T.D. 8/91
Decision rendered on June 25, 1991

CANADIAN HUMAN RIGHTS ACT
RSC 1985, c H-6 (as amended)

IN THE MATTER of a hearing held before a Human Rights Review Tribunal appointed under subsection 56(1) of the Canadian Human Rights Act.

BETWEEN

FRANCE GRAVEL

and

LUCIE CHAPDELAINE

and

CANADIAN HUMAN RIGHTS COMMISSION

Appellants

and

AIR CANADA

Respondent

and

CANADIAN AIR LINES PILOTS' ASSOCIATION

Intervenant

DECISION OF THE REVIEW TRIBUNAL

BEFORE:

Maurice Bernatchez, Chairman
Maria Domaradzki, Member
Demagna Koffi, Member

APPEARANCES:

Paula Laviolette and Diane Brais,
Counsel for Lucie Chapdelaine and France Gravel, Appellants

Anne Trotier,
Counsel for the Canadian Human Rights Commission, Appellant

Louise-Hélène Sénécal,
Counsel for Air Canada, Respondent

Lila Stermer,
Counsel for the Canadian Air Lines Pilots' Association (CALPA)

Appeal heard in Montreal, Quebec, from August 21 to 23, 1990 and on
September 17 and 18, 1990.

TRANSLATION

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I

CONSTITUTION OF THE TRIBUNAL

On August 13, 1990, the Chairman of the Human Rights Tribunal appointed this tribunal (Exhibit T-2) to hear the appeal of Complainants France Gravel, Lucie Chapdelaine and the Canadian Human Rights Commission against a judgment of a Human Rights Tribunal rendered pursuant to subsection 53(2) of the Canadian Human Rights Act by Daniel H Tingley on October 23, 1987. This judgment had declared the Complainants' complaints to be substantiated and had allowed a portion of their financial claims (loss of earnings), while dismissing their claim to be integrated as Air Canada pilots with full seniority retroactive to the date of the discriminatory act.

The appeal was heard in Montreal on August 21, 22 and 23, 1990 and continued in Montreal on September 17 and 18, 1990 before Maurice Bernatchez, Maria Domaradzki and Demagna Koffi.

POWERS OF THE TRIBUNAL

The powers of the Review Tribunal are set out in section 56 of the Canadian Human Rights Act (RSC 1985, c H-6 (as amended)), and in particular subsections 3, 4 and 5, which state that:

(3) An appeal lies to a Review Tribunal against a decision or order of a Tribunal on any question of law or fact or mixed law and fact.

(4) A Review Tribunal shall hear an appeal on the basis of the record of the Tribunal whose decision or order is appealed and of submissions of interested parties but the Review Tribunal may, if in its opinion it is essential in the interests of justice to do so, admit additional evidence or testimony.

(5) A Review Tribunal may dispose of an appeal under section 55 by dismissing it, or by allowing it and rendering the decision or making the order that, in its opinion, the Tribunal appealed against should have rendered or made.

II

THE FACTS

The facts not in dispute by the parties can be briefly summarized as follows:

1- The Complainant France Gravel submitted an application for employment to the Respondent Air Canada in August 1978, wherein she indicated her height to be 5'7". The Respondent Air Canada's minimum height requirement at that time was 5'6", which is why it informed her on December 7, 1978 that it could not consider her application (Exhibit C-1). As for the Complainant Lucie Chapdelaine, the evidence indicates that she submitted an application in August 1979, and that, because of her height, she too received a letter from Air Canada (Exhibit C-2), on October 26, 1979, stating that her application could not be given further consideration because of Air Canada's minimum height requirement of 5'6".

The Complainants (France Gravel and Lucie Chapdelaine) then filed complaints (Exhibits C-3 and C-4) with the Canadian Human Rights Commission, dated February 26, 1980 and September 1980 respectively. According to the evidence, the Respondent Air Canada was not made aware of these complaints until late in 1981. The Respondent Air Canada modified its height requirement in 1982 (Exhibit D-4), agreeing to reduce this requirement, with the Commission's consent, from 5'6" to 5'2", with the proviso that an applicant be able, in the opinion of Air Canada alone, to operate, manoeuvre and pilot all aircraft of the Respondent with complete safety and ease and without any difficulty.

The evidence also showed that the Respondent Air Canada invited the Complainants in 1982 to apply for a position with the company.

The evidence (in particular Exhibit C-6) further revealed that in September 1985 the Complainants were invited to an interview with the Respondent Air Canada. The Complainant France Gravel did not attend; the

Complainant Lucie Chapdelaine did, but informed the Respondent Air Canada in a letter dated October 3, 1985 that she was withdrawing her candidacy.

The Tribunal was appointed on April 16, 1986 (Exhibit D-7) and hearings were held from September 17, 1986 to April 1, 1987.

The Tribunal's judgment was rendered on October 23, 1987, as mentioned above, and made public on November 6, 1987.

The Canadian Human Rights Commission, France Gravel and Lucie Chapdelaine filed a notice of appeal on December 2, 1987, pursuant to section 55 (formerly 42.1) of the Act.

The stated grounds of their notice of appeal were that:

1- The Tribunal erred in fact and in law by not granting the Complainants the rights, opportunities or privileges they were denied as a result of the discriminatory act, namely:

i) A position as an Air Canada pilot at the first reasonable opportunity; and

ii) Seniority retroactive to the date of the discriminatory act.

2) The Tribunal erred in fact and in law by reducing the claims for loss of earnings and expenses incurred as a result of the discriminatory act.

On August 29, 1988, the first day of the review tribunal's hearings, the Complainants Lucie Chapdelaine and France Gravel made a verbal request to present new evidence and hear new testimony in order to prove that the monetary losses they incurred as a result of the discriminatory act were greater than the compensation awarded by the Tribunal. This request was unanimously dismissed in a decision rendered by the review tribunal on November 14, 1988. The Complainants appealed this decision to the Federal Court of Appeal pursuant to section 28 of the Federal Court Act.

Subsequently, and following an application by the Attorney General of Canada, the appeal was dismissed by the Federal Court of Appeal, with the result that it has been brought before the present Review Tribunal.

III

THE LAW

The Complainants, who were personally represented by counsel at the review tribunal, requested that the inquiry be "reopened" so that additional evidence could be introduced, claiming that Exhibits D-9 and D-11 had been produced without their knowledge and that the actual financial losses which they incurred as a result of the discriminatory act were about $361,316 in France Gravel's case and $345,706 in Lucie Chapdelaine's.

A preliminary judgment on this verbal request to reopen the investigation present new evidence and hear witnesses, made at the beginning of the appeal hearing, was rendered by then-Chairman Gilles Mercure on November 14, 1988 and fully concurred in by the other members of the tribunal. The present Review Tribunal does not intend to address this matter again, since it fully supports this decision.

Moreover, the Review Tribunal intends to deal here with the Complainants' contention that Exhibits D-9 and D-11 were introduced without their knowledge, in disregard of the audi alteram partem rule.

First of all, keep in mind that subsection 50(1) of the Canadian Human Rights Act reads:

A Tribunal shall, after due notice to the Commission, the complainant, the person against whom the complaint was made and, at the discretion of the Tribunal, any other interested party, inquire into the complaint in respect of which it was appointed and shall give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, to appear before the Tribunal, present evidence and make representations to it.

For reasons of their own, which the Review Tribunal has no cause to comment on, the Complainants did not deem it necessary to be represented by lawyers at the Tribunal, as was their right. They decided to rely on the Commission's solicitors, with whom they certainly co-operated to establish

their claims, appearing both at the initial declaration of November 21, 1986 and the amended one of January 22, 1987. They were present at all times when representations were made to the Tribunal, and at the pre-hearing conference held on September 17, 1986 (Vol. 1(a), page 3 of the stenographic notes taken at the Tribunal).

The Complainants were also present at the February 3, 1987 hearing (Vol. 3, at page 155), when the amount of wages that the Complainants would have earned in the absence of the discriminatory act was agreed upon by the parties. They were present as well when Exhibit D-9 (February 3, 1987 hearing, Vol. 3, at page 188 and following) was introduced, and when counsel for the Commission asked a witness for the Respondent to submit another document, which was subsequently prepared and introduced as Exhibit D-11, concerning the year 1978. Finally, the Complainants were present at the pleadings (Vol. 5, March 13, 1987 hearing, at page 332), when counsel for the Commission reiterated the admissions regarding the salary that the Complainants would have earned if the discriminatory act had not occurred and if they had been hired by the Respondent Air Canada.

Based on all these facts, the Review Tribunal readily concludes that the principle of natural justice was widely respected and that Exhibits D-9 and D-11 were not introduced "proprio motu" (Commission des affaires sociales v Mouice Mess (1985 RD 295, 302)), that is, they were not introduced by counsel for the Respondent Air Canada without the Complainants' knowledge.

Moreover, the Tribunal's hearings lasted more than five (5) days and were furthermore adjourned a number of times, which gave the Complainants ample time to take note of these two exhibits and to present counter-evidence to show that Exhibits D-9 and D-11 did not adequately and accurately represent their loss of earnings.

For these other reasons and those stated in the previous review tribunal's preliminary decision of November 14, 1988, the Review Tribunal is of the opinion that the principle of natural justice was respected, such that the Appellants' renewed request to the Review Tribunal to present additional evidence (in particular, Vol. 6, September 18, 1990 hearing of the Review Tribunal, at page 855) is dismissed.

A) EMPLOYMENT (INTEGRATION) VERSUS EMPLOYMENT OPPORTUNITY

According to the record of appeal, only the Complainants -- Lucie Chapdelaine, France Gravel and the Canadian Human Rights Commission -- appealed the decision rendered on October 23, 1987 by the Tribunal chaired by Daniel Tingley. The essential basis of the notice of appeal, filed pursuant to section 55 (formerly 42.1) of the Act (RSC 1985, c H-6), was that the Tribunal did not grant the Complainants employment as pilots

with Air Canada at the first reasonable opportunity, with seniority retroactive to the date of the discriminatory act. In addition, the notice of appeal sought a reversal of the Tribunal's judgment, which reduced the Complainants' proven claims for wage losses, as well as claims for expenses incurred as a result of the discriminatory act of which they had been victims.

The Respondent Air Canada did not appeal this judgment. On the contrary, following the admissions of the parties at the review tribunal, the company sent to the Commission the amount of money it had been ordered to pay in the October 23, 1987 judgment for the Complainants' benefit.

Although the Respondent Air Canada did not appeal the Tingley Tribunal's judgment, given the pleadings of counsel for the Respondent, the question of whether the Complainants were refused employment or an employment opportunity as a result of the discriminatory act should be settled immediately.

There is no doubt in the Review Tribunal's mind that the Complainants were victims of a discriminatory act committed by the Respondent Air Canada.

Pages 17 and 18 of the Tribunal judgment state that:

As the Tribunal has already observed above (at page 10), the effect of the Respondent's height policy, although perhaps "on its face neutral" in its application, operated to deprive 82% of all Canadian women and 11% of all Canadian men between the ages of 20 and 29 from the opportunity for employment as a pilot.

Considerably more women than men were adversely affected by the Respondent's height policy. In this context, it may be said that the policy affected women "differently from" men (semble, Griggs v Duke Power Co, 401 US 424 (1971), approved in the Simpsons-Sears case, supra, at page 549).

The Tribunal concludes therefore that the Complainants have established a prima facie case of discrimination based on sex. Accepting this, the next question to determine is whether or not

the Respondent was justified in imposing its height policy to pilot applicants between 1978 and 1980.

The height requirement of 5'6" as a condition of employment with the

Respondent Air Canada was not, from the evidence adduced at the Tribunal, justified within the meaning of the decision rendered in Ontario Human Rights Commission et al v Etobicoke, [1982] 1 SCR 202, as indicated in the following passage of the Tribunal's judgment (at page 20):

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Indeed, counsel for the Respondent acknowledged that no attempt was made to make a defence under section 14 (Case 5, at page 382).

Exceptions to the general rule must be construed narrowly. The Tribunal concludes on the evidence adduced at the trial and discussed above that the Respondent has not discharged the burden of proof incumbent upon it to satisfy the objective test laid down in the Etobicoke case. If either test is not satisfied, a defence under section 14(a) must fail. As if to confirm that there was no valid occupational requirement for pilots to be at least 5'6" tall, the Respondent modified its standards in the Spring of 1982.

Having said this, the Respondent Air Canada maintained before the Review Tribunal that the Tribunal's judgment must be confirmed; consequently, the orders made to compensate the Complainants (for loss of earnings) should also be confirmed by the Review Tribunal.

Following this line of argument, one would first be tempted to conclude that the Tribunal ordered the Respondent Air Canada to pay this compensation because the Tribunal felt that the Complainants had lost employment and not an employment opportunity. Had it been only a question of an employment opportunity, the Tribunal would have ordered the Respondent Air Canada to restore the Complainants to the situation they were in before their applications were refused on the basis of the height requirement (Exhibits C-1 and C-2), as was done in Frank McCreary (CHRR, Case 6, decision 408 February 1985 D/2512). In that case (number A-15-86), the Honourable Heald J wrote on page 14 of the Federal Court of Appeal decision that:

[page 12]

The main grounds of review argued before us were:

. . .

(b) that the Review Tribunal erred in not concluding that what McCreary lost in this case was employment as a bus driver and, therefore, the appropriate order would have been to the effect that McCreary be granted employment at the next available opportunity provided he met the normal job requirements and passed the driver training programme. As a consequence, counsel submitted further that the employment order should also confer upon him the seniority rights he would have enjoyed had he been accepted in May of 1980.

This issue was addressed by Mr Kerr who said (Case, Volume 24, page 3482):

With respect to the refusal to employ the Complainant, the Complainant is entitled to be put in the position he would have been in but for the application to him of

the Respondents' age of hire policy. . . . this does not mean that he is entitled to an offer of employment but only to an opportunity to enter the training program for new drivers.

[page 15]

Counsel for McCreary repeated this submission before the Review Tribunal. It was dismissed by the Review Tribunal in the following paragraph of their reasons (Case, Volume 24, page 3511):

There is an essential fallacy to this point of view. Mr McCreary's application to the training opportunity, not a job, was denied. It would be beyond the jurisdiction of the Review Tribunal and the original Tribunal to restore to Mr McCreary an opportunity he had not yet won. Mr McCreary was denied the opportunity to enter and pass the Eastern Canadian Greyhound Lines Ltd training program. That right was restored to him in the order of Mr Kerr and will not be enlarged by this Review Tribunal.

I agree with the views of Mr Kerr as expressed supra. I also agree with the decision of the Review Tribunal not to enlarge or extend the Order given by Mr Kerr.

At the Review Tribunal, the Respondent Air Canada maintained that Mr Tingley's decision did not specifically conclude or declare that the Complainants had lost an employment position, the amount awarded suggesting that they had been compensated on the basis of a lost employment opportunity. Air Canada maintained that at the time of the discriminatory act, the company had received 1,200 job applications, approximately 525 of which were accepted; thus the probability of the Complainants being hired was 43.75%. According to the Respondent, this explains the Tingley Tribunal's decision to award 40% of the Complainants' claims.

In support of its argument, the Respondent Air Canada cited two decisions, Boucher v The Correctional Service of Canada (reported in Case 9 CHRR, D/4910, decision 766, July 1988) and Szabo v Atlas Employees Welland Credit Union (Case 9 CHRR, decision 738, June 1988, D/4735).

Without deciding whether these decisions, which awarded a percentage based on the probability of being hired during a hiring process, are substantiated, we feel that they are not pertinent to this case.

With respect, and contrary to the Respondent's opinion, it appears from reading the Tribunal's judgment that the Complainants were refused employment and not an employment opportunity. To be convinced of this, one has only to read certain passages of the Tribunal's judgment, such as the following:
Gravel was refused employment by the Respondent in December 1978. This was early in a period when the Respondent had embarked on a hiring program that lasted into 1980. Chapdelaine was refused employment by the Respondent towards the middle of this hiring

period. No pilots were hired by the Respondent after 1980 until December 1985 (Exhibit I-3). (at page 14)

Further on it is stated that:

The Respondent undertook in 1982 and 1985 to consider the Complainants' applications for employment (see page 12 above). Having done so, the Tribunal will make no order requiring the Respondent to repeat this exercise at this time. As mentioned above (at page 12), the Tribunal is satisfied that neither

Complainant will accept employment with the Respondent unless retroactive seniority rights are included. (at page 27)

The second conclusion in the Tingley Tribunal's order is also pertinent in that it:

DECLARES that the Respondent engaged in discriminatory practices in that it refused to employ the Complainants on a prohibited ground of discrimination, namely, sex.
(Emphasis added.)

It is therefore implied, if not explicit, that the Tribunal recognized the Complainants' right to a pilot's position. Moreover, had it been only a matter of an employment opportunity, why did the Respondent Air Canada not attempt to prove statistically or otherwise during the Tribunal hearings that the Complainants had in effect been refused an employment opportunity and not an actual position?

Furthermore, in relation to the Respondent's argument, Thurlow CJ in the Federal Court of Appeal decision on Via Rail Canada Inc v Butterill et al, [1982] 2 FC 830, in particular wrote that:

In my opinion, proof of the ability of the complainants to pass the eyesight examination referred to in the order of the Human Rights Tribunal was not an element of the case which it was incumbent on them to prove in

support of their claim for compensation for wages lost by them as a result of the discriminatory practice. Their case, as I see it, was made out when they proved that they were refused employment as a result of the application to them of an unlawful discriminatory practice.

(Emphasis added.)

Also pertinent are the words of Chairman Robinson in Morgan v Canadian Armed Forces (tribunal judgment reported in Case 10 CHRR, decision 950, October 1989 D/6386 and following), and in particular the following passages:

What is the distinction between the denial of a position and a loss of an opportunity to compete for a position? Where the Complainant has done all that it is necessary for him or her to

do in order to complete the application process for a position and the only basis for rejecting the Complainant's application is a prohibited ground of discrimination, this constitutes a denial of employment. Where the Complainant is disqualified from further competition in the application process for a position before the Complainant's application has been considered for employment, this constitutes a loss of an opportunity to compete for a position, if the person is disqualified on the basis of a prohibited ground of discrimination. (at paragraph 45226, emphasis added)

In the documentary evidence in this case, the only basis for rejecting the Complainant's application that is mentioned in either the decision that was communicated from Headquarters to the Victoria Recruiting Centre or in the letter that was sent to the Complainant, was the Complainant's medical condition. The Respondent did not introduce any evidence before this Tribunal to show that the Complainant was unable to meet a bona fide occupational requirement. (at paragraph 45234, emphasis added)

Evidence was tendered on behalf of the Respondent to show that during the year 1980, the Armed Forces received approximately three times as many applications for enrolment as they had positions available and consequently they were unable to accept all of the applications which they received. Evidence was also introduced that at the time when the Complainant applied for re-enrolment, the Armed Forces were over strength in the positions of cook, vehicle technician and mobile support equipment operator. However, no evidence was tendered to suggest that the Respondent rejected the Complainant's application on the basis that, in competition with applications of other former service members, the Complainant's skills, education and other characteristics were less meritorious. Furthermore, there is no evidence that the Respondent rejected the Complainant's application on the basis that all of the positions, for which he had applied, were over strength. (at paragraph 45235, emphasis added)

And finally:

With respect to all of the above "possible" bases for rejecting Complainant's application, if they had in fact been a reason for rejecting his application, surely they would have been recorded

in the documentation and communicated to the Complainant. Since there is no mention of these grounds, I conclude that in the absence of the medical ground, the Respondent would have accepted the Complainant's application for re-enrolment. (at paragraph 45237, emphasis added)

It appears from these two judgments that the Respondent Air Canada was responsible for proving through statistical or other means that, notwithstanding the height criterion, the Complainants would not and could not have obtained the positions sought. In the Review Tribunal's opinion, the fact that only 525 pilots were hired from among the 1,200 applicants cannot in itself constitute proof that the Complainants lost an employment opportunity only. The Respondent Air Canada could have proven, for example, and not restrictively, that the 525 pilots hired during the period in question were more experienced and/or qualified than the Complainants, such that it was impossible for the Complainants to have one of the 525 positions assigned by the Respondent Air Canada during that time.

Any evidence from Air Canada showing that there were other, more qualified candidates than the Complainants would have reduced the probability of the Complainants being hired to less than the 43.75% claimed at the Review Tribunal. At the same time, other candidates who were less qualified would have increased the probability of the Complainants being hired. In concluding on this first point (employment versus employment opportunity), it is worth noting the following passage from the notice of refusal sent by Air Canada to France Gravel (Exhibit C-1): [translation] "I will always have good memories of this interview and am convinced that with the qualities you possess you will succeed as a pilot." (Emphasis added.)

This statement further convinces the Review Tribunal that, were it not for the height criterion, the Complainants would have been hired by the Respondent Air Canada. Finally, recall the Respondent's admission,

presented by its counsel at the Tribunal (Vol. 2, page 70, February 2, 1987 hearing), as follows:
[translation]

Mr Marchand: Mr Chairman, the Respondent Air Canada admits that the applicants met the basic requirements to apply for employment with Air Canada.

Chairman: At that time?

Mr Marchand: Yes, except for the height requirement of course.

(Emphasis added.)It therefore seems clear to the Review Tribunal that this was a question of employment and not of an employment opportunity.

B) THE FINANCIAL CLAIMS

The amounts claimed by the Complainants France Gravel and Lucie Chapdelaine for loss of earnings, as declared in their January 22, 1987 "amended" declaration (a rather unusual occurrence at a human rights tribunal), were respectively $52,418 in paragraph 20 and $83,054 in paragraph 25.

Despite the amounts claimed in the amended declaration, the parties agreed during the hearings (particularly that of February 3, 1987, Vol. 3, page 155 of the stenographic notes) to a calculation of the salaries that would have been earned by the Complainants if the discriminatory act had not occurred and they had been hired. It was after this agreement was reached between counsel for the two parties that Exhibits D-9 and D-11 were introduced with the consent of those concerned; these exhibits represented the average earnings of 22 pilots hired in October 1978 (Exhibit D-11) and the average for 13 pilots hired as of 1980 (Exhibit D-9).

Called upon to explain the amounts claimed and in relation to the request to reopen the inquiry made at the August 29, 1988 appeal hearing, counsel for the Commission (Vol. 1, at page 74 and following of the notes) gave its version and understanding of the figures (loss of earnings) used by Chairman Tingley in his judgment of October 23, 1987.

This first day of hearings by the Review Tribunal had essentially been concerned with the request to reopen the inquiry so that additional evidence regarding the damages claimed to have been incurred by the Complainants as a result of the discriminatory act of which the Respondent Air Canada was accused could be tendered, and with the request to hear new testimony accordingly. A preliminary judgment on this request was rendered on November 14, 1988 by Gilles Mercure, who dismissed it for reasons concurred with by the other tribunal members. This preliminary judgment was then appealed to the Federal Court of Appeal which, in a unanimous judgment rendered on December 8, 1989, dismissed the appeal pursuant to section 28 of the Federal Court Act following an application by the Attorney General of Canada. The case was then brought back before the present Review Tribunal. In the meantime, Chairman Gilles Mercure was appointed a Superior Court judge, which explains the new composition of the present Review Tribunal.

There is therefore no question of the Review Tribunal returning to the matters disposed of by the preliminary judgment, since that judgment is quite justified and is fully endorsed by the members of the Review Tribunal. Furthermore, sitting again as the Review Tribunal, we cannot review this decision, contrary to what was argued by counsel for the Complainants on the first day of hearings held by the Review Tribunal. Moreover, early on in this decision, the Review Tribunal already ruled on the renewed request by Complainants Gravel and Chapdelaine to reopen the inquiry.

That said, the grounds of appeal contained in the notice of appeal of December 2, 1987, and more specifically the monetary damages should be considered. The Complainants essentially claim that the Tribunal's

judgment is unsubstantiated in fact and in law, since in their opinion, the Tingley Tribunal was not at all justified in reducing their claims by 60%. The Complainants further submit that the stated grounds for this reduction were clearly unreasonable and constitute an obvious error in consideration of which the Review Tribunal must act to award them 100% of the amounts claimed.

The Complainants claim that an unreasonable error committed by a tribunal in assessing the facts gives a review tribunal the power to intervene and substitute its own opinion or modify the judgment. To support their claim, they referred the Review Tribunal to the principle stated in Stein et al v The Ship "Kathy K", [1976] 2 SCR 802 and cited on several occasions since, including by Thurlow J in Brennan v The Queen as represented by the Treasury Board and Bonnie Robichaud, [1984] 2 FC 799 (CA) and MacGuigan J in Cashin v Canadian Broadcasting Corporation, [1988] 3 FC 494.

Therefore the reasons put forth by the Tingley Tribunal in awarding the Complainants 40% of the amounts claimed at the Tribunal should be considered.

Chairman Tingley's reasons are stated in the judgment as follows:

In all the circumstances of this case and considering the possibility of lay-offs between 1980 and 1984 and other aléas de la vie, the Tribunal believes it is not unreasonable to assess the Respondent for forty per cent (40%) of the Complainants' potential monetary claims. In Gravel's case, this amounts to $32,600. The amount for Chapdelaine is $24,480. (at page 25)

What are the other circumstances of this case to which he refers? Chairman Tingley discusses them on pages 22 and 23. They can be summarized in five points. First, there is the complex hiring process referred to on page 22; there is also the Respondent's invitation to the Complainants in 1985; there is the period between the job interviews and the actual hiring, which Chairman Tingley estimated at 12 to 18 months; there is the delay by the Complainants in filing their complaints; and finally, there is the time between the complaint and the notice given to the Respondent Air Canada.

Page 24 of the Tingley Tribunal's judgment states:

> Admittedly, this is conjecture, but it is a reasonable inference to draw from the Respondent's behaviour after learning of the complaints in May 1981. (Emphasis added.)

We will now consider one by one the reasons put forth by the Tingley Tribunal in concluding that it was justified in reducing the damages claimed by 60%.

First of all, with respect to the complex hiring process referred to by the Tingley Tribunal, the Review Tribunal, as already discussed at length, is of the opinion that the Complainants were deprived not of an employment opportunity but of actual employment as a result of the discriminatory act of which the Respondent Air Canada was accused. It was therefore incumbent upon the Respondent Air Canada to prove "according to the ordinary civil standard of proof, that is upon a balance of probabilities" (Etobicoke, [1982] 1 SCR 202, at page 208) that the Complainants would not have been hired even in the absence of the discriminatory act, owing to the complexity of the hiring process. In the Review Tribunal's opinion, Air Canada provided no such proof at the Tribunal. Admittedly, the Complainants had not yet gone through all the stages of the hiring process when they were refused (Exhibits C-1 and C-2), as there was still the interview with a group of three to six pilots and the medical examination. However, here again, bear in mind what the Honourable Thurlow J wrote in Via Rail Canada v Butterill et al (op cit):

> Their case, as I see it, was made out when they proved that they were refused employment as a result of the application to them of an unlawful discriminatory practice. (at page 844)

In other words, it was not the Complainants' responsibility to prove that they would have been hired, but rather the Respondent Air Canada's

responsibility to demonstrate that the Complainants would not have passed the hiring process because of its "complexity". Since this was not proven at the Tribunal, the Tingley Tribunal cannot be justified in using this reason to reduce the amounts awarded to the Complainants.

COMPLAINANTS DEEMED TO HAVE BEEN HIRED WITHIN 12 TO 18 MONTHS OF THEIR
APPLICATIONS.

Chairman Tingley wrote on page 23 of the judgment that:
Although it is by no means certain that the Complainants would have been hired by the Respondent, absent the height requirement, the Tribunal is of the view that, given their qualifications and the Respondent's need for pilots between 1978 and 1980, they would likely have been hired within a year to eighteen months of their respective applications. Gravel applied in September 1978 (Exhibit D-1) and Chapdelaine applied in October 1979 (Exhibit D-2).

The Tingley Tribunal thus estimated that a period of 12 to 18 months would have passed between the time the Complainants applied (Exhibits D-1 and C-2) and the date they would have been hired.

Certainly, the evidence has shown that the Complainants would have had to pass two other stages before being hired (the interview with a group of three to six pilots, and the medical examination and training course).

However, in the Review Tribunal's opinion, it is unreasonable to conclude that 12 to 18 months would have passed between the time the Complainants applied and the actual hiring. In fact, the evidence (France Gravel's testimony, Vol. 2 of the stenographic notes from the February 2, 1987 Tribunal hearing, at page 76, and

that of Captain Pigeon, Vol. 4, at pages 199-201, February 4, 1987 hearing) shows that between late 1977 and late 1980, the Respondent Air Canada conducted a massive program to recruit pilots (525 pilots). The evidence also indicates that the Complainant France Gravel applied a second time to Air Canada in August 1978 (Exhibit D-1) and was refused in December 1978

(Exhibit C-1). Lucie Chapdelaine applied in August 1979 and was refused in October 1979 (Exhibit C-2).

It is therefore clear that the Complainants were refused employment with the Respondent Air Canada during the massive pilot recruitment program. Furthermore, the Tingley Tribunal was not justified in concluding that 12 to 18 months would have passed between the date the applications were made and the time the Complainants would actually have been hired.

Of course, it is entirely conceivable and likely that some time would have passed between the submission of the applications and Air Canada's acceptance of them: it takes time to review the applications (1,200 between 1977 and 1980) and for applicants to pass the training course (four to six weeks), and they are only hired after that (testimony of Captain Servos, page 161 of the stenographic notes, Vol. 3, February 3, 1987 hearing and that of Captain Pigeon, at page 210 and following, Vol. 4, February 4, 1987 hearing).

For these reasons, the Review Tribunal concludes that at most six months would have passed between the date of the Complainants' application and the date on which they would actually have been hired, not the 12 to 18 months stated by the Tingley Tribunal.

Consequently, in France Gravel's case, based on her second application (Exhibit D-1 dated August 21, 1978), the Review Tribunal believes that the date she would have been hired by the Respondent Air Canada is March 1, 1979. As for Lucie Chapdelaine, according to her complaint (Exhibit C-4) and the correction to the year as authorized by the Tribunal (Vol. 3, page 149 of the stenographic notes from the February 3, 1987 hearing) and by logical deduction from the date she was refused by Air Canada -- October 1979 (according to Exhibit C-2) -- and the date of her application, August 1979, the date she would have been hired, in the Review Tribunal's estimation, is March 1, 1980.

With respect to the reason based on the Respondent Air Canada's invitation of 1985, it seems clear to the Review Tribunal that it cannot be used to reduce the loss of earnings claimed by the Complainants. It cannot be used to reduce the damages incurred by the Complainants before the invitation was made. The evidence shows that the damages (loss of earnings) claimed by the Complainants and based on Exhibits C-7 and D-11 were incurred by them before the Respondent Air Canada made the invitation in 1985. This argument therefore cannot be sustained.

Another argument raised by Chairman Tingley is the Complainants' failure or rather neglect to file their complaint, which could have enabled the

Respondent Air Canada, in the Tingley Tribunal's opinion, to change its position and reduce their damages. With respect, this kind of situation

remains a matter of conjecture. Furthermore, there was no scientific basis for Air Canada's height requirement (5'6"). On page 20 of its judgment, the Tingley Tribunal concludes from the evidence and from the Respondent Air Canada's own admission that the height requirement was not a bona fide occupational requirement. Quite the contrary: the Respondent Air Canada never received written instructions to this effect from the manufacturers of its aircraft, and knew or should have known that the American standards (Exhibit C-5, Airworthiness Standards: Transport Category Airplanes, and Captain Pigeon's testimony, Vol. 4, pages 204-205 of the February 4, 1981 hearing) required airplanes to be designed so that they could be operated by persons as short as 5'2". Certainly, a company such as Air Canada could have stricter requirements than other airlines or the Department of Transport. However, it had to prove scientifically or otherwise that this stricter requirement was justified, giving reasons for it.

The "undue delay" reason

On pages 24 and 25 of its judgment, the Tingley Tribunal writes in relation to this reason that:

> In Chapdelaine's case, the complaint was made some six months after the discriminatory act. This is well within the one-year limit imposed by section 33(b)(iv) of the Act. But the Respondent was not notified until more than one year later or nineteen months after the discriminatory act. In Gravel's case, her complaint was only made some fifteen months after her application was refused. This is beyond the one-year period. The Respondent never learned of Gravel's complaint until thirty-one months after the discriminatory act. These delays are far too long and, in the opinion of the Tribunal, have contributed to the Complainants' damages.

With respect, we cannot accept the reason of delay as a ground for reducing the loss of earnings suffered by the Complainants.

The Tribunal showed that the actual period of hiring by Air Canada was between 1978 and 1980. From late 1980 to 1985, nearly no other pilots were hired by Air Canada. Moreover, the Tingley Tribunal makes only the victims of Air Canada's discriminatory act, the Complainants, suffer the consequences of it. On several occasions, various human rights tribunals

have had the opportunity to take a stand on delays in filing complaints. In the Cashin v Canadian Broadcasting Corporation decision of June 14, 1990,

TD 7/90, Susan M Ashley, who chaired the tribunal, wrote the following:

> It is clear that, had the Commission acted on the complaint in 1981, the two-year period during which the complainant was forced to ask the Federal Court of Appeal to overturn the Commission's decision not to proceed (which the court did) might have been avoided. In theory, if the Commission had acted properly in this regard, the Tribunal would have been appointed and its decision rendered a full two years earlier. The employer's argument that they should not be responsible, in financial terms, for delays caused by the Commission, is persuasive. On the other hand, it would be unfair to the complainant to exclude this period of time from any calculation, because of events which were out of her control.
>
> The Commission should bear some responsibility for its actions in this regard, as these actions had serious implications for both the complainant and respondent. However, a Tribunal's power to award damages under the Act is limited to making "an order against the person found to be engaging or to have engaged in the discriminatory practice . . ." (section 41(2)). (at pages 18 and 19, emphasis added)

Ms Ashley continues by stating that:

> While I am somewhat sympathetic to the employer's position on this issue as the delay was as much out of its control as the complainant's, I am opposed to the principle of excluding this time period from the calculations, for to do so would be to place the responsibility on the shoulders of the innocent party - the complainant. The two-year period leading up to the appointment of the Tribunal was a direct consequence of the discriminatory act of the respondent. Moreover, delays in litigation should not be beyond the contemplation of any parties to a dispute so as to affect the duration of the compensation award. (at page 19, emphasis added)

Similarly, the tribunal's decision in Morgan, reported in Case 10 CHRR, decision 950, paragraphs 45214 to 45302 and particularly paragraph 45247, states that:

> Normally, where an order for compensation for loss of wages is made, the compensation should continue up to the date of the commencement of the Tribunal Hearing. Different considerations should apply in this case. The Complainant did not file his Complaint with the Canadian Human Rights Commission until July 31, 1983 which is more than three years after the date upon which he was advised that his application for re-enrolment had been rejected. There is no limitation period for filing a complaint under the Act. Nevertheless, a substantial delay by the Complainant in pursuing a claim should be taken into account when assessing compensation for loss of wages and where there is an order that the Respondent offer the Complainant the first available position. Unless the delay is taken into account in these circumstances, theRespondent would be required to pay for the Complainant's services for an extended period of time without receiving the benefits of the Complainant's services. The Complainant must be allowed some time, after receiving the letter rejecting his application for re-enrolment, to consider his position, make inquiries and consult with advisors. I think that it is reasonable to expect the Complainant to have filed his complaint within one year.
>
> (Emphasis added.)

In the case at hand, the Complainant Lucie Chapdelaine, as mentioned earlier, filed a complaint in the year her application was rejected (Exhibit C-1), and consequently within the time limit prescribed by subsection 41(e) of the Act (new numbering). In the Complainant France Gravel's case, the evidence shows that she filed her complaint 15 months after the discriminatory act, which was three months late according to the time limit in subsection 41(e).

For all these reasons, the Review Tribunal considers unfounded in fact and in law the reason of "undue" delay put forward by Chairman Tingley in reducing the Complainants' claim.

Another reason given by Chairman Tingley for reducing to 40% the amounts claimed by the Complainants is "the possibility of lay-offs between 1980 and 1984."

The Review Tribunal is of the opinion that this reason is unfounded in fact and in law. No evidence to substantiate this was introduced at the Tribunal. If this reason could have had repercussions or if it justified reducing the damages claimed by the Complainants, it was the Respondent Air Canada's responsibility to prove that between 1980 and 1984, employees had been laid off and that, consequently, it was very likely that the Complainants would have been laid off because of the little seniority they would have had at that time.

Since no such evidence was adduced at the Tribunal, the error constitutes an error in law that can be reviewed by the Review Tribunal, as already decided in Kotyk and Allary v Canada Employment and Immigration Commission, Case 5 CHRR, D/339, February 1984, D/1895 and particularly paragraph 16276, where the Tribunal refers to a decision in Watt or Thomas v Thomas [1947] AC 484, at page 486, as follows:

> I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. . . . Apart from the classes of case in which the powers of the Court Appeal are limited to deciding a question of law . . . an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.

Finally, the last reason stated by Chairman Tingley for reducing the Complainants' claims is other unforeseeable events that occur in life ("aléas de la vie"). This last point made by Chairman Tingley in his argumentation is, in our opinion, one that cannot be ignored. "Aléa" is, by definition, an unforeseeable event, something that happens by chance.Is there, in the case at hand, any evidence to suggest that there are unforeseeable events?

In the Review Tribunal's opinion, certain facts point to the occurrence of unforeseeable events in this case. Exhibit C-9, a document entitled "Airline Pilot - Air Canada", dated April 1977, describes the basic skills, qualifications and previous training required to be considered for employment as an Air Canada pilot (Tingley Tribunal, page 22). The following paragraph from Exhibit C-9 states that:

Competition among candidates is expected to be very keen during the next few years. Preference is given to more experienced

pilots and those with minimum flying experience should have more advanced education.

However, the evidence shows that at the time they applied at Air Canada, the Complainants had little experience. Furthermore, as already pointed out, an "aléa" is an unforeseeable event. Therefore, even if the discriminatory act had not occurred and the Complainants had been hired by Air Canada, it is possible that between 1980 and 1984, they would have accepted a position with a competitor, for example. One might counter that this is pure speculation or conjecture, but is that not the very essence of "aléas de la vie"?

Called upon to comment on the Cashin case (June 14, 1990 decision already cited), counsel for the Commission admitted the following to the Review Tribunal (Vol. 4, page 623 of the stenographic notes, Review Tribunal hearing of August 23, 1990):

[translation]
Acting on the basis of so-called "aléas de la vie" and the pure exercise of discretion is a somewhat more sensitive issue. You are right in this respect. I think that it would have been better to justify more specifically the reasons for dismissing the claims, but in the Cashin case, you are right, the claim was reduced by a third by taking into account these possible "aléas de la vie", no more and no less.

To this statement must be added the broad discretionary powers granted to a human rights tribunal under paragraph 53(2)(c) which requires:

> . . . that the person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice.

(Emphasis added.)

Does the last argument put forward by Chairman Tingley as a reason for reducing the amounts claimed by the Complainants constitute in itself a reasonable ground for reducing their claims by 60%? As mentioned previously, the other reasons stated by Chairman Tingley for reducing the Complainants' loss of earnings cannot be allowed. In the Review Tribunal's opinion, only this last reason relating to "aléas de la vie" justifies reduction of the amounts claimed and therefore the Review Tribunal concludes that the Tribunal committed a manifest error in reducing that amount by 60%.

Accordingly, the Review Tribunal under section 56 of the Act is substituting its own opinion in this part of the Tribunal's judgment and ordering the Respondent Air Canada to pay 80% of the amounts claimed by the Complainants for financial damages.

The Review Tribunal will now establish the loss of earnings incurred by the Complainants, based on the evidence adduced at the Tribunal, in particular Exhibits C-7 and D-11, the testimony of the Complainants France Gravel

(Vol. 2, February 2, 1987 hearing, at page 76) and Lucie Chapdelaine (Vol. 3, February 3, 1987 hearing, at page 147), Exhibit D-9, the Review Tribunal's understanding of the figures used by Chairman Tingley in his October 22, 1987 judgment and the undisputed explanations provided by counsel for the Commission at the Review Tribunal on the first day of hearings held on August 29, 1988 (Vol. 1, Review Tribunal, at page 37 and following). The Review Tribunal establishes the loss of earnings incurred by the Complainant France Gravel, as a result of the discriminatory act of which she was a victim, at $65,928.11, and those of the Complainant Lucie Chapdelaine at $48,986.40. The calculations used to arrive at these figures are detailed below.

FRANCE GRAVEL

Based on Exhibits D-11 and C-7 where they concern France Gravel, for the compensation period (as it relates to the present case) established at March 1, 1979 to December 31, 1984 (the evidence having shown that as of 1985, the Complainants no longer suffered loss of earnings as such because of their employment with Nordair):

A) Based on Exhibit C-7, France Gravel's total income for 1979 =$ 13,054.00

For 1979, one sixth of this sum, or $2,175.67, must be considered income earned before the deemed date of hiring set by the Review Tribunal at March 1, 1979.

Based on Exhibit C-7, the Complainant France Gravel thus earned the following salary:

1979 (5/6 of $13,054) $ 10,878.33
1980 16,510.00
1981 19,595.00
1982 18,777.00
1983 20,118.00
1984 37,436.00

Total income earned by France Gravel from March 1, 1979 to December 31, 1984 $123,314.33

B) Based on Exhibit D-11 (average income of 22 pilots hired in 1978)

1979: 5/6 of $14,148.00 (deemed date of hiring - March 1, 1979) $ 11,790.00
1980 21,707.58
1981 33,299.97
1982 40,472.92
1983 42,228.50
1984 46,225.50

Total salaries based on Exhibit D-11 for the period in question $195,724.47

C) Total salaries based on Exhibit D-11 ($195,724.47) minus amount established based

on Exhibit C-7 ($123,314.33) $ 72,410.14

D) Total of C ($72,410.14) plus $10,000.00
(representing the benefits lost as allowed
by the parties) $ 82,410.14

E) Total of D ($82,410.14) X 20%
"aléas de la vie" 16,482.03

France Gravel's loss of earnings between
March 1, 1979 and December 31, 1984 65,928.11

LUCIE Chapdelaine

A) Declared salary according to her testimony
(page 147 of the stenographic notes, Vol. 3
of February 3, 1987).

Start of the compensation period, set by
the Review Tribunal at March 1, 1980

1980 (5/6 of $13,218.42) $ 11,015.35
1981 10,270.21
1982 7,803.01
1983 19,811.29
1984 31,617.82

Total income earned from
March 1, 1980 to December 31, 1984 $ 80,517.68

Note: Lucie Chapdelaine's declared salary for
1985 (see testimony of Vol. 3, February 3, 1987
hearing, at page 147) is higher than that earned
by an Air Canada pilot for this same year, according
to Exhibit D-9.

B) According to Exhibit D-9 (average salary earned
between 1980 and 1986 by 13 Air Canada pilots hired in January 1980)

1980 (5/6 of $13,098.84) $ 10,915.70
1981 $ 22,422.01
1982 29,570.92

1983 33,018.23
1984 35,823.82
Total salaries based on Exhibit D-9 for the
period in question $131,750.68

C) Total salaries based on Exhibit D-9 minus
Lucie Chapdelaine's declared salary
($131,750.68 - $80,517.68) $ 51,233.00

D) Total of C ($51,233.00) plus $10,000.00
(benefits lost as allowed by the parties) $ 61,233.00

E) Total of D ($61,233.00) x 20%
"aléas de la vie" $ 12,246.60
Lucie Chapdelaine's loss of earnings
from March 1, 1980 to December 31, 1984 $ 48,986.40

C) THE SENIORITY CLAIMS

The Complainants appealed the Tribunal's judgment mainly because it had concluded that it did not have the jurisdiction to make an order awarding pilot seniority to the Complainants, retroactive to the date of the discriminatory act. The Complainants argued that sections 52 and 53 of the Act give a human rights tribunal the power to make such an order by reason of the broad terms used. Based on this principle, they maintain that the Tribunal erred in law by refusing to exercise its jurisdiction, which justifies the Review Tribunal intervening. They cited in support of their argument Cashin v Canadian Broadcasting Corporation, [1988] 3 FC 494, where the Honourable MacGuigan J wrote the following:

In Dennis Brennan v The Queen as represented by the Treasury Board and Bonnie Robichaud, [1984] 2 FC 799 at 819 reversed by Bonnie Robichaud and the Canadian Human Rights Commission v Her Majesty the Queen, as represented by the Treasury Board, [1987] 2 SCR 84, 40 DLR (4th) 577, on other grounds, Thurlow CJ wrote for the majority of this Court:

It is no doubt true that in a situation of this kind where no evidence in addition to that before the Human Rights Tribunal was before the Review Tribunal the latter should, in accordance with the well-known principles adopted and applied in Stein et al v The Ship "Kathy K", [1976] 2 SCR 802; 62 DLR (3d) 1, accord due

respect for the view of the facts taken by the Human Rights Tribunal and, in particular, for the advantage of assessing credibility which he had in having seen and heard the witnesses. But, that said, it was still the duty of the Review Tribunal to examine the evidence and substitute its view of the facts if persuaded that there was palpable or manifest error in the view taken by the Human Rights Tribunal. (at page 500)

The Complainants, which include both the Canadian Human Rights Commission and the Complainants themselves through their counsel, maintain that a human rights tribunal has the jurisdiction to order Air Canada to offer the Complainants positions as pilots with the company at the first reasonable opportunity, with full seniority retroactive to the date of the discriminatory act of which the Respondent Air Canada is accused. The Complainants claim that the Tribunal erred in law when it declared that:

Even if the Tribunal has the jurisdiction to make such an order, and it does not think it has, it would be imprudent and perhaps detrimental . . . (at page 27)

Before examining the other reasons given by the Chairman of the Tribunal, which in his opinion militated against making such an order regardless of the question of jurisdiction, it must be determined whether a human rights tribunal has this power and jurisdiction and, if so, whether a review tribunal has the jurisdiction under section 55 of the Act to rescind the judgment of a tribunal.

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The powers of a review tribunal as set out in subsection 56(5) of the Act are as follows:

A Review Tribunal may dispose of an appeal under section 55 by dismissing it, or by allowing it and rendering the decision or making the order that, in its opinion, the Tribunal appealed against should have rendered or made.

Therefore a review tribunal has the power to substitute its own opinion if, in its view, the original tribunal's opinion reflects a manifest error in fact or in law in the assessment of the evidence. A review tribunal is all the more justified in intervening and substituting its opinion in the case of an error in law, where the original tribunal had the power to make an order concerning the seniority claimed by the Complainants.

In other words, for a tribunal to deny its own jurisdiction and power constitutes a jurisdictional error, which without a doubt enables a Review Tribunal to intervene.

Does the Canadian Human Rights Act allow the type of order sought by the Complainants from both the Tribunal and the Review Tribunal? Section 2 of the Act states that:

> The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that 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 race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction for an offence for which a pardon has been granted. 1976-77, c 33, s 2; 1980-81-82-83, c 143, ss 1, 28.

The powers of a human rights tribunal to make various orders at the conclusion of an inquiry are set out in subsection 53(2) of the Act:

> If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, it may, subject to subsection (4) and section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in that order any of the following terms that it considers appropriate:
>
> (a) that the person cease the discriminatory practice and, in order to prevent the same or a similar practice from occurring in the future, take measures, including . . . in consultation with the Commission on the general purposes of those measures;
>
> (b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, such rights,

> opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice;
>
> (c) that the person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of

and for any expenses incurred by the victim as a result of the discriminatory practice; . . .

(Emphasis added.)

Furthermore, subsection 53(4) states that:

If, at the conclusion of its inquiry into a complaint regarding discrimination based on a disability, the Tribunal finds that the complaint is substantiated but that the premises or facilities of the person found to be engaging or to have engaged in the discriminatory practice require adaptation to meet the needs of a person arising from such a disability, the Tribunal shall

(a) make such order pursuant to this section for that adaptation as it considers appropriate and as it is satisfied will not occasion costs or business inconvenience constituting undue hardship, or

(b) if the Tribunal considers that no such order can be made, make such recommendations as it considers appropriate,
and, in the event of such finding, the Tribunal shall not make an order unless required by this subsection. 1976-77, c 33, s 41; 1980-81-82-83, c 143, s 20.

As well, section 54 reads:

(1) Where a Tribunal finds that a complaint related to a discriminatory practice described in section 13 is substantiated, it may make only an order referred to in paragraph 53(2)(a).

(2) No order under subsection 53(2) may contain a term

(a) requiring the removal of an individual from a position if that individual accepted employment in that position in good faith; or

(b) requiring the expulsion of an occupant from any premises or accommodation, if that occupant obtained such premises or accommodation in good faith. 1976-77, c 33, s 42.

As can be observed from reading these sections of the Act, the powers vested in a human rights tribunal are broad, extensive and strong. In Action Travail des Femmes v Canadian National Railway Company et al, [1987] 1 SCR 1114 and Bonnie Robichaud v Her Majesty the Queen, [1987] 2 SCR 84 and following, the Supreme Court declares in powerful words the principles

that must serve as a guide when interpreting the Act, not only on questions of responsibility but also in terms of compensation to be awarded as a

result of a discriminatory act. In addition, the Honourable Dickson CJ wrote on page 1132 of the Action Travail des Femmes decision that:

> The real controversy relates solely to the legality of the remedial order issued by the Human Rights Tribunal.
>
> I do not think the answer to the question posed in this appeal will be found by applying strict grammatical construction to the last twelve words of s 41(2)(a). I say this for at least three reasons. First, such an approach renders meaningless the specific reference back to s 15(1) contained in s 41(2)(a). Section 15(1) of the Act is designed to save employment equity programmes from attack on the ground of "reverse discrimination". If s 41(2)(a) is read to limit the scope of such programmes, no effective mandatory employment equity programme could be undertaken in any circumstances, and the legislative protection offered to the principle of employment equity would be nullified. Second, in focusing solely upon the limited purposive aspect of s 41(2)(a) itself, the dominant purpose of the Canadian Human Rights Act is ignored. Yet, we are not left in the dark as to purpose of the Act as a whole. The drafters saw fit to include a specific statement of purpose in s 2 . . .
>
> Third, the case law of this Court, some of which postdates the judgment of the Federal Court of Appeal in the present proceedings, has a direct bearing on the outcome of this appeal. The Court has spoken on the proper interpretive attitude towards human rights codes and acts.
>
> . . .
>
> We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal Interpretation Act which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained.

He continued by saying:

The purposes of the Act would appear to be patently obvious, in light of the powerful language of s 2. In order to promote the goal of equal opportunity for each individual to achieve "the life that he or she is able and wishes to have", the Act seeks to prevent all "discriminatory practices" based, inter alia, on sex. It is the practice itself which is sought to be precluded. The purpose of the Act is not to punish wrongdoing but to prevent discrimination.

Further on, the Honourable Dickson CJ calls to mind the words of the Honourable McIntyre J in the unanimous Simpsons-Sears decision:

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It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed. The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment, ... and give it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary -- and it is for the courts to seek out its purpose and give it effect. The Code aims at the removal of discrimination. (at page 1136, emphasis added)

The same approach is taken in Bonnie Robichaud, [1987] 2 SCR 84, where the Supreme Court reiterates the manner in which the Canadian Human Rights Act is to be interpreted. The Honourable La Forest J wrote the following in this Supreme Court decision:

As McIntyre J, speaking for this Court, recently explained in Ontario Human Rights Commission and O'Malley v Simpsons Sears Ltd, [1985] 2 SCR 536, the Act must be so interpreted as to advance the broad policy considerations underlying it. That task should not be approached in a niggardly fashion but in a manner befitting the special nature of

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the legislation, which he described as "not quite constitutional"; see also Insurance Corporation of British Columbia v Heerspink, [1982] 2 SCR 145, per Lamer J, at pages 157-58. (at page 89)

He continues by saying:

> Any doubt that might exist on the point is completely removed by the nature of the remedies provided to effect the principles and policies set forth in the Act. This is all the more significant because the Act, we saw, is not aimed at determining fault or punishing conduct. It is remedial. Its aim is to identify and eliminate discrimination. If this is to be done, then the remedies must be effective, consistent with the "almost constitutional" nature of the rights protected. (at page 92)

(Emphasis added.)

Because of the Act's wording and the principles for interpreting it stated by the Supreme Court, and in order for the aims and purposes of the Act to be truly met, and considering as well the broad terms used in section 53 with respect to the remedial measures that a human rights tribunal may allow -- in particular, and without limiting the generality of the foregoing, the "rights, opportunities or privileges" referred to in paragraph 53(2)(b) -- it seems clear to the Review Tribunal that a human rights tribunal, in cases where it finds a complaint it is inquiring into to be substantiated, has the power and jurisdiction to take such remedial measures as make an order awarding seniority where a victim has been denied such seniority as a result of a discriminatory act.

The Complainants referred the Review Tribunal to various decisions granting seniority which were rendered by the human rights tribunal since the subject decision. The decisions cited include Edwin Erickson v Canadian Pacific Express and Transport Ltd (1987) 8 CHRR, D 3942, Bhinder v Canadian National (1981) 2 CHRR, D/546, rendered pursuant to the Canadian Human Rights Act, and other decisions arising from various provincial human rights laws, Hamlyn v Cominco Ltd (1990) 11 CHRR, D/333, Bhupinder Singh Dhaliwal v B C Timber Ltd (1983) 4 CHRR, D/1520, and Morley Rand v Sealy Eastern Limited (1982) 3 CHRR D/938.

Having thus concluded that a human rights tribunal has the jurisdiction and authority to award seniority, the other reasons cited by the Tribunal Chairman as militating, in his opinion, against such an order must be considered and analyzed.

One reason cited in Mr Tingley's judgment for his refusal to award seniority, his general jurisdiction aside, was that such an order would in this case affect a third party, CALPA, whereas Air Canada was the one accused of committing the discriminatory act.

The Tribunal wrote on page 25 of its judgment that:

It will be observed at once that the Tribunal may only make an order under sections 4 and 41 "against the person found to . . . have engaged in the discriminatory practice".

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The Tingley Tribunal therefore accepted the claim made by the Intervenant CALPA and the Respondent Air Canada that pilots employed by Air Canada might be affected if the Complainants were awarded positions as pilots with the company, with retroactive seniority, since such an order could be considered as being against them. The Tingley Tribunal cited in support of this Greyhound Lines of Canada Ltd et al v McCreary et al, 1986 CHRR, Case 7, paragraphs 25911-25959, at paragraph 25953.

With respect for the opinion to the contrary, we are of the view that such a conclusion cannot be upheld. In effect, the Complainants have asked that the Respondent Air Canada be ordered to offer them a position at the first reasonable opportunity, without laying off at some future point the two pilots at the bottom of the seniority list negotiated between the Respondent Air Canada and CALPA. Further, in Bhinder v Canadian National Railway Co, [1985] 2 SCR 561, the Honourable McIntyre J wrote for the Supreme Court that:

It was said in Etobicoke that the rule under the Ontario Human Rights Code was non-discrimination, while the exception was discrimination. This is equally true of the Canadian Human Rights Act. The tribunal was of the opinion that a liberal interpretation should be applied to the provisions prohibiting discrimination and a narrow interpretation to the exceptions. (at page 589, emphasis added)

In accordance with this decision, then, all the exceptions that would contradict the effects and orders of a human rights tribunal in connection with section 53 of the Act should be interpreted narrowly. The broad, liberal terms used in paragraph 53(2)(b) -- "rights, opportunities or privileges" -- undoubtedly refer in this case to a place on a seniority list and consequently a place on a seniority list does not constitute a position within the meaning of paragraph 54(2)(b). In our view, a place on a seniority list does not constitute a "position" within the meaning of paragraph 54(2)(a), although the positions of several pilots on the list in question could be affected if an order awarding positions as pilots to the Complainants at the first reasonable opportunity were issued against the Respondent Air Canada, with the additional stipulation that seniority be granted retroactive to the date of the discriminatory act.

Another reason cited by the Tingley Tribunal for its refusal to make an order granting seniority is that "such an order would necessarily interfere with the contractual and bargaining rights and obligations of CALPA and its pilot members on the one hand and of CALPA and the Respondent on the other hand" (page 26 of the Tingley Tribunal judgment).

Aside from the argument put forward to this effect at the Review Tribunal by CALPA and the Respondent Air Canada, no evidence, such as proof of lay-offs, dismissals or other, was introduced at the Tribunal to substantiate this claim.

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Moreover, such a claim scorns the principle established by the Supreme Court in Bhinder v Canadian National Railway Company, [1985] 2 SCR 561, where the Honourable Dickson J wrote:

In effect, the tribunal held that federal legislation is inoperative to the extent it conflicts with the Canadian Human Rights Act.

The tribunal was, in my view, correct in coming to that conclusion. In Winnipeg School Division v Craton, [1985] 2 SCR 150, this Court came to a similar conclusion with respect to a provision concerning mandatory retirement. Justice McIntyre, writing for the Court, said (at page 156):

Section 50 of the Public Schools Act 1980 cannot be considered a later enactment having the effect of creating an exception to the provisions of s 6(1) of the Human Rights Act.

In any event, I am in agreement with Monnin CJM where he said:

Human rights legislation is public and fundamental law of general application. If there is a conflict between this fundamental law and other specific legislation, unless an exception is created, the human rights legislation must govern.

This is in accordance with the views expressed by Lamer J in Insurance Corporation of British Columbia v Robert C Heerspink and Director, Human Rights Code, [1982] 2 SCR 145. Human rights legislation is of a special nature and declares public policy regarding matters of general concern.

It is not constitutional in nature in the sense that it may not be altered, or amended, or repealed by the legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement. (at page 574, emphasis added)

Here, the Supreme Court reiterates the principle that the Canadian Human Rights Act takes precedence over any other legislation. A fortiori, it must also have precedence over contractual relations.

The Tribunal stated on page 26 of its judgment that:

To the extent that CALPA and its pilot members are adversely affected, such an order may be said to be against them (semble, Greyhound Lines of Canada Limited et al vs McCreary et al, 1986 CHRR, Case 7, paragraphs 25911-25959 at paragraph 25953).

As already pointed out, the Respondent Air Canada refused not an employment opportunity but employment. Therefore, this reference to the Greyhound

decision is irrelevant. The paragraph referred to in the Greyhound case by Chairman Tingley is the following:

There is an essential fallacy to this point of view. Mr McCreary's application to the training opportunity, not a job, was denied. It would be beyond the jurisdiction of the Review Tribunal and the original Tribunal to restore to Mr McCreary an opportunity he had not yet won. Mr McCreary was denied the opportunity to enter and pass the Eastern Canadian Greyhound Lines Ltd training program. That right was restored to him in the order of Mr Kerr and will not be enlarged by this Review Tribunal.

The facts of this case are thus different from those of the Greyhound Lines Ltd case.

Moreover, as the Review Tribunal has already pointed out, any exception to the Canadian Human Rights Act must be interpreted narrowly, and the Act in the context of human rights must have precedence over all other legislation (except where deliberate and explicit exceptions are made). This is all the more true for contractual matters.

Since the Tribunal had the jurisdiction to make an order providing for the Complainants to be hired by Air Canada because they had been deprived of employment and not an employment opportunity, and since the Canadian Human Rights Act gives a tribunal the power and jurisdiction to make orders granting seniority to victims of discrimination who are denied seniority as a result of an unlawful discriminatory act, it must now be determined whether it would be appropriate to grant seniority in this case.

Chairman Tingley wrote on pages 26 and 27 of the Tribunal's judgment that:

> The question of jurisdiction aside, factors such as the passage of time, the different equipment used by the Respondent compared to Nordair, the different training techniques adopted by different airlines, the time it would necessarily take to familiarize the Complainants with the Respondent's procedures and equipment and generally to integrate them into the Air Canada system, all militate against the granting of an order to rehire with seniority retroactive to the dates of the discriminatory acts.

(Emphasis added.)

Counsel for the Complainants argued before the Review Tribunal that these reasons were clearly unreasonable in light of the evidence. Moreover, counsel for the Complainants Gravel and Chapdelaine pointed out to the Review Tribunal that these reasons were restrictive, in that they prevented the Review Tribunal from adding to them or substituting other reasons for those given by the Tingley Tribunal.

With respect, we cannot subscribe to this last argument, because of the Kathy K decision cited previously and referred to by MacGuigan J in Cashin, [1988] 3 FC 494 and in particular at page 500. Without taking too strong a stand on the reasons cited by the Tingley Tribunal and claimed by the

Complainants to be unsubstantiated in fact and in law, we feel that the seniority order sought by the Complainants is not an appropriate remedy or measure in view of all the current circumstances of the case and the principles stated in the legal precedents, in particular the September 14, 1990 decision of the review tribunal in Canadian Armed Forces and Canadian Human Rights Commission and Morgan, reported in TD 10/90.

The Review Tribunal has already concluded that the act of which the Respondent Air Canada has been accused by the Complainants deprived them of

positions as pilots with this company, not simply the possibility of employment. Therefore, in accordance with the powers granted to a human rights tribunal under section 53 and in particular paragraph 53(2)(b) of the Act, the Tribunal had the discretionary power to order that the Complainants be hired or reinstated. The Review Tribunal has the same power, granted to it by subsection 56(5):

A Review Tribunal may dispose of an appeal under section 55 by dismissing it, or by allowing it and rendering the decision or making the order that, in its opinion, the Tribunal appealed against should have rendered or made.

The power to order integration or reinstatement has already been recognized extensively in case law, as can be seen by referring to the non-exhaustive list produced to this effect at the Review Tribunal by counsel for the Commission. As pointed out earlier, a human rights tribunal also has the power and jurisdiction to make an order allowing, where circumstances permit, the rights, opportunities or privileges which in its opinion have been denied the victim of a discriminatory act. These rights, opportunities and privileges certainly include seniority.

Do the order to integrate the Complainants and an order awarding seniority retroactive to the discriminatory act in this case constitute orders which circumstances permit? Are the circumstances appropriate for making such orders?

With respect to the order to the Respondent Air Canada to include the Complainants among its pilots, we agree with the following comments made by Chairman Tingley at page 27 of his October 23, 1987 decision:

As mentioned above (at page 12), the Tribunal is satisfied that neither Complainant will accept employment with the Respondent unless retroactive seniority rights are included.

This conclusion is widely supported by the testimony of the Complainants France Gravel (Vol. 2 of the February 2, 1987 hearing, at page 81) and Lucie Chapdelaine (Vol. 3 of the February 3, 1987 hearing, and particularly pages 147 and 148 of the stenographic notes).

Chairman Tingley's conclusion that the Complainants would refuse employment with the Respondent Air Canada unless the order included seniority retroactive to the date of the discriminatory act was also confirmed by counsel for the Commission at a hearing held by the Review Tribunal

(Vol. 6, September 18, 1990 hearing, and particularly pages 914 and 915 of the stenographic notes).

These findings by the original Tribunal justified its not ordering as part of its judgment that the Complainants be offered positions as pilots at the first reasonable opportunity. As a result, the Review Tribunal does not intend to give further consideration to the Complainants' argument contained in paragraph 1 of subparagraph (i) of their notice of appeal of December 2, 1987, unless it concludes that the seniority claim made by them in that paragraph is to be granted them.

The essential question is whether the circumstances of this case justify and permit an order awarding seniority.

In this regard, the Review Tribunal endorses the opinion of Chairman Norman Fetterly (minority decision on the question of compensation and loss of earnings) in Canadian Armed Forces and Canadian Human Rights Commission and Morgan, particularly where it is stated that:

> It is important to emphasize that subsections (a) and (b) are discretionary and, as I read them, are not mutually exclusive or dependent on each other. In other words the Act does not restrict the Tribunal in any way in the exercise of its discretion. It may order one or the other or both of the remedies provided in those sections depending on the circumstances of the case. To illustrate my point and by way of contrast, where a plaintiff seeks specific performance of a contract the court may deny that relief but allow an alternative claim for damages. It rarely, if ever, orders both. Where damages are awarded the principle of "restitutio in integrum" is invoked and applied. (at page 66, emphasis added)

. . .

In Rosanna Torres v Royalty Kitchenware Limited et al (1982) 3, CHRR D/858 (Ontario Human Rights Tribunal), Professor Cummings examined the development of human rights legislation and the decisions of boards of inquiry in Canada in great depth. An analysis of the decision in Butterill, Foreman et al v Via Rail Canada 1 CHRR D/233 (Review Tribunal) and Albermarle Paper Co v Moody, 422 US 405, 45 LEd (2d) 280, (1975) leads him to conclude that "compensatory awards should not be completely discretionary" - see paragraph 7720.

When commenting on reinstatement, on the other hand, he states:

Another type of order that is sometimes made so as to effect "full compliance" (or to "rectify any injury") is reinstatement of an employee who has been discriminatorily dismissed. Such orders are, for obvious reasons, rarely made, yet they are appropriate in some cases where immediate, substantive compliance is desired.

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From these comments I take it that compensation should follow more or less as a matter of course where there is a finding of discrimination. On the other hand, re-instatement is a purely discretionary remedy, rarely made and only if, in the opinion of the Tribunal, it is appropriate. (at page 67, emphasis added)

The Tingley Tribunal, for its part, felt that an order to hire the Complainants with seniority retroactive to the discriminatory act was not appropriate in this case, as indicated on page 26 of its judgment. It indicated only some factors ("factors such as"), which in the view of the Review Tribunal are not at all restrictive or exhaustive.

Without presenting an opinion on the reasons cited by the Tingley Tribunal, the Review Tribunal feels, on reading the stenographic notes from the Tribunal and based on the human rights case law established since the Tribunal's decision, that other reasons quite justified the Tribunal's refusal to grant the seniority sought by the Complainants.

First, since the time of the discriminatory act committed by the Respondent Air Canada in 1979 and 1980, the Complainants were able to carry out their "career plan" of becoming airline pilots. Not only did they become pilots, but they worked as of 1983 for a competitor of the Respondent, namely Nordair, which later became Canadian Airlines. In addition, between 1983 and February 2, 1987, when she testified before the Tribunal, the Complainant France Gravel became first officer on a Boeing 737 for Canadian Pacific (page 49 of France Gravel's testimony, Vol. 2 of the stenographic notes from the Tribunal's February 2, 1987 hearing). The Complainant Lucie Chapdelaine was hired by Nordair in 1983 and also became a first officer for Canadian Pacific on a Boeing 737 between that year and February 3, 1987 (see her testimony, Vol. 3 of the Tribunal's February 3, 1987 hearing, at page 136). Since the time of the discriminatory act committed against them by Air Canada, the Complainants fulfilled their dream of becoming pilots and obtained similar positions. This is different from the Morgan case where, despite his efforts, the Complainant could not find employment similar to that sought in the Canadian Armed Forces, such

that he was unable to realize his career plan which essentially involved becoming a member of the Canadian Armed Forces.

The evidence produced at the Tribunal revealed not only that the Complainants fulfilled their dream of becoming pilots, as of 1983 at least, but also that they acquired seniority from January of that year with Nordair, subsequently Canadian Pacific, such that today they enjoy at least seven years of seniority with the successor company. As of 1983, therefore, the Complainants ceased to be denied the "rights, opportunities or privileges" of which they were deprived as a result of the discriminatory act.

On this matter, the Review Tribunal adopts as its own the minority opinion of Mr Fetterly as stated in the Morgan decision:

Apart from awards for damages where the victim suffers physical or mental impairment of a permanent nature, as in personal injury

claims, a point is reached, it seems to me, where reason requires that the target of a discriminatory act become responsible for his or her well-being and when the duty to mitigate overrides other considerations. This really is the other side of the coin which holds that the responsible party is accountable only for such part of the loss as is reasonably foreseeable by a reasonable person who has directed his mind to it. The application of this principle need not and should not diminish the remedial nature of the legislation or defeat its intent. (at pages 80 and 81, emphasis added)

It is true that Mr Fetterly's opinion in the Morgan case is the minority opinion and moreover, that this passage was rendered in the part of the decision relating to compensation for loss of earnings. However, the Review Tribunal is of the view that it concerns a circumstance militating in favour of refusing to grant seniority in this case. In effect, the Review Tribunal feels that the effect(s) of a discriminatory act must cease at some point. As counsel for the Commission said at the Review Tribunal (page 900 of the stenographic notes):

[translation]
Therefore, there comes a point at which, life being what it is, you cannot continue forever to feel sorry for a particular situation; life goes on, and you pick up the pieces. No matter

how serious the setback, you cannot go on suffering all your life.

Of course, you can suffer for a long time, because the damage can be very great. It comes down to the facts of the case. The damage in monetary terms can be calculated; what one had and what one would have had, and so on, but I think that the consequences of a discriminatory act must end some day. At least, that is what the Review Tribunal is telling us. It is a matter of facts, a question of circumstance and of the seriousness of the damage, and it is up to the tribunal to assess the events and determine at what point the victim is considered to be back on his feet or when that should have happened, at which time the consequences -- the compensable consequences, if you will -- are considered to have ceased.

(Emphasis added.)

Another circumstance that militates in favour of the refusal to grant seniority is, to some extent, the impossibility or rather the arbitrariness of determining the place that the Complainants would have had on Air Canada's seniority list, were it not for the discriminatory act committed against them. On page 14 of its judgment, the Tingley Tribunal evaluated France Gravel's position at "about" 1,377 if she had been hired the day her application was rejected. Lucie Chapdelaine would have placed "about" 1,684 on Air Canada's seniority list on October 26, 1979, when her application was rejected. The use of the word "about" clearly shows that

these two placements are arbitrary and, moreover, uncertain. They are all the more arbitrary in that, as Captain Pigeon said in his testimony, the determination of a position of seniority is made at the time the applicants pass their training exams, such that if several applicants pass this stage together, their place on the list is determined by the results of their exam. The Complainants never passed this stage, which could have enabled the Review Tribunal to make a more "realistic" determination of their place on the seniority list. Since they did not pass this stage, assigning them a place on the seniority list would be an arbitrary act, especially since Exhibit I-3 clearly shows that while a number of applicants passed the training exam on the same day, they do not occupy the same place on the seniority list.

Another circumstance that in the Review Tribunal's view does not justify assigning (each of) the Complainants a position on the Respondent

Air Canada's seniority list is the following excerpt from Captain Pigeon's testimony (Vol. 4 of the stenographic notes from the Tribunal hearing of February 4, 1987, at pages 208 and 209):

Q: I show you Exhibits I-3, the Air Canada pilots' system seniority list. Could you indicate on that list to the best of your knowledge the position presently occupied by those pilots who were hired back in 1979, if I understand your testimony, up to the Spring of '80, during that hiring programme?

A: Well, bear in mind, as I indicated earlier, that the hiring programme ran from 1978 to 1980.

Q: Okay. I'm sorry.

A: And to testify to the position or positions held by the various pilots who were hired in that 525 group would be very difficult because some of the people who were hired early are of necessity reasonably senior and they could be holding a multitude of positions or, you know, amongst the group, that I really could not talk to with any definition.

Some of them might be first officers and some of the very early people, the vast majority of the last group, the last I might say 150 pilots certainly are all second officers still to this day, maybe more, but some of the very early ones are probably first officers and if I just look at this, with my knowledge, you know, the knowledge of some of the people, I may be able to spot the odd one who is first officer.

Q: If you were to take in that search for instance somebody who would have been hired in January of 1980, where would that individual be on the list at this time?

A: A person who was hired in January of 1980 would be in the last . . . well, he certainly would be a second officer, most likely still on the 727, possibly if he would be based in

Toronto, a DC-8 second officer, but most certainly still a second officer.

As I look through the earlier part of the group in 1978, '79, I see several names who certainly are first officers today, but that's a function of seniority again."

(Emphasis added.)

From this testimony, it is highly likely that, had the Complainants been hired in the absence of the discriminatory act of which the Respondent Air Canada is accused, they would be in about the same situation as at the time of the Tribunal hearing in February 1987: that of first officer on a Boeing 737. It is even possible and probable that they are both now in a better position than they would have been in if they had been hired during the periods concerned, since they were both first officers on a Boeing 737 in 1987, whereas according to Captain Pigeon's testimony, many of the candidates selected during the periods in question were still only second officers with Air Canada in 1987.

Another circumstance making it inappropriate to make an order granting seniority to the Complainants is their refusal to accept the position offered by the Respondent Air Canada in 1985, and in particular the letter which the Complainant Lucie Chapdelaine sent to Captain Pigeon, filed as Exhibit D-8, in which she declined the offer of employment even though at that time she had passed another stage of the employment process. The Complainant France Gravel did not submit to an interview with Air Canada in 1985 since, according to her testimony, she did not receive the invitation until the middle of the week during which Air Canada interviewed potential candidates. Ms Gravel not only received the invitation too late, but she was also before the Canadian Human Rights Commission at that time in connection with her complaint, and therefore did not see fit to act on the invitation (France Gravel's testimony, pages 102 and following of the stenographic notes from the Tribunal, Vol. 3, February 3, 1987).

The sole purpose of this digression is to show that the Review Tribunal feels that the Complainants should have mitigated their losses. They could have accepted the position that the Respondent Air Canada offered them in 1985, while keeping their right to an order for seniority retroactive to the date of the discriminatory act committed against each of them. The Review Tribunal has difficulty granting the Complainants retroactive seniority of more than ten years, when they did not see fit to mitigate their loss of seniority by accepting the position offered in 1985 while retaining the right to argue the matter before the Human Rights Tribunal. This is what was done a contrario in Cinq-mars v Les Transports Provost Inc (Case 9, CHRR, May 1988, D/4704), where the employer, in an obvious effort to minimize the damages that he could see himself being ordered to pay the victim of the discriminatory act, hired the Complainant while continuing to

claim that the refusal to hire the Complainant had been based on a bona fide occupational requirement.

Another reason for which the Review Tribunal feels that it would not be appropriate to grant seniority is the criterion of "reasonable foreseeability" that must be considered as a limit on the damages allowed.

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This criterion has been upheld by case law on many occasions and in particular in Cashin v Canadian Broadcasting Corporation (decision of June 14, 1990, TD 7/90), Attorney General of Canada v McAlpine, [1989] 3 FC 530, Hinds v Canada Employment and Immigration Commission (1988) 10 CHRR D/864, and in the minority opinion of Chairman Fetterly in Canadian Armed Forces and Canadian Human Rights Commission and Morgan (op cit, at pages 78 and 79).

For all the above reasons, we feel that an order requiring the Respondent Air Canada to grant the Complainants seniority retroactive to the date of the discriminatory act committed against them is not an appropriate measure in this case. The Tribunal's decision not to make such an order is thus confirmed.

In concluding on the question of seniority, the Complainants asked the Review Tribunal to award them "monetary" compensation in the event it found that seniority did not constitute an appropriate remedy in this case, even though they would be entitled to it under other circumstances.

In the Review Tribunal's opinion, it is possible to assign a monetary value to seniority, except that in this case, for two reasons, the question does not arise.

First, an overall amount of $10,000 was arbitrarily set by the parties at the Tribunal as equivalent to the Complainants' loss of benefits, which themselves stem in large part from seniority. Second, the Complainants' dream of being pilots for Air Canada has to some extent been fulfilled, since they have become pilots for a very prestigious company which is also Air Canada's main competitor, namely Canadian Airlines. At the time of the Tribunal hearing, the Complainants were probably more advanced professionally than they would have been had they been with Air Canada, absent the discriminatory act (according to Captain Pigeon's testimony referred to earlier). Furthermore, both the testimonial and documentary evidence shows that as of 1985, the Complainants were earning more with their current employer (Exhibits D-9, D-11 and C-7 and the testimony of

Lucie Chapdelaine, Vol. 3, hearing of February 3, 1987, at page 147).

D) THE MORAL CLAIMS

While the Complainants Lucie Chapdelaine and France Gravel did not mention specifically in their notice of appeal that they were appealing the part of the Tingley Tribunal's judgment on the amount awarded for moral claims, they asked the Review Tribunal to increase the amount of $1,000 awarded by Chairman Tingley to the maximum provided for under subsection 53(3) of the Act, namely $5,000. Counsel for the Respondent Air Canada objected to all arguments put forward on this matter, on the ground that the notice of appeal did not make any reference to this aspect. Nevertheless, this objection was taken under advisement, since in the Review Tribunal's view, paragraph 2 of the notice of appeal of December 2, 1987 was sufficiently worded to include this claim. This paragraph reads as follows:

[translation]

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The tribunal erred in fact and in law reducing the claims for loss of earnings, and the claims for other expenses incurred as a result of the discriminatory act.

(Emphasis added.)

The Respondent Air Canada also claimed that since there was no specific reference to moral damages in the notice of appeal, any arguments in this regard took it by surprise. The Review Tribunal assured the Respondent Air Canada that the time required to argue this ground would be allotted to it if need be.

As expressed at the hearings, the Review Tribunal is of the view that a tribunal appointed under the Canadian Human Rights Act must not be weighed down by formalism (notice of appeal) to the extent that the purpose and aim of the Act, offsetting and remedying the consequences of a discriminatory act, would be obstructed. According to the Supreme Court, this is the objective that must be sought in interpreting a given law, as stated by La Forest J in Robichaud (op cit, at page 92):

If this is to be done, then the remedies must be effective, consistent with the "almost constitutional" nature of the rights protected.

Furthermore, the Review Tribunal feels that, in general, there are almost no written procedures for use by a human rights tribunal. As far as possible, there is no cause to limit debate by the parties on an important point because of a "deficiency" in the notice of appeal. Notwithstanding this, the Review Tribunal, not sitting de novo, must restrict the arguments of the parties to the evidence presented at the Tribunal on the matter of moral claims.

For these reasons, the Respondent's objection to arguments by the Complainants at the Review Tribunal on the matter of moral claims cannot be sustained. Having said this, and based on the evidence adduced at the Tribunal hearings, was a manifest and palpable error committed by the Tribunal in the amount awarded for moral claims?

It should be remembered that a review tribunal must intervene in a tribunal decision only when, in its opinion, the tribunal clearly erred unreasonably. As so often reiterated in case law, respect should be shown for the opinion of the person(s) who had the opportunity to hear the evidence and assess the credibility of the various witnesses at the tribunal.

During the pleadings before the Review Tribunal, counsel for the Complainants, commenting on the Tingley Tribunal judgment as it relates to moral claims awarded on page 27, maintained the following (pages 429 and following of the stenographic notes from the Review Tribunal, Vol. 3, August 22, 1990 hearing):
[translation]

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I therefore submit to you that the Tribunal, if I understand its position correctly, might normally have awarded no damages under this aspect, had counsel for Air Canada not offered $1,000 to each complainant.

As for the reasons cited to justify the Tribunal's position, I have just read them in this document. I think that one can at times use arguments and facts -- which I would not say are insignificant, but I will say so anyway -- but I mean they can nevertheless be used in relation to facts that have some importance . . .

Counsel for the Commission had asked the Tribunal (Vol. 1 of the January 15, 1987 hearing and in particular at pages 6 and 7) to award $3,000 in moral damages, and requested an amendment to this effect in the

conclusions of their November 21, 1986 declaration. The Review Tribunal does not intend to substitute its opinion regarding the $1,000 awarded by the Tribunal for moral damages, since in its view the grounds put forward by the Tingley Tribunal, which as stated earlier had the opportunity to hear the witnesses and evaluate their credibility, definitely do not reflect a manifest error in fact where compensation for moral damages is concerned.

However, the Review Tribunal will permit itself to make explicit the reasons given by the Tingley Tribunal. First, with respect to the Complainants' knowledge of the Respondent Air Canada's height requirement, the following passage from France Gravel's testimony (Vol. 2 of the stenographic notes from the Tribunal hearing of February 2, 1987, at page 71) is worth noting:
[translation]

Q. Ms Gravel, could you explain how it is that you grew two inches within two years?

A. Well, I was aware that Air Canada had a height requirement, but it didn't stop me, because I told myself that if I indicated my actual height at that time, I would not have the right to what they call an interview with Air Canada. The only way to change the standard is to go and explain. Therefore, on the second occasion I put 5'7" because I thought that was Air Canada's height requirement . . .

(Emphasis added.)

The evidence shows that Ms Gravel submitted an application in 1976 and a second one, that referred to above, in 1978. The evidence also shows that it is in relation to the second application, the one submitted in 1978, that she filed a complaint with the Commission after the Respondent Air Canada refused to consider her application (Exhibit C-1). Exhibit C-9 entitled "Air line pilot Air Canada", dated April 1977, shows that a basic

requirement of Air Canada's policy at that time was that the candidate be at least 5'6" tall.

From this evidence, Chairman Tingley was quite justified in writing that "both therefore took a calculated risk in applying for a position with the Respondent" (at page 27). It therefore appears to the Review Tribunal that the "humiliation" which the Complainants feel they were caused and their

surprise at receiving a letter of refusal from Air Canada (Exhibits C-1 and C-2) definitely do not justify awarding $5,000 in moral claims. Moreover, the Review Tribunal feels that the humiliation they felt is not so great, given the complaint filed by France Gravel on February 26, 1980 (Exhibit C-3), wherein she indicates at the bottom that she would like her complaint to remain anonymous.

How can someone say they have been greatly humiliated and still ask that his or her complaint remain anonymous? Of course, we suppose that the Complainants were humiliated by Air Canada's decision not to consider their applications for employment, but surely not enough to justify $5,000 in compensation, since again, they knew or should have known Air Canada's requirements.

Counsel for the Complainants even claimed at the Review Tribunal (at page 284 and 285, Vol. 2 of the August 21, 1990 hearing) that one of the reasons cited by Chairman Tingley for not awarding seniority in itself was justification for the Review Tribunal to increase the amount awarded for moral damages. The Complainants referred to the following passage from page 27 of the judgment:

> Even if the Tribunal has the jurisdiction to make such an order, and it does not think it has, it would be imprudent and perhaps detrimental to the safety of the Complainants and the general public to make such an order in all the circumstances of this case.

This "public safety" argument would thus constitute a ground for increasing the compensation for moral damages.

In our view, this argument cannot be sustained in fact or in law. On the one hand, it is not at all related to the discriminatory act of which Air Canada is accused, and on the other, it was cited by Chairman Tingley in refusing to make an order granting seniority. Furthermore, the Tribunal judgment made various remedial orders to the Complainants' benefit since it felt their complaints to be substantiated.

Therefore, for all the above reasons, the Review Tribunal will not intervene in the moral damages awarded the Complainants, except to add an order in this regard to the conclusion of its decision, since it is not among the orders made by the Tingley Tribunal at the conclusion of its judgment.

E) INTEREST AND REQUEST FOR SUSPENSION OF INTEREST

a) The claim regarding interest

The Complainants France Gravel and Lucie Chapdelaine, through their counsel, asked the Review Tribunal to modify the Tribunal's judgment with respect to the date on which the calculation of interest was to begin on the amounts awarded by the Tingley Tribunal, established at April 16, 1986, the date it was appointed.

The Complainants referred to a number of decisions to support their argument. Their study shows that there are still no established precedents regarding the date on which interest calculation is to begin. Nor is there an established rate of interest to be applied.

In DeJager 8 CHRR, decision 629, 1987, D/3963, and particularly paragraph 31398, where the amount awarded by the Tribunal did not include any interest, this conclusion is in no way justified.

In Boucher 9 CHRR, June 1988, decision 766, T/4910 and particularly in conclusion 6 of paragraph 37915, interest was to begin on the date that the Tribunal was appointed and accrue at the prime rate of Canadian chartered banks (conclusion similar to that of the Tingley Tribunal).

In Cameron 5 CHRR, decision 371, 1984, D/2170 and in particular paragraph 18565, the date chosen was the date on which the complaint was made known to the party that had committed the discriminatory act, and the rate was set according to the interest rate established by the Bank of Canada at the time.

In Kearns 1989, 10 CHRR, D/5700, interest was to begin on the date the discriminatory act occurred and accrue at the rate set by the Clerk of the British Columbia Supreme Court.

In the Morgan (Review Tribunal) decision of September 14, 1990, TD 10/90, the interest rate was set according to the variable rate for Canada Savings Bonds. The date the interest was to begin varies depending on whether the point of view of the majority decision or that of the minority decision is adopted.

Since there is still no established case law for the point at which calculation of interest should begin or for the applicable interest rate, and even though it is possible to conclude that a different rate and starting date than those chosen by Chairman Tingley in this case would be more appropriate, the Review Tribunal cannot conclude that there was

"palpable and manifest error" in the starting date and interest rate used by the Tribunal. On this point, therefore, the Tribunal's conclusions are confirmed and the Complainants' request dismissed.

b) Request for suspension of interest

The request for suspension of interest made by the Respondent Air Canada was based mainly on the delays incurred since the discriminatory act took place: the hearing delays, the delays caused by the Complainants' appeal to

the Federal Court of the preliminary judgment rendered on November 14, 1988 and possibly those resulting from an appeal of the Review Tribunal's decision, and finally, on the lack of an awarding mechanism in the Canadian Human Rights Act.

The Review Tribunal is of the opinion that this request should be dismissed, because on the one hand, the Respondent Air Canada committed the discriminatory act in question and the delays in the case are direct consequences of this act. Ms Ashley wrote in Cashin (June 14, 1990 decision, TD 7/90):

> . . . delays in litigation should not be beyond the contemplation of any parties to a dispute so as to affect the duration of the compensation award. (at page 20, emphasis added)

This applies even more to interest, in the Review Tribunal's opinion, since interest is associated with principal, or the amount of compensation awarded.

The right to appeal is clearly a recognized right of each party to a case. In the Cashin decision, Ms Ashley writes that:

> Obviously, each party has a right to pursue their claim through the courts. (at page 20)

For these reasons, the request to suspend interest is dismissed.

IV ORDERS

For all the reasons given in this decision, and in accordance with subsection 56(5) of the Canadian Human Rights Act, the Review Tribunal confirms in part the Tribunal's judgment on the following points:

The Review Tribunal:

DECLARES that the Complainants' complaints are substantiated;
DECLARES that the Respondent engaged in discriminatory practices in that it refused to employ the Complainants on a prohibited ground of discrimination, namely sex;

CONFIRMS the Tribunal's decision not to grant seniority to the Complainants retroactive to the discriminatory act, since this remedy is inappropriate in this case; ADDS to the provisions of the Tribunal judgment orders relating to compensation for moral damages as follows:

ORDERS the Respondent Air Canada to pay the Complainant France Gravel $1,000 for moral damages;
ORDERS the Respondent Air Canada to pay the Complainant Lucie Chapdelaine $1,000 for moral damages.

ALLOWS in part the appeal lodged by the Complainants with respect to the compensation for loss of earnings and consequently the Review Tribunal:

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ORDERS the Respondent Air Canada to pay the Complainant France Gravel $65,928.11 and the Complainant Lucie Chapdelaine $48,986.40 with interest calculated as of the date the Tribunal was appointed, namely April 16, 1986, at the prime rate of interest offered by the Respondent Air Canada's principal bankers.

Signed at Quebec City this 5th day of December 1990
[sgd]
MAURICE BERNATCHEZ, Chairman

Signed at Montreal this 3rd day of December 1990.
[sgd]
MARIA DOMARADZKI, Member

Signed at Trois-Rivières this 30th day of November 1990.
[sgd]
DEMAGNA KOFFI, Member

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BEFORE: Maurice Bernatchez
Maria Domaradzki
Demagna Koffi

BETWEEN:

FRANCE GRAVEL

LUCIE CHAPDELAINE

CANADIAN HUMAN RIGHTS COMMISSION

Appellants

- and -

AIR CANADA

Respondent

- and -

CANADIAN AIR LINES PILOTS' ASSOCIATION

Intervenor

WHEREAS the President of the Human Rights Tribunal Panel appointed a new Review Tribunal on June 14, 1991 composed of Maurice Bernatchez, Maria Domaradzki, and Demagna Koffi to hear the appeal of France Gravel, Lucie Chapdelaine, and the Canadian Human Rights Commission dated December 2, 1987;

WHEREAS a conference call was held on June 14, 1991 between the members of the said Review Tribunal and the following parties:

Diane Brais, Counsel for the Complainants/Appellants;
France Gravel, Complainant/Appellant
Lucie Chapdelaine, Complainant/Appellant;
Louise-Hélène Sénécal, Counsel for the Respondent;
John Keenan, Counsel for the Intervenor;
René Duval, Counsel for the Commission/Appellant;

WHEREAS all parties consented to the said Review Tribunal adopting the official record of the hearings held before the Review Tribunal on August 21, 22, 23, 1990 and September 17, 18, 1990 concerning this appeal;

THEREFORE this Review Tribunal confirms and adopts the decision signed on December 5, 1990 as its decision in this matter.

DATED THIS 17th day of June, 1991.

(sgd)
Maurice Bernatchez, Chairman

DATED THIS 19th day of June, 1991.

(sgd)
Maria Domaradzki, Member

DATED THIS 18th day of June, 1991.

(sgd)
Demagna Koffi, Member