TD-2/83
DECISION RENDERED ON FEBRUARY 10, 1983

IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT,
S.C. 1976-77, C. 33, as amended;

AND IN THE MATTER OF the Appeal pursuant to Section 42.1
of the Canadian Human Rights Act by the Canadian National
Railway Company from the Human Rights Tribunal Decision
pronounced on August 24, 1982;

BETWEEN:
HARRY C. PRIOR,
COMPLAINANT,
(RESPONDENT)

- and -
THE CANADIAN NATIONAL
RAILWAY COMPANY,

RESPONDENT.
(APPELLANT)

REVIEW TRIBUNAL:
SIDNEY N. LEDERMAN, Q.C., Chairperson
SUSAN MACKASEY ASHLEY, Member
CLAUDE PENSA, Q.C., Member

DECISION OF THE REVIEW TRIBUNAL
APPEARANCES:
R. J. DOWNIE, Q.C. Counsel for the Canadian National Railway
Company

RUSSELL G. JURIANSZ Counsel for The Human Rights Commission
and Harry C. Prior

DATE OF HEARING: November 30, 1982.
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This is an appeal under Section 42.1 of the Canadian
Human Rights Act (hereinafter referred to as "The Act") from the
decision dated August 24, 1982 of Paul L. Mullins sitting as a
Human Rights Tribunal wherein he found that the Appellant, Canadian
National Railway Company (hereinafter referred to as "CN"),
contravened the Canadian Human Rights Act by reason of age
discrimination against the Complainant, Harry C. Prior, and ordered
that he be reinstated to his former position as a Freight Checker

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with full seniority.
The findings of the Tribunal are based upon Sections 7
and 10 of the Canadian Human Rights Act, the pertinent parts of
which read as follows:

Section 7: It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual,
...
on a prohibited ground of discrimination.

Section 10: It is a discriminatory practice for an employer or an employee organization

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

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

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The Tribunal held that because CN maintained a policy of retiring its Checkers at age 65, it discriminated against Mr. Prior by reason of age which is one of the prohibited grounds of discrimination under Section 3 of the Act.

The evidence tendered before the Tribunal consisted of the testimony of Mr. Prior and an Agreed Statement of Facts which is set out in full in Mr. Mullins' Reasons and need not be repeated here.

No issue was taken by CN before the Tribunal or, indeed this Review Tribunal that its policy of mandatory retirement at age 65 and in particular its termination of employment of Mr. Prior at age 65 was contrary to Sections 7 and 10 of the Act. Instead, CN raised before Mr. Mullins and this Review Tribunal a variety of defences - some jurisdictional and constitutional - which will now be considered in turn.

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Does CN's Pension Plan afford a defence to the Complainant's allegation?

Mr. Downie argued that Section 48(1) of the Act precluded its application to the CN Pension Fund. It reads:

"Parts I and Il and this Part do not apply to or in respect of any superannuation or pension fund or plan established by an Act of Parliament enacted before the

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coming into force of this section."
He pointed to the fact that the existing CN Pension Plan is based

upon a normal retirement age of 65 and reasoned that the established practice of the Plan therefore is that employees retire from CN at the age of 65. The Pension Plan is deemed to have been established by Parliament according the Canadian Railway Act, S.C. 1955, Ch. 29, s. 43. It was argued that the Canadian Human Rights Act is inapplicable to the Pension Fund and should not interfere with or disturb CN's traditional retirement age for its employees.

"Normal retirement age" as defined in the Plan refers to the usual age that an employee may receive full and unreduced actuarial payments from the Plan. The word "normal" as used in the Pension Plan describes pension age or retirement age. It, however, cannot be said that the phrase "normal retirement age" means "compulsory retirement age." The Plan merely contemplates

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- 4 retirement
at age 65 but does not prescribe a mandatory retirement at that age. The statement that the normal date of retirement is at age 65 clearly implies that there are other dates within the minds of the parties at which CN employees may retire. In this respect we agree with the conclusion of the Tribunal below that the Pension Plan is not in conflict with the Canadian Human Rights Act. It is not the Pension Plan but rather CN corporate policy which requires an employee to retire at age 65. Accordingly, Section 48(1) of the Act affords no defence to CN.

2. Jurisdiction of the Tribunal
A. Power of the Canadian Human Rights Commission to appoint a Tribunal following receipt of an Investigation Report

Mr. Downie argued that the power in the Commission to appoint a Tribunal to inquire into a complaint is circumscribed by Section 36(3), if, as was the case here, the Commission had designated a person to investigate a complaint under Section 35 of the Act and was in receipt of the report. Section 36(3) reads as follows:

"On receipt of a report mentioned in subsection (1), the Commission

(a) may adopt the report if it is satisfied that the complaint to which the report relates has been substantiated and should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in subparagraphs 33(b)(ii) to (iv); or

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(b) shall dismiss the complaint to which the report relates if it is satisfied that the complaint has not been substantiated or should be dismissed on

any ground mentioned in subparagraphs 33(b)(ii) to (iv).

Mr. Downie's position is that although the Commission has a discretion whether or not to appoint an investigator in the first instance, if it has chosen to follow this course, its authority to appoint a Tribunal is thereafter limited by Section 36(3).

An investigator can in his or her report arrive at one of the following conclusions:

(a) that the complaint be dismissed;
(b) that the complaint be proceeded with;
(c) that he or she can make no recommendation.

It is argued that once the investigator recommends against the complaint, then the Commission must abide by it and cannot thereafter appoint a Tribunal. Mr. Downie submitted that this interpretation of Section 36 is consistent with common sense and fair play. In the present case, he argued, a careful investigation was carried out by an investigator and a report prepared and filed recommending dismissal of the complaint. It followed that the Commission had no right to reject the report and then proceed to the appointment of a Tribunal. It is urged that the powers of the Commission after it receives the formal report of the investigator enable it to do only the following:

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(1) if the report recommends that the complaint be proceeded with, then the report may be adopted by the Commission under subsection 36(3)(a) or rejected under subsection 36(3)(b);

(2) if the report recommends dismissal of the complaint, then the report may be adopted under subsection 36(3)(a).

It is contended that Section 36(3) contemplates that the Commission cannot simply reject the report and nevertheless send the matter on for a formal hearing by a Tribunal.

Mr. Juriansz argued, on the other hand, that pursuant to Section 39(1) of the Act, the Commission may, at any stage after the filing of a complaint, appoint a Human Rights Tribunal. Accordingly, a Tribunal may be appointed by the Commission at any time either before or after an investigation has been conducted, or indeed, even in the absence of an investigator's report. Section 36, he argued, does not cover the full extent of the powers of the Commission. The only mandatory requirement is that the Commission is obliged to dismiss the complaint if it is satisfied that it has not been substantiated or that it should be dismissed on any ground specifically set out in subparagraphs 33(b)(i) to (iv) of the Act. Accordingly, even if the investigator recommended that the complaint be proceeded with in a situation where the Commission believed that the facts do not give rise to a complaint or that the

allegation has not been substantiated, then it must dismiss the complaint.

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Juriansz stated that it does not follow that,if the Commission is not satisfied that the complaint has not been substantiated and therefore is not obliged to dismiss the complaint under subsection 36(3)(b), it is then compelled to adopt the investigator's report under subsection 36(3)(a).

The Human Rights Tribunal in the case of Ward v. Canadian National Express [1980] 2 CHRR, D/415, reviewed generally the jurisdiction of the Commission in dealing with complaints that are filed with it. Mr. Robert W. Kerr, sitting as the Tribunal, described the statutory scheme as follows at paragraphs 3710 and 3712:

Under the Canadian Human Rights Act, S.C. 1976-77, c. 33, as amended, the Commission receives complaints of alleged discriminatory practices, or it may initiate complaints itself: s. 32(1) & (4). The Commission has a number of options in disposing of a complaint, although the availability of various options is subject to certain findings by the Commission. The Commission may dismiss a complaint on the ground that it is beyond its jurisdiction, is trivial, frivolous, vexatious or made in bad faith, or is based on events more than a year part (subject to a discretion to consider cases in this last category): s. 33(b)(ii)-(iv). The Commission may decline to deal with the complaint on the basis that the complainant ought to exhaust available grievance or review procedures or that the complaint can be better dealt with, initially or

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completely, by procedures under another federal statute: s. 33(a)2(b)(i). The Commission may designate a person to investigate the complaint and report back, and following the report it is required to dismiss the complaint if satisfied that the complaint is not substantiated or a condition for dismissal, as already outlined, exists: s. 36(3)(b). Alternatively, the Commission is required to refer the complainant to the appropriate other procedure if satisfied that such procedure ought to be exhausted in the case of a grievance or review procedure or that such procedure is more appropriate in the case of another statutory procedure: s. 36(2). The Commission may adopt the investigator's report if satisfied that the complaint is substantiated: s. 36(3)(a). The Commission may appoint a conciliator to attempt to settle the complaint: s. 37(1). The Commission may appoint a Tribunal to inquire

into and make a binding decision with respect to a remedy of the complaint: s. 39(1) & 41.

. . .
Moreover, even with the extensive listing of options for the Commission, it is not clear that all options are expressly provided for. It may be that some options are merely implicit. For example, it is conceivable that, following an investigation, it may be uncertain whether a complaint is justified. There is not express provision for this situation. This may mean that such a situation is to be treated as one in which the complaint

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is substantiated. That would bring the case under s. 36(3)(b) and require dismissal of the complaint. On the other hand, it may be implicit that such a case is not within s. 35(3) and the Commission is free to appoint a Tribunal to resolve the matter.

Mr. Kerr concluded that Section 36(3) is not exhaustive of the options available to the Commission upon receipt of an investigator's report. He stated, at paragraph 3715:

"There is no provision as to what the Commission should do if it decides not to adopt the investigator's report in such a case, although obvious possibilities are to ask for further investigation by the same or another investigator, to call for conciliation or to appoint a Tribunal." (emphasis added)

We agree with the analysis in the Ward decision and accordingly uphold the conclusion of the Tribunal below that the Commission is not bound to accept the recommendation of the investigator. The Commission is free to draw its own conclusions based upon its own independent judgment to decide what is the appropriate course of action to be taken including the question of whether a Tribunal should be appointed. If the Commission's discretion was totally fettered upon receipt of an investigator's report recommending dismissal of the complaint, as Mr. Downie submitted, it would mean that if an investigator

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this recommendation because of his or her interpretation of the law based upon the facts that he or she has put forth, then the Commission would be powerless to appoint a Tribunal even though it was satisfied that the investigator had erred in his or her legal interpretation and that the facts warranted an inquiry by a Tribunal. That obviously was not Parliament's intent in enacting Section 36(3).

The difference in function between an investigator who is purely a fact-finder and a Tribunal which makes judicial findings based on legal requirements, must be appreciated. The investigator, unlike a Tribunal, takes no note of judicial

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precedent, rules of evidence, credibility, etc. but merely expresses an opinion as to whether there might be some basis to the complaint.

The Commission has a wide-based discretion except in circumstances where it, as opposed to the investigator, has concluded that the complaint has not been substantiated or is beyond the Commission's jurisdiction or is trivial, frivolous, vexatious or made in bad faith or more appropriately dealt with in some other forum or, in its discretion, is based upon acts or omissions that are stale-dated by more than one year: see Section 33(b). That is not the case here and accordingly the Commission was free to appoint a Tribunal even though it did not adopt the investigator's report.

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- 11 B.
The Constitutional validity of the Tribunal
Mr. Downie submitted that in view of the finding by the Tribunal below that a Human Rights Tribunal exercises purely judicial functions, it is thereby performing the role of a Superior Court Judge under Section 96 of the British North America Act (now incorporated in the Constitution Acts, 1867-1982); and not having been appointed as such, the Tribunal is without jurisdiction unless some other jurisdictional basis could be found in the Constitution Acts.

Mr. Downie conceded that Section 101 of the Constitution Acts, 1967-1982 allowed for the establishment by Parliament of additional courts and that this Tribunal would come within that provision. In this sense he agreed with the finding of the Tribunal below. However, Mr. Juriansz was frank to state that his view was that Section 101 would not in itself permit the appointment of a Human Rights Tribunal but rather other courts such as the Federal Court of Canada. Mr. Juriansz's position was that, notwithstanding that Section 101 could not be resorted to as Parliament's authority to establish this Tribunal, the powers and functions of the Tribunal cannot be equated to those of a Section 96 Superior Court Judge.

Although we do not agree with the Tribunal below that Section 101 of the Constitution Acts is applicable, we are of the view that the nature of the powers exercised by a Human Rights Tribunal is not analogous to the powers exercised by Section 96 Courts. That being so, there cannot be any conflict with Section 96 of the Constitution Acts.

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We base our conclusion upon the decision of the Court of Queen's Bench of New Brunswick, Trial Division, in Lodger's International Limited v. O'Brien and the New Brunswick Human Rights Commission (October 24, 1982, as yet unreported). In that case, Mr. Justice Stevenson considered the constitutionality of the Board of Inquiry and the New Brunswick Human Rights Commission. One of

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the issues before Mr. Justice Stevenson was whether the Provincial legislature could confer authority to award damages upon a Human Rights Tribunal, the members of which were not Judges appointed by the Federal Executive under Section 96 of the Constitutions Acts, 1867-1982. He concluded that there was no basis for the constitutional challenge. He reasoned as follows in a passage worthy of quoting at length at pages 11 - 13:

"I do not find it necessary to review the many cases in which attacks on provincial statutes have been made on the ground that they were invalid as offending s. 96 of the Constitution Acts, 1867 to 1982 by creating tribunals and conferring on them powers or jusidictions similar to those exercised by superior, district or county courts in 1867. Section 96 issues have recently been considered by the Supreme Court of Canada in Reference re The Residential Tenancies Act (1979), [1981] 1 S.C.R. 714 and in Massey-Ferguson Industries Ltd. v. Government of Saskatchewan (1981), 39 N.R. 308. In those cases the Court laid down a three-step test for considering the s. 96 issue. In the Residential Tenancies case Dickson, J. described the first step at p. 734:

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The first involves consideration, in the light of the historical conditions existing in 1867, of the particular power or jurisdiction conferred upon the tribunal. The question here is whether the power or jurisdiction conforms to the power or jurisdiction exercised by superior, district or county courts at the time of Confederation. ...

If the historical inquiry leads to the conclusion that the power or jurisdiction is not broadly conformable to jurisdiction formerly exercised by s. 96 courts, that is the end of the matter.

In Massey-Ferguson, Chief Justice Laskin put the same test in the interrogative form at p. 324:

Does the challenged power or jurisdiction broadly conform to the power or jurisdiction exercised by Superior, District or County Courts at the time of Confederation?

Human rights legislation was virtually unknown in 1867. Indeed many of those things now recognized as "rights" were either unknown then or were enjoyed only by a minority of society, e.g. the right to vote. Discrimination was common and was probably accepted as a fact of life. The enactment of legislation guaranteeing equal and universal rights of the kind dealt with in the Act and prohibiting discrimination is the product of the modern Human Rights movement which is a 20th century phenomenon. Such legislation has been enacted in most Canadian jurisdictions and more recently certain rights have been constitutionally enshrined in the Canadian

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Charter of Rights and Freedoms.
While any grievance by an employee against an employer (or vice versa) can be said to arise out of

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the master-servant relationship many of the remedies now open to the aggrieved party were unknown to the law and were not obtainable from the courts at the time of Confederation. Labour legislation has created some of those remedies and made them available in provincially constituted forums without running afoul of s. 96 of the Constitution Acts, 1867 to 1982. Such legislation has been held valid in cases such as Labour Relations Board of Saskatchewan v. John East Iron Works Ltd., [1948] 4 D.L.R. 673 (P.C.) and Tomko v. Labour Relations Board (Nova Scotia), [1977] 1 S.C.R. 112.

In the instant case the employees did not complain of, or seek damages in respect of, wrongful dismissal. Their complaint, which the Board of Inquiry upheld, was one of discrimination because of sex.

In my view it is incontestable that, in the light of conditions as they existed in 1867, the power or jurisdiction conferred upon the Commission by s.21 of the Act does not conform to the power or jurisdiction exercised by superior, district or county courts at the time of Confederation."

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Further confirmation for the fact that discrimination on one of the prohibited grounds does not give rise to a common law tort can be found in the Supreme Court of Canada decision in Board of Governors of the Seneca College of Applied Arts and Technology v. Bhadauria, [1981] 2 S.C.R. at 181. Although the Supreme Court of Canada found that there was no tort at common law for denial of employment opportunities on the ground of racial origin, the same reasoning would apply to age discrimination. The Canadian Human Rights Act establishes a modern comprehensive code to deal with the

social problems of discrimination and sets up a structure which is both administrative and adjudicative to deal with these concerns. There were not matters that came before Superior or County or District Courts in 1867.

Having found that CN has not satisfied the first step in the test as to whether the Tribunal is fulfilling a Section 96 Court role, it becomes unnecessary to review the two further steps laid down by the Supreme Court of Canada in the Residential Tenancies Act case and their application to the circumstances before us.

It should be pointed out as well that these cases all relate to Boards appointed under Provincial legislation and we have

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considered the tests therein by analogy only. There may be some question whether the Residential Tenancies Act case has application to a Board appointed under Federal jurisdiction.

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Mr. Downie next argued that even if that were the case, the Tribunals must be appointed by the Governor in Council. He points out that although the Governor in Council names a panel of approximately 100 persons as set out in Section 39(5) of the Act, it is the Canadian Human Rights Commission which appoints the Tribunal to hear particular cases under Section 39(1) and (5) of the Act. He submitted that the procedure laid down in Section 39 is not in accordance with the requirement of the Constitution Acts because the Act purports to give the Commission the power to "appoint a Human Rights Tribunal". As if to confirm this "appointment" power, Section 39(5) provides that "in selecting any individual or individuals to be appointed as a Tribunal, the Commission shall make its selection ...". In the scheme of the Act, it is the Commission itself which reviews the investigator's report; it is the Commission that then decides to appoint a Tribunal; and it is the Commission itself which in fact appoints the Tribunal. Accordingly, the Commission reviews the report of its investigator, decides to proceed with the formal hearing on the complaint and appoints the Tribunal to conduct the hearing. In this context, Mr. Downie argued that it is important that the Governor in Council make the appointments not only to the Panel but to the particular Human Rights Tribunals to hear specific cases.

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This argument has the hallmark of a natural justice rather than a constitutional issue. Mr. Downie, however, made it clear that he was not taking the position that because the Commission appoints a Tribunal it is biased or that there is an apprehension of bias in favour of the Commission's position.

In any event, we are of the opinion that no constitutional problem arises from the scheme of appointment to

Panels and selection of the Human Rights Tribunals under Section 39 of the Act. It is the Governor in Council who appoints individuals to a Panel and pursuant to Section 39(5) it is the Commission that merely assigns individuals on that Panel to sit as a Human Rights Tribunal to inquire into particular complaints. The Commission thereby merely selects or assigns individuals who have already been appointed by the Governor in Council. It is the Governor in Council who establishes and maintains the Panel and accordingly we see no constitutional impropriety in either the Commission's designation of Mr. Mullins to the Tribunal below or the designation by the Commission of the Members of this Review Tribunal.

3. Normalcy of Mandatory Retirement

Considerable reliance was placed by CN on Section 14(c) of the Act, which reads as follows:

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It is not a discriminatory practice if
(c) an individual's employment is terminated because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual.

In terms of the evidence adduced before the Tribunal, the number of Checkers subject to mandatory retirement differed statistically depending upon whether a local or national survey is considered. The evidence was that in the Halifax area, 30 percent of the Checkers are subjected to mandatory retirement at age 65 whereas 70 percent are not. There are two types of Checkers employed on the Halifax waterfront: employees of CN who are subject to mandatory retirement because of corporate policy and members of the International Longshoreman's Association (ILA) which does not impose mandatory retirement at age 65 in all its locals. The 70 ILA Checkers employed in Halifax are not subject to mandatory retirement and that number comprises the 30 percent figure referred to above.

Across Canada, however, the percentages fall out differently. Approximately 60 percent of the Checkers across the country have a mandatory retirement age of 65 and only 40 percent do not. This evidence emanates from the Commission Investigator's report (Exhibit C-4) wherein he found that 365 Checkers employed at Canadian ports are subject to mandatory retirement at age 65 whereas 228 are permitted to work beyond the age of 65.

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The issue to be resolved is whether the Tribunal below was correct in holding that this evidence does not establish a norm or standard for a particular occupation so as to allow CN the benefit of the defence set out in Section 14(c).

The Tribunal focused on the phrase "normal age of retirement" and, referring to Campbell v. Air Canada [1981] 2 C.H.R.R. D/602, correctly held that, by the usual canons of statutory interpretation, words are to be given their clear and normal meaning unless there is something to indicate that the words are being used in a special sense. In considering the meaning of the word "normal" the Tribunal stated that a synonym for it was "usual"; and that "normal" was the opposite of "exceptional" or "highly extraordinary". Rather than directly addressing the question of whether the evidence before it demonstrated that the normal age of retirement was 65, the Tribunal inquired whether it was "exceptional" or "highly extraordinary" that 40 percent of the Checkers are not subject to mandatory retirement. The Tribunal concluded that it was not, and having so found, then stated that it cannot be said "that Checkers usually have mandatory retirement at age 65."

We do not agree with the Tribunal that the opposite of normal is "exceptional" or "highly extraordinary". Rather, it would include the less extreme descriptions of "unusual" or "unordinary". In any event, we feel that the Tribunal erred in

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on the meaning of the opposite of "normal" and concluding that, because the 40 percent who were not compelled to retire did not meet its test of "exceptional" or "highly extraordinary", then it followed that the opposite cannot be true, ie. the fact that 60 percent of the Checkers across the country are retired at age 65 cannot be said to be "normal" or usual. We are mindful of the cases which have stated that the defences and exemptions to the policies stated in the Canadian Human Rights Act are to be construed narrowly in view of the fact that the statute is a humanitarian remedial enactment and should be interpreted in a way to best achieve the policies underlying it. However, even the most conservative and restrictive interpretation of the phrase "normal age of retirement" would have to encompass the evidence in this case. It has been demonstrated that a significant majority of those engaged in positions similar to the position of the Complainant are subjected to retirement at age 65 and it would require a totally artificial and unnatural interpretation of the word "normal" to infer that the defence has not been met in a case where 60 percent of employees in similar positions retire at that age.

For, if the 60 percent figure cannot be equated with normalcy, then what arithmetic figure would establish a norm? In Campbell v. Air Canada, supra, the Human Rights Tribunal considered Section 14(c) in the context of the

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of flight attendants in the industry in Canada and concluded that "by far the majority retire at age 60, ie. 4,981 out of 6,112 or 81.49 percent." That figure was sufficient to establish the

norm in the circumstances of that case. It would be totally illogical and arbitrary to say that 81.49 percent satisfies the test of "normal age of retirement" but that 60 percent fails short. This reasoning would lead to the unlikely conclusion that there exists a numerical point between 60 percent and 81.49 percent when it becomes obvious to all that a normal standard has been achieved. It can readily be seen that 60 percent of the Checkers across Canada are now obliged to retire at age 65 and surely that is a sufficient number to conclude that 65 is the normal retirement age within that field of endeavour. "Normal" means conforming to the standard or the common type, usual or regular, or not abnormal. CN has met those tests on the basis of the evidence contained in the Agreed Statement of Facts.

We cannot leave this matter without the observation that Section 14(c) is a rather curious provision in human rights legislation. It creates a defence for employers and allows them to discriminate against the older worker and force them out of the

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workplace not because of any specific or individual inability or incapacity but rather merely because it has been the "normal" practice in the industry to do so.

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The fact that retirement at a certain age for certain positions is normal does not mean that it has a rational basis in fact. It appears that the mere historical existence of early retirement is sufficient justification for the defence even in the absence of any countervailing social policy such as public safety, or in circumstances where it can be demonstrated that age is a serious factor in the individual's ability to perform the relevant work function. An example of the latter can be found in Section 14(a) of the Act which permits discrimination against the older employee if an employer can demonstrate that age is a bona fide occupational requirement of the job.

There is an obvious beneficial social policy in the Act underlying the prescription that older workers not be discriminated against merely because of their age. The adverse consequences of mandatory retirement for those who are otherwise fit to perform their tasks have been articulated by an Ontario Board of Inquiry in Hadley v. City of Mississauga (1976) at page 32:

"Most people philosophically agree that discrimination based on race, colour or sex is a soul-destroying act which cries out for relief. Unfortunately, discrimination against the elderly does not generally evoke such emotion. The problem of mandatory retirement which the elderly face is a problem which does not confront any other minority

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segment in society. To some, retirement is viewed longingly as a time for increased leisure, a welcome escape from the work-filled years of the past. In fact, voluntary retirement on an adequate income can be a highly satisfying experience. To those, however, who have both the ability and the inclination to continue working and have been forced into retirement, the remaining years of life afford only idleness and a feeling of a lack of utility. When one adds to that the rigours of living on a fixed income from a pension fund, retirement could well become a dehumanizing experience rather than the anticipated halcyon period of life. Then, there is the psychological distress which an individual who has been compelled to retire against his will might well suffer. Not only is work economically important, it is psychologically a source of recognition in our society. The work ethic is related directly to an individual's image of being a respected member of the community. Mandatory retirement is another way for society to say that the older person is useless because society no longer requires his productivity. An

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individual's work should be measured by his personal capacity rather than arbitrarily counting up the number of years he has happened to live. Mandatory retirement can be characterized as unfair to the able older worker, psychologically and socially damaging and economically wasteful to not only the particular individual but to the country as a whole."

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Section 14(c) in its present form, only serves to undermine the principle enunciated in Section 2(a) of the Act wherein it is stated that "every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on ... age."

It would appear that the Canadian Charter of Rights and Freedoms contained in the Constitution Act, 1982, will alter this state of affairs. Section 15(1) of the Charter provides as follows:

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

However, by Section 32(2) of the Charter, this Section does not come into effect until three years after the Charter comes into force. When it does take effect, it may well render Section 14(c) of the Canadian Human Rights Act inoperative or unconstitutional. Regrettably, that provides little solace to Mr. Prior who must take the law as it presently exists.

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- 25 Accordingly,
on the evidence, we are obliged to find that Mr. Prior was retired at age 65 which is the "normal age for retirement for employees working in positions similar to the position of that individual". CN is entitled to rely upon this defence and therefore the appeal must succeed on this basis and the complaint dismissed.

DATED at Toronto, this 2nd day of February, 1983.

SIDNEY N. LEDERMAN, Q.C.,
Chairperson

SUSAN MACKASEY ASHLEY,
Member

CLAUDE PENSA, Q.C.
Member