finality in this matter, the Tribunal has taken these contingencies into account and awards the sum of $3,122.46 for lost income, but declines to order that interest be paid on this amount.

c) Loss of other employment benefits

The Commission has also sought damages for loss of pension benefits and severance pay. We have already found that Messrs. Chiasson, Laliberté, Burke, Gilks, Allin, Carson, Cranston, Devine, Graham, and Williams were not entitled to compensation for any loss of employment income as they were either ineligible for a CAF position or failed to properly mitigate their damages. Given these findings, these individuals are similarly precluded from claiming other employment related losses.

With respect to the other Complainants, we have found that they all earned more than they would have had they been enrolled in the military. As individual pension and severance benefits are tied to

earnings, one would expect that there would be no loss in pension or severance benefits for any of these Complainants.

The only possible exception might be Mr. Brulé, who earned less than he would have done in the military. Mr. Brulé may have suffered corresponding pension losses, however, a variety of other contingencies would have to be considered. Mr. Brulé was already

receiving a pension for prior military service. It is unclear whether he would have still received this sum if re-enrolled in the military (Brulé Testimony, Transcript Volume 6, p. 988). Moreover, Class "C" Reserve postings are for a relatively brief period (MacDonald Testimony, Transcript Volume 16, p.2486), and the difference between what he actually earned and the maximum salary he could have received was a fairly small sum ($9,462.15), when base salaries are compared (Brulé testimony, Transcript Volume 6, at pp. 987 -989; and Exhibit R-24). The calculation of his pension losses requires evidence of these unknowns.

Virtually all of the evidence that was adduced at this hearing was premised on the Complainants' losses being calculated in relation to a civilian salary (see Exhibits HRC 75 and HRC 76, Tate Actuarial Report, Supplementary Report, and Tate's Testimony, Transcript Volume 13, at p. 1984). The only evidence with respect to pension losses based on enrolment in the CAF was an admission by Mr. Tate, the Commission's actuary, that it was difficult to make any comparisons with projected pension benefits using the Force's salary and pension plan and that any pension losses therefore remain 'unknown' (Tate Testimony, Transcript Volume 14, at pp. 2159-63, quote at p. 2163).

The onus is on the Commission and the Complainants to establish any losses that they have suffered. On the basis of the record before us we find that this onus has not been met and that there is insufficient evidence to order compensation for pension or severance pay benefit losses.

d) Loss of a 'fun job'

The Commission also claimed an unspecified sum for each Complainant for the loss of a 'fun job'. Although job satisfaction is not readily quantifiable, there is no doubt that these Complainants enjoyed immensely satisfying and prestigious jobs when they were with the Executive Flight Services of DOT. It was clear on the evidence that

one of the attractions for the military in the transfer of this service was that they would then get to hand out these plum assignments to their military pilots (Reid Testimony, Transcript Volume 22, at p. 3342). Equally, for the Complainants, we understand that part of the pain in losing these positions was that they truly loved their work. Despite our sympathy for the Complainants, ss.53(2)(c) of the Act only allows us to compensate the victim for "... any or all the wages that the victim was deprived of and for any expenses incurred by the victim ...". On its face this section refers only to pecuniary losses. Any jurisdiction that we may have to compensate for the intangibles associated with discriminatory conduct is limited to the power found in ss. 53(3), which permits the Tribunal to order compensation for hurt feelings.

e) Hurt Feelings

Subsection 53(3) of the CHRA permits a Tribunal to order compensation (up to a maximum of $5,000) to be paid where the Tribunal finds that a Respondent has acted wilfully or recklessly, or where the

victim of the discriminatory practice has suffered in respect of feelings or self-respect.

In assessing the Complainants' entitlement to damages the Tribunal recognizes that some of the Complainants' sense of outrage regarding their treatment no doubt stems from the fact that they were initially led to believe that their positions as Executive Flight Service pilots and flight attendants were secure, notwithstanding the impending transfer of jurisdiction to DND. Despite the representations made by various government officials up to and including the Prime Minister, the Complainants then found that the rug had been pulled out from under them with the militarization of the service, and again with the acceleration of the phase-out period for the JetStars, despite the assurances given on January 30, 1985 that the three year transition period was very firm. Their sense of betrayal no doubt stems from the way that the process dealt with them as much as from the influence that their collective ages had on its outcome.

In awarding damages under this head, the most significant factors for the Tribunal are the events of January 30 and April 26, 1985. Age is a factor somewhat unlike the other proscribed grounds enumerated in s. 3 of the CHRA. In contrast with many of the other proscribed grounds such as race or religion, which describe

characteristics that may be shared by only a few members of our society, or characteristics such as gender which are immutable and will not ordinarily change over time, we all have an age, and that age changes constantly as we travel through life. We were all young once, and most of us will live to be old. Perhaps for that reason age and age issues figure prominently in our lives, affecting everything from ticket prices in movie theatres to pension rights. A person's age is, however, every bit as much a part of the individual's personal identity as one's gender, race or sexual orientation. It is difficult to imagine, in this day and age, meetings being held where individuals would be told that they were not acceptable to an organization because of their gender, religion, race or sexual orientation. The evidence discloses, however, that in this case, these highly experienced, professional individuals were told that they were not acceptable to the CAF because they were too old.

In assessing a complainant's entitlement to damages under this head, a Tribunal will ordinarily consider a number of factors, including the demeanour of the individual Complainant while testifying, particularly with respect to the effects of the discriminatory conduct upon him or her. In this case we are hampered in that we have not had the opportunity of observing the Complainants in person. Many of the Complainants have, however, described the effects of the discrimination upon them in compelling terms.

We also had occasion to observe Mr. Cranston, who has acted as the leader of the Complainants throughout this long saga. Mr. Cranston made an impassioned statement at the outset of this hearing. It is evident that, notwithstanding the passage of some twelve years since these events began to unfold, the emotions surrounding the treatment of these individuals still run very high.

While no doubt some of the Complainants were more profoundly affected by these event than others, in that the case was decided on

the basis of a written record, we are unable to fully assess the varying degrees to which the various Complainants have suffered with any degree of precision. Consequently we are awarding each of the Complainants the same compensation under this head, which we fix at $3,000 per Complainant.

f) Interest

It is now well established that interest is payable on awards for damages for hurt feelings (Canada (Attorney General) v. Morgan [1992] 2 F.C. 401 (C.A.). The Tribunal therefore orders that simple interest be paid on the monies awarded in the preceding paragraph. Interest should start to run from April 26, 1985 - the date on which the Complainants were advised that they were not acceptable to the CAF because of their age. Interest should be calculated using the Canada Savings Bond rate. Having regard to the enormous fluctuations in interest rates over the last eleven years, the Tribunal orders that the average Canada Savings Bond rate for that period be utilized. In no case, however, should the total amount payable for damages for hurt feelings, including interest, exceed $5,000 for each Complainant (Canada (Attorney General) v. Rosin, [1991] 1 F.C. 391).

VI. ORDER

For the foregoing reasons, the Tribunal declares that the Complainants' rights under the CHRA have been contravened by the Respondent, and orders:

1. that the Respondent pay to the Complainant Brulé the sum of $3,122.46 for lost wages;

2. that the Respondent pay to each of the Complainants the sum of $3,000 for injury to feelings and self-respect;

3. that the Respondent pay simple interest on the monies awarded pursuant to paragraph 2, such interest to start to run from April 26, 1985, in accordance with the average Canada Savings Bond rate for the period from April, 1985 to November, 1996. In no case, however, should the total payment on account of hurt feelings to an individual Complainant exceed $5,000, inclusive of interest.

Dated this day of November, 1996.

_____

Anne L. Mactavish

_____

Reva Devins

APPENDIX A

DETAILED SALARY CALCULATIONS

I. Maximum allowable Aircrew Allowance (All Personnel)

1985: $1800 (8/12 @ $2700)

1986: $2934 (3/12 @ $2700, 6/12 @ $2988,
and 3/12 @ $3060)

1987: $3132.00 (3/12 @$3060, and 9/12 @ $3156)

1988: $1060 (3/12 @ $3156, and 1/12 @ $3252)

Total: $8,926.00

II. Flight Attendants - Maximum Military salary at MCPL level:

1985: $17,984 (8/12 @ $26,976)

1986: $27,867 (3/12 @ $26,976, 6/12 @ $27,984,
and 3/12 @ $28,524)

1987: $29,217 (3/12 @$28,524, and 9/12 @ $29,448)

1988: $9,980 (3/12 @ $29,448, and 1/12 @ $30,336)

TOTAL: $84,958 + $8,926.00 = $93,884.00

Total to July 1, 1986: $31,724+ $3,222 = $34,946

(SEE EX. R - 24)

i) R. Bisson

Actual earnings:

1985: $24,672 (8/12 of $37,008)

1986: $30,581

1987: $39,866.99

1988: $14,395 (4/12 of $43,185)

Total income earned: $109,514.99

(Ref. Transcript Volume 11, at pp. 1734-36)

ii) Brulé

Actual earnings:

1985: $23,452.38 (8/12 of $35,178.58)

1986: $31,950.05

1987: $27,509.44

1988: $7849.67 (4/12 of $23,549)

Total income earned: $90,761.54

(Ref. Transcript Volume 6, at pp. 987 -989)

iii) Burke

Actual earnings:

1985: $23,001.54 (8/12 of $34,502.31)

1986: $18,835.62, until July 1 '86

1987: $ pension income only

1988: $ pension income only

Total income earned: $41,837.16 (until July 1, 1986)

Military salary for
equivalent period: $34,946

Particulars re retirement:

Retired July 1, 1986 when EFS rolled into CAF. Mr. Burke recalls receiving lists of positions available within the Public Service on a regular basis, and concedes that he would have seen the letter outlining the Workforce Adjustment Program (pp. 629-630, and 637). He does not recall obtaining any personal assistance from DOT in finding him other work (pp.628-30).

Mr. Burke did not apply for any positions within DOT as he felt that he was either under-qualified for the positions or they were beneath him. Ultimately he concluded that retirement was his best option (pp.552, 631 and 635). During cross-examination he reviewed the Public Service lists and stated that of the jobs listed he was either unqualified or "... those I could do I didn't want" (at p. 638). He did apply for flight attendant positions with two major airlines, but was not successful due to his age (pp. 551 and 631). Mr. Burke also testified that he was slightly depressed at the time and did seek medical help as a result (p. 631). There

was no medical evidence regarding the severity of Mr. Burke's condition. Neither Mr. Burke, in his testimony, nor the Commission, in argument suggested that his depression was severe enough to prevent him from undertaking efforts to look for alternate work.

(Ref. Transcript Volume 4, at pp. 608-12)

iv) Chiasson

Actual earnings:

1985: $22,950.67 (8/12 of $34,426)

1986: $19,130 (until June 1986)

1987: $ pension income only

1988: $ pension income only

Total income earned
for 1985 and 1986: $42,080.67

Military salary for
equivalent period: $34,946

Particulars re retirement:

Retired June, 1986. Mr. Chiasson did not try to relocate within the Public Service as there were no openings in his area of expertise (p. 1682). Under cross-examination, Mr. Chiasson admitted that he was aware of the Work Force Adjustment Program, although he could no longer recall all of the details of the program (pp. 1716- 19).

Mr. Chiasson also admitted that he did not apply for any positions in the Public Service as he 'was under the impression that he was going over to the military as a Class "C" employee (p. 1719). Mr. Chiasson had initially applied to the military for re-enrollment as a Class "C" Reservist. During the course of his physical examination by Dr. Rodgman, Mr. Chiasson was told that he was unfit for military service because he was 23 kilos overweight. Mr. Chiasson did not lose the weight necessary to qualify for the armed forces and did not pursue his application to become a Class "C" Reservist after the medical examination (pp. 1681-83, 1697-1708, and 1719 - 20).

At the time of his physical, Dr. Rodgman and Mr. Chiasson also discussed abnormal liver test results which indicated that he may be suffering from hepatitis B or liver cancer. Mr. Chiasson was understandably alarmed by this news, and underwent further tests with his own family physician over the next nine

months. Ultimately, Mr. Chiasson was told that there was no underlying condition affecting his liver function, however, he did not pursue his prior military application (pp. 1681-83, 1697-1708, and 1719-20).

(Ref. Transcript Volume 11, at pp. 1688-89)

v) Empey

Actual earnings:

1985: $ 32,126.67 (8/12 of $48,190)

1986: $ 36,513.12

1987: $ 41,377.59

1988: $12,817.28 (4/12 of $38,451.83)

Total income earned: $122,834.66

(Ref. Transcript Volume 7, at pp. 1109-12)

vi) Gilks

Actual earnings:

1985: $ 22,914 (8/12 of $34,371)

1986: $ 19,476.28 (until July 1, 1986)

1987: $ pension income only

1988: $ pension income only

Total income earned for
1985 and half of 1986: $42,390.28

Military salary for
equivalent period: $34,946

Particulars re retirement:

Retired July 1, 1986 when EFS
rolled into DND. Mr. Gilks tried to apply to a number of
private sector airlines, but was told that he was too old (p. 1579).
He was familiar with the Workforce Adjustment program and understood
that he would enjoy priority for listed positions, that
retraining was available, if necessary, and that his salary would be
protected for one year if he accepted a position at a lower
salary (pp. 1600-1). Nonetheless, he did not apply for
any jobs within the Public Service as he felt that he was
unqualified for the positions listed and he was not interested in
being retrained (pp. 1580 and 1602).

Mr. Gilks was explicit in his testimony that he was not interested in a position in the military - he wanted a civilian job with the military (p. 1597).

(Ref. Transcript Volume 10, at pp. 1583-85)

III. Pilots - Maximum Military Salary at Captain Level:

1985: $31,088 (8/12 @ $46,632)

1986: $48,150 (3/12 @ $46,632, 6/12 @ $48,384, and 3/12 @ $49,200)

1987: $50,397 (3/12 @ 49,200, and 9/12 @ $50,796)

1988: $17,059 (3/12 @$50,796, and 1/12 @$52,320)

TOTAL: $146,694+$8,926.00 (Aircrew Allowance)= $155,620.00

Total to July 1, 1986: $54,842+ $3,222 = $58,064 (SEE EX. R - 24)

i) Allin

Actual earnings:

1985: $42,563.15 (8/12 of $63,844.72)

1986: $48,915.91 (until retired July 1, 1986)

1987: pension income only

1988: pension income only

Total income earned for 1985 and 1986: $91,479.06

Military salary for equivalent period: $58,064

Particulars re retirement:

Retired July, 1986 when EFS rolled into CAF. He did not apply for any positions within DOT as he felt that he didn't have the necessary qualifications (p. 465). He also chose not to apply for jobs that required retraining as he would start at a salary equal to his pension (p.466). Once retired he did not look for work as by then he was committed to retirement (p.467).

(Ref. Transcript Volume 3, at pp. 469-74)

ii) D. Bisson

Actual earnings:

1985: $34,095.39 (8/12 of $51,143.09)

1986: $62,848.64

1987: $58,395.41

1988: $21,504.42 (4/12 of $64,513.27)

Total income earned: $176,843.86

(Ref. Transcript Volume 3, at pp. 388-90)

iii) Brown

Actual earnings:

1985: $37,275.57 (8/12 of $55,913.36)

1986: $42,031 *

1987: $81,123

1988: $42,276.67 (4/12 of $126,830)

Total income earned: $202,706.23

* accepted lay off from DOT July 1, 1986 & went to Wardair
(Ref. Transcript Volume 8, at pp. 1315-18)

iv) Carson

Actual earnings:

1985: $33,312.67 (8/12 of $49,969)

1986: $36,745.13

1987: $57,174

1988: $17,998 (4/12 of $53,994)

Total income earned: $145,229.80

Particulars re employment:

Between 1985 and 1988 Mr. Carson pursued a number of career opportunities including training with Air Canada, promotion within DOT as a Aviation Safety Officer, and possible upgrading to qualify as an Engineering Test Pilot (pp. 310-313). Ultimately, it was determined that the training cost of the job he wished to pursue was too high ($450,000 to $1 million in U.S. funds), and he decided to seek employment in the private sector (p. 313-17).

Prior to leaving the Public Service, Mr. Carson was employed by DOT at a CAI-3 salary level of $49,406 (p. 323). Effective August 30, 1986 Mr. Carson took a lay-off for personal reasons, and to 'get a return on (his) contributions, as well as ... severance pay" (pp.324-25, and 334-35). Under cross-examination, Mr. Carson readily admitted that when he left his position as Aviation Safety Officer in June, 1986 it was open to him to remain in that job indefinitely (p.334-35).

(Ref. Transcript Volume 2, pp. 321-329)

v) Caskie

Actual earnings:

1985: $43,771.88 (8/12 of $65,657.82)

1986: $69,423.83

1987: $74,393

1988: $23,391 (4/12 of $70,173)

Total income earned: $210,979.71

(Ref. Transcript Volume 4, at pp. 651-58)

vi) Cranston

Actual earnings:

1985: $42,115.33 (8/12 of $63,173)

1986: $68,642.33

1987: $22,270.91 (until retired Ap. 28, 1987)

1988: pension income only

Total income: $133,028.57
(from Ap. 1985 to Ap. 28, 1987)

Military salary for $95,768.42 + $5672 = $101,440.42
Equivalent period

Particulars re retirement:

Retired April 28, 1987. He chose to leave his new DOT job as he had deferred full training in this position while he applied for outside flying jobs. When those jobs fell through, he felt that he wasn't pulling his weight and that it was not fair to continue in the position (pp. 39-41). There was no evidence that DOT asked him to leave or that they were no longer willing to train him in his new position. Indeed, in his evidence (at p. 134), he says that DOT did their very best to find alternative work for everyone.

(Ref. Transcript Volume 1, pp. 42, 51 and 55)

vii) Czaja

Actual earnings:

1985: $36,394.67 (8/12 of $ 54,592)

1986: $54,759.12

1987: $56,722.66

1988: $20,316.77 (4/12 of $60,950.30)

Total income earned: $168, 193.22

(Ref. Transcript Volume 7, at pp. 1041-47, and 1086)

viii) Devine

Actual earnings:

1985: $43,098 (8/12 of $64,647)

1986: $37,007 (until retired July 1, 1986)

1987: pension plus small sum from part time work

1988: pension plus small sum from part time work

Total income earned for 1985 and 1986: $80,105

Military salary for equivalent period: $58,064

Particulars re retirement:

Retired July, 1986 when EFS rolled into CAF. He was offered a position within DOT as an Air Carrier Inspector which he took for 3 months. He found that his new DOT job had too much paper work and not enough flying time. Consequently, he asked to be

transferred back to the EFS and took early retirement on July 1, 1986 (pp.900,927- 31).
(Ref. Transcript Volume 6, at pp. 905-07)

ix) Falardeau

Actual earnings:

1985: $43,478.73 (8/12 of $65,218.09)

1986: $69,846.44

1987: $58,430.31

1988: $21,061.80 (4/12 of $63,185.40)

Total income earned: $192,817.28

(Ref. Transcript Volume 5, at pp. 751-55)

x) Graham

Actual earnings:

1985: $42,678 (8/12 of $64,017)

1986: $70,415.71

1987: $58,979.95

1988: pension income only

Total income earned for 1985-1987: $172,073.66

Military salary for equivalent period: $129,635 + $7872.75 = $137,507.75

Particulars re retirement: Retired Dec. 30, 1987 (p. 1458).

(Ref. Transcript Volume 10, pp. 1481-83)

xi) Laliberté

Actual earnings:

1985: $33,619.98 (8/12 of $50,429.97)

1986: $33,614.18 (until retirement on June 28, 1986)

1987: pension income only

1988: pension income only

Total income earned
for 1985 and 1986: $67,234.16

Military salary for
equivalent period: $58,064

Particulars re retirement:

Retired June 28, 1986, pilot's
license cancelled in 1985 for medical reasons (pp.196 and 227-28.)

(Ref. Transcript Volume 2, at pp. 196)

xii) Laroche

Actual earnings:

1985: $35,866.67 (8/12 of $53,800)

1986: $62,914

1987: $64,701.75

1988: $24,205.90 (4/12 of $72,617.70)

Total income earned: $187,688.32

(Ref. Transcript Volume 5, at pp. 793-95)

xii) MacInnis

Actual earnings:

1985: $43,362 (8/12 of $65,043)

1986: $70,750

1987: $62,399.66

1988: $20,998.97 (4/12 of $62,996.90)

Total income earned: $197,510.62

(Ref. Transcript Volume 2, at pp. 265-69)

xiv) Murray

Actual earnings:

1985: $44,071.33 (8/12 of $66,107)

1986: $67,158.83

1987: $62,274.52

1988: $21,219.40 (4/12 of $63,658.20)

Total income earned: $194,724.08

(Ref. Transcript Volume 12, at pp. 1770-75)

xv) Powell

Actual earnings:

1985: $44,948 (8/12 of $67,422)

1986: $68,101

1987: $62,128.59

1988: $19,903.97 (4/12 of $59,711.90)

Total income earned: $195,081.56

(Ref. Transcript Volume 4, at pp. 579-82)

xvi) Squires

Actual earnings:

1985: $44,494.67 (8/12 of $66,742)

1986: $67,815

1987: $63,280.89

1988: $22,039.10 (4/12 of $66,117.30)

Total income earned: $197,629.66

(Ref. Transcript Volume 8, at pp. 1203-05)

xvii) Thorpe

Actual earnings:

1985: $47,230.91 (8/12 of $70,846.36)

1986: $69,794.71

1987: $67,848.63

1988: $29,357.87 (4/6 of $44,036.80, retired July, 1988)

Total income earned: $214,232.12

(Ref. Transcript Volume 3, at pp. 519-23)

xviii) Vickers

Actual earnings:

1985: $44,158.67 (8/12 of $66,238)

1986: $73,371.84

1987: $66,320

1988: $24,339.97 (4/12 of $73,019.90)

Total income earned: $208,190.47

(Ref. Transcript Volumes 5, at pp. 828-31)

54

xix) Williams

Actual earnings:

1985: $43,848 (8/12 of $65,772)

1986: $57,077.92 (until retired July 1, 1986)

1987: pension income only

1988: pension income only

Total income earned
in 1985 and 1986: $100,925.92

Military salary for
equivalent period: $58,064

Particulars re retirement:

Retired July 1, 1986 when EFS rolled into CAF (p.724). He was aware of the Workforce Adjustment Program (p.726) but chose not to look forjobs in the Public Service as there were no flying jobs available (p.714). He looked for civil aviation jobs with small airlines (p.688) but stopped looking in November of 1986 (p.717). At the end of 1985 he determined not to look at the available DOT positions, stating: 'I didn't want them. I had decided I was going to go out and look for something in civil aviation' (p.716).

55

(Ref. Transcript Volumes 4, at pp. 694-95)

xx) Woodley

Actual earnings:

1985: $47,518 (8/12 of $71,277)

1986: $64,580

1987: $61,813

1988: $19,874.80 (4/12 of $59,624.40)

Total income earned: $193,785.80

(Ref. Transcript Volume 1, at pp. 149-52)