Decision rendered on October 26, 1983
T.D. 11/83

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

AND IN THE MATTER of the appeal filed by Air Canada
dated April 16, 1982, against the Human Rights
Tribunal Decision pronouced March 18, 1982.

BETWEEN:
PAUL S. CARSON, RAMON SANZ, WILLIAM NASH
BARRY JAMES and ARIE TALL

Complainants
(Respondents)

- AND -
AIR CANADA
Respondent
(Appellant)

DECISION OF THE REVIEW TRIBUNAL
Before: Robert W. Kerr
Peter A. Cumming
M. Wendy Robson

Appearances: John C. Murray and C.A. Morley for the Appellant,
Air Canada

George Hunter and David Aylen for the Respondents
Heard: Pre-Hearing: - August 9, 1982 - Toronto, Ontario
Hearing: December 8, 9, 10, 1982 - Toronto,
Ontario
February 16, 17, 1983 - Toronto,
Ontario

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This is an appeal by Air Canada from a decision rendered by Sidney N. Lederman, Q.C., a Tribunal appointed pursuant to section 39(1) of the Canadian Human Rights Act. The Tribunal found the complaints under sections 7 and 10 of the said Act to have been substantiated.

For the purposes of this decision (and since no further factual evidence was adduced nor was exception taken to the facts as found by the Tribunal), those facts giving rise to the complaints may be briefly summarized as follows.

Each complainant was an applicant for the position of pilot with the Appellant employer, Air Canada. Each was advised in varying terms that his

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- 2 age
was a factor in denying employment as all were over the age of 28 years at the date of the relevant application and the employer had indicated a preference for applicants in the low to mid-twenty age range.

Discrimination having been found, the onus shifted to the employer to prove a bona fide occupational requirement and the Tribunal found that it had not discharged that onus under section 14(a) of the Act. It is essentially from that finding that the appeal was taken before this Tribunal.

The Jurisdiction of the Review Tribunal
Both counsel urged upon us different interpretations of our powers under section 42(1) of the Canadian Human Rights Act. Their arguments can be put as follows.

Counsel for Air Canada saw this Tribunal's jurisdiction as very broad, broader than the normal appellate review, and suggested it almost amounted to a hearing de novo. He suggested we could assess the evidence and substitute a different opinion.

Counsel for the Human Rights Commission argued a narrower interpretation of the relevant section of the Act. He submitted that the breadth of jurisdiction conferred on a Review Tribunal is in respect of remedy and is exerciseable only if we find an actual

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error in fact or in law on the part of the initial Tribunal. He urged on us a presumption that the decision appealed from was correct and therefore the burden of showing error, either in fact or law, was on the Appellant.

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Since counsel took widely divergent views, we think it appropriate to comment upon the nature of the Review Tribunal. Section 42.1(3)-(6) of the Act states as follows:

(3) Subject to this section, a Review Tribunal shall be constituted in the same manner as, and shall have all the Powers of, a Tribunal appointed pursusant to section 39, and subsection 39(4) applies in respect of members of a Review Tribunal.

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

(5) A Review Tribunal shall hear an appeal on the basis of the record of the Tribunal whose decision or order is appealed from 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, receive additional evidence or testimony.

(6) A Review Tribunal may dispose of an appeal under this section by

(a) dismissing it; or
(b) allowing it and rendering the decision or making the order that, in its opinion, the Tribunal appealed from should have rendered or made.

Two decisions under the Canadian Human Rights Act have dealt with this matter -- an interim decision of a Review Tribunal in Butterill, Foreman and Wolfman v. VIA Rail Canada Inc. (1980), 1 C.H.R.R. D/233, and an appeal from that decision to the Federal Court (1981), 3 C.H.R.R. D/1043.

In the interim decision in Butterill the Review Tribunal was invited to comment upon the powers of Review Tribunals and reached the conclusion that they had a broader discretionary power than an "appeal" Tribunal and that

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 section
42.1(6) clearly gave them the power to substitute their opinion for that of the original Tribunal, even on discretionary matters.

On that point, Thurlow, C.J. of the Federal Court upheld the Review Tribunal and said, at D/1044:

.... in any event, having regard to paragraph 42.1(6)(b) of the Act, I do not think it is fairly arguable that the Review

Tribunal is not empowered to substitute its judgment for that of the Human Rights Tribunal.

Further, at D/1046, he says:
It was for the Review Tribunal to deal with these issues on such evidence as there was in the record of the Human Rights Tribunal and such further evidence as they might admit.

Although the remarks of the Chief Justice are obiter to the decision rendered, they are of some considerable assistance to us and fortify us in our conclusion that the spirit of human rights legislation requires a broad and liberal interpretation and is not to be narrowly constrained. The Review Tribunal has been given generous powers of permitting additional evidence and, where appropriate, rendering the decision or making the order that, in its opinion, the Tribunal appealed from should have rendered or made.

By implication, the Review Tribunal has a broader than appellate jurisdiction. We turn, then, to the law applicable to this case, followed by our specific findings and conclusions, based on the record before us and not limited to any search for error in the decision of the initial Tribunal.

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- 5 The
Law Relating to Discrimination on the Basis of Age
1. The General Structure of the Statutory Provisions Concerning Discrimination on the Basis of Age

We shall consider first, the general scheme of the legislation with respect to discrimination on the basis of age in the provinces, second, legislation in the United States and the United Kingdom, and third, the Canadian legislation.

All of the Canadian provinces have enacted statutes to protect human rights. At first appearance, the protection from discrimination on the basis of age receives some diversity of treatment across Canada. For example, "age" may be included as one of the grounds of proscribed discrimination in the general provision setting forth various grounds, which generally include race, colour, sex, religion, marital status, ancestry, political belief, and place of origin (as in the British Columbia Human Rights Code, R.S.B.C. 1979, c.186, s.8). Conversely, "age" may be treated separately (as in the Newfoundland Human Rights Code, R.S.N. 1970, c.262, as am. by S.N. 1974, No. 114, s.9(1)(b)), or along with another specific ground, such as "physical handicap" (in the Prince Edward Island Human Rights Act, S.P.E.I. 1975, c.72, s.11(1)). Quebec’s approach is distinctive in that it makes no specific reference to any proscribed grounds of discrimination, but rather refers to "discrimination" in the generality (Charter of Human Rights and Freedoms, R.S.Q. 1977, c.C-12, s.16)

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However, the substantive aspects of the various provisions dealing with age discrimination in all eleven Canadian statutes are quite similar. While "age" is a specifically prohibited ground of discrimination (except in the case of Quebec) exceptions allow "age" to be a permissible ground of discrimination under certain circumstances. Discrimination on the basis of age in employment circumstances is permitted where a reasonable or bona fide occupational qualification requires an age-related distinction to be made between employees, or applicants for employment. Such an exception clause is present in the federal, and in all of the provincial human rights statutes, except that of Nova Scotia (Human Rights Act, C.S.N.S. 1979, c.H-24). Another exception to the proscription against discrimination on the basis of age is where bona fide retirement, pension, or insurance plans make a distinction on the basis of age between persons covered by them. (See, for example, the British Columbia Human Rights Code, R.S.B.C. 1979, c.186, s.9(3))

Thus, the regime for dealing with age discrimination in employment is generally consistent across Canada. The prohibition against age discrimination is generally coupled with the bona fide occupational qualification exceptions.

The United States has enacted a federal statute specifically prohibiting discrimination on the basis of age: The Age Discrimination in Employment Act of 1967, 29 U.S.C.A. s.621 et seq. The structure of its provisions dealing with age discrimination in conditions of employment, including the provisions providing for exceptions, are analogous to the Canadian statutes. The U.S. provision, s.623(a), states:

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It shall be unlawful for an employer -
(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age;

As well, there is an excepting provision, in s.623(f), allowing the employer:

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a

subterfuge to evade the purpose of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual;

There exists no general statute in the United Kingdom that deals with human rights, as Bills of Rights have been thought to offend the principle of parliamentary supremacy. However, Britain has enacted statutes which afford protection from discrimination on the basis of race and sex (The Race Relations Act, 1976, c.74; The Sex Discrimination Act, 1975, c.65). No such statue prohibits age discrimination, although a private member's Bill to empower the Equal Opportunity Commission to act in cases of age discrimination was recently introduced in Westminister by Mr. George Foulkes, a Labour M.P. Its provisions include the requirement that employers not be able to specify an age group in hiring without a specific reason: The Daily Telegraph, April 14, 1983, p. 8.

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However, some protection is provided to employees under the Trade Union and Labour Relations Act, 1974, c.52, where an employee may bring an action against an employer for wrongful dismissal, if the dismissal is not justified as being related to the work, to the employee's conduct, to employee redundancy, or any other substantial reason (Schedule 1, Part II, s.6). An employee may not bring an action though, once he or she has reached "normal retirement age": Nelson and Woolett v. Post Office, 1978 I.R.L.S. 548. There are no reported cases involving wrongful dismissal where the reason for dismissal was the employee's age.

Other rights are now guaranteed to Britain by virtue of that country's ratification of the European Convention on Human Rights. Under the Convention, the European Commission may hear individual petitions from citizens of signatory states with respect to violations of human rights in their home state. However, the Convention seeks to guarantee legal and political rights on a non-discriminatory basis, not rights against discrimination as they pertain to the provision of services or conditions of employment. Furthermore, "age" is not a ground of discrimination recognized in the Convention as giving rise to a complaint.

2. Statutory Definition of "Age"

Having examined the general structures of the various statues which offer recourse to victims of discrimination on the basis of age, we shall now consider the definition of "age" contained in those statutes. In discussing sections 4(1)(b), 4(6), and 19(a) of the old Ontario Human Rights Code, R.S.O.

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 1970, c.318, as am. (later R.S.O. 1980, c.340, ss.4(1)(b), 4(6), 26(a), repealed by S.O. 1981, c.53, s.48) with respect to age discrimination, the Board of Inquiry (Professor Bruce Dunlop) in Hall and Gray v. Etobicoke Fire Dept. (July 21, 1977), stated as

follows, at p. 5:
One of the objectives of the Code is to ensure that people in the age range forty to sixty-four, who in the past often have been discriminated against in respect of employment opportunities, are not prevented from working simply because they are believed to be too old. If they are to be prevented from filling available jobs it must be because they have shortcomings apart from age.

In defining "age" in section 19(a) of that legislation as "any age of forty years or more and less than sixty-five years", the expressed policy was to protect employees in that particularly vulnerable age group from being denied employment opportunities.

Other provincial human rights legislation with similar definitions of "age" and, it would seem, the same objective, are: Alberta, Individual's Rights Protection Act, R.S.A. 1980, c.I-2, s.38(a), (45 to 65 years); Nova Scotia, Human Rights Act, C.S.N.S. 1979, H-24, s.11B(1), (40 to 65 years); British Columbia, Human Rights Code, R.S.B.C. 1979, c.186, s.1, (45 to 65 years). The definition in the B.C. Code was previously deemed not to be exhaustive, since it had stated that the definition was to apply ... "unless the context otherwise requires..." (S.B.C. 1973 (2nd Session), c.119, s.1). The Code was therefore held to apply where there was discrimination against a 31-year-old complainant: Burns v. Piping Industry Apprentice Board, (Apr., 1977), but has now been amended by the clause "unless the context otherwise requires" being removed.

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Other provisions define "age" more broadly, evidencing an intention to protect a wider group. These statutes define age as follows: Newfoundland Human Rights Code, R.S.N. 1970, c.262, s.9(1)(b), (19 to 65 years); Prince Edward Island, Human Rights Act, S.P.E.I. 1975, c.72, s.11(1)(a), (18 to 65 years); Saskatchewan Human Rights Code, S.S. 1979, c.S-24.1, s.2(a), (18 to 65 years).

The New Brunswick Human Rights Act, R.S.N.B. 1973, c.H-11 15.2, as am., defines "age" as over 19 years, but has no ceiling.

The Quebec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12, and the Manitoba Human Rights Act, S.M. 1974, S.M. 1974, c. 65, have no definition of age at all. Because there is no ceiling in the definition of "age", both the Manitoba and New Brunswick Acts have been used to find discrimination on the basis of age where an employee was forced to retire at age 65: Derksen v. Flyer Industries Ltd. (June 2, 1977); Little v. St. John Shipbuilding and Drydock (1980), 1 C.H.R.R. D/1.

The new Ontario Human Rights Code, S.O. 1981, c.53, s.9, proclaimed into force June 15, 1982, defines "age" as follows:

In Part I and in this Part,
(a) "age" means an age that is eighteen years or more, except

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in subsection 4(1) where "age" means an age that is eighteen years or more and less than sixty-five years;

Section 4(1) deals with discrimination in employment. Thus, the Ontario Legislature considers that age discrimination in respect of persons at

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65 is reasonable in an employment situation, but not where the discrimination occurs in another context. The defintion of "age" is much wider than that in the old Ontario Code, since it now protects persons aged 18 to 39 years, and also those over 65, who were previously not protected, in non-employment situations.

3. The Scope of the Statutory Protection.
The Canadian statutes prohibit discrimination on the basis of age in employment. For example, section 4(1) of the old Ontario Code states:

No person shall,
(a) refuse to refer or to recruit any person for employment;

(b) dismiss or refuse to employ or to continue to employ any person;

(c) refuse to train, promote or transfer an employee;
(d) subject an employee to probation or apprenticeship or enlarge a period of probation or apprenticeship;

(e) establish or maintain any employment classification or category that by its description or operation excludes any person from employment or continued employment;

(f) maintain separate lines of progression for advancement in employment or separate seniority lists where the maintenance will adversely affect any employee; or

(g) discriminate against any employee with regard to any term or condition of employment

because of ... age ... of such person.
All of the statutes (except those of Manitoba, P.E.I. and Quebec) prohibit age discrimination by a trade union, employer organization or occupational association. For example, section 10 of the Alberta Act states:

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No trade union, employer's organization or occupational association shall

(a) exclude any person from membership therein, or
(b) expel or suspend any member thereof, or
(c) discriminate against any person or member, because of ... age ... of that person or member.

The British Columbia Code expressly provides as well that any such entity shall not "without reasonable cause ... negotiate, on behalf of that person, an agreement that would discriminate against him contrary to this Act." (s.9(1)(b)). This affords some protection to a union employee from a discriminatory contract made between the employer and union. In other jurisdictions, contracts that violate human rights' legislation have been held to be contrary to public policy and, therefore, not enforceable.

Apart from Quebec, Saskatchewan, and P.E.I., the provincial statutes prohibit employment advertisements that discriminate on the basis of age. The statutes of Nova Scotia, Newfoundland, New Brunswick, Ontario and Canada prohibit an employee from using an application form for prospective employees that discriminates on the basis of age. The Nova Scotia, Newfoundland, New Brunswick and Ontario statutes also prohibit the employer from making oral or written inquiries of job applicants that relate to age. Ontario, British Columbia, Nova Scotia, and New Brunswick prohibit age discrimination by employment agencies. For example, section 22(4) of the Ontario Code provides:

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The right under section 4 to equal treatment with respect to employment is infringed where an employment agency discriminates against a person because of a prohibited ground of discrimination in receiving, classifying, disposing of or otherwise acting upon applicants for its service or in referring an applicant or applicants to an employer or agent of an employer.

The onus of proof is initially upon the complainant. Upon establishing a prima facie case of discrimination, the onus of proof then shifts to the respondent to justify its actions. The standard of proof that the complainant must meet is proof "on the balance of probabilities", being the same burden of proof that a party in a civil action must meet. Lord Denning expressed this standard of proof in Miller v. Minister of Pensions, [1974] 2 All E.R. 372, as follows:

That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can

say: "We think it more probable than not", the burden is discharged, but if the probabilities are equal, it is not.

Where the complainant was refused employment, or the employment was terminated, pursuant to a standard policy that makes

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a distinction between employees or applicants expressly on the basis of age, the complainant will find it easy to meet the onus of proving a prima fade case of discrimination. For example, in Derkson v. Flyer Industries Ltd. (Manitoba, June 2, 1977), an employee with a good work record was dismissed when he turned 65 years of age, the only reason for dismissal being his age. The Board held that the complainant had shown a prima facie case of discrimination and the onus shifted to the employer, as the Manitoba Human Rights Act does not set an upper age limit in respect of age discrimination.

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Similarly, in Canadian Human Rights Commission v. Voyageur Colonial Ltd. (1980), 1 C.H.R.R. D/239, the complainant was refused employment as a bus driver because he was over 40 years old. The respondent admitted that its personal practice was to refuse to consider any applicants over 40. The Tribunal stated, at D/240:

The Respondent’s admission and the evidence subsequently tendered established beyond question that the Respondent has, since March 1, 1979, or before, refused to employ as new bus drivers individuals over the age of 40. Thus, the onus swung to the respondent to establish that this refusal was a bona fide occupational requirement.

The onus in establishing a prima facie case is more difficult to meet where the employer did not act pursuant to a well-defined employment policy, and particularly so when a number of reasons for dismissal are present.

The Nova Scotia Board of Inquiry decision in Goyetche v. French Pastry Shop Ltd. (1980), 1 C.H.R.R. D/124, is illustrative. A 60 year old baker was fired from his job after 41 years of service, being told that his employment was terminated because of slack business conditions. However, the complainant felt that he lost his employment because of his age. Several witnesses for the employer, including employees and shareholders of the bakery company, stated that the complainant was an inefficient worker and that business was slow. The Board dismissed the complaint because of a lack of evidence of discrimination.

Although there is not direct evidence of discrimination because of age, a board of inquiry may, of course, infer discrimination from the

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In the case of O'Brien v. Ontario Hydro (1981), 2 C.H.R.R. D/504, an Ontario Board of Inquiry (Professor P.A. Cumming) considered the complaint of a 40 year old man who alleged that he was not considered for the position of apprentice electrician because of his age. He had filled out an application form for the position and subsequently phoned a personnel officer at Ontario Hydro to inquire about his chances. This employee told the complainant that most 40 year olds hired were journeymen

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electricians and that most applicants for apprenticeship positions were 18 to 28 years old. Evidence tendered by the respondent showed that Ontario Hydro had no general corporate policy of discriminating on the basis of age, and the respondent testified that the complainant was not considered because he was thought to be over-qualified and had an unstable employment record. O'Brien's application had been lost by Ontario Hydro. The Board held, at D/517-8:

However, considering all the evidence, I find that they employ age as an arbitrary factor in the recruitment of apprentices. If Mr. O'Brien had been, say 22 years of age with his background in electrical theory, he would, I am sure, have most certainly been encouraged by Mr. Low, and one way or the other it would have been realized at a later point his application had gone astray, he would have filled a new one and been a prime candidate at least to the stage of the first interview and testing. But his age was the significant factor that resulted in his being discouraged by Mr. Low. I really do not think it was his varied background that mattered.

(4) The Legal Position of the Parties Before this Tribunal
The onus is upon the Complainants and the Canadian Human Rights Commission to establish a prima facie case of discriminatory practice under sections 7 and 10 as a result of the Respondent's employment practice. Section 3 specifies the prohibited grounds of discrimination which include "age".

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Part I of the Act establishes proscribed grounds for discrimination, recognizes certain practices as constituting discriminatory practices, and provides certain statutory exceptions to discriminatory practices.

Section 7 provides:
It is a discriminatory practice, directly or indirectly,
(a) to refuse to employ or continue to employ any individual, or

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

on a prohibited ground of discrimination.

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

(a) to establish or pursue a policy or practice, or
(b) to enter into an agreement affecting recruitment,

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referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prosepctive employment

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

Part III of the Act establishes the right in individuals, groups of individuals, and the Commission to file complaints of discriminatory practices with the Commission, and section 39 permits the Commission to appoint a Tribunal to inquire into the complaints.

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Section 41 empowers the Tribunal to dismiss unsubstantiated complaints, and with respect to substantiated complaints, to order, inter alia, that such person cease such discriminatory practice, that the victim be extended the rights he was being denied, and that such person compensate the victim for all lost wages and expenses incurred.

The Tribunal may order the respondent to pay an additional amount (to a maximum of $5,000) in compensation if he engaged in the discriminatory practice wilfully or recklessly, or if the victim has suffered in respect of feelings or self-respect as a result of the practice.

Fundamental to the concept of discrimination is the existence of a preference or distinction based on an individual's characteristics, but not related to an individual's merit. Section 3 of the Canadian Human Rights Act lists those specific characteristics in respect of which discrimination is prohibited. As such, the Canadian Human Rights Act enunciates as public policy the protection of certain classes of individuals who historically have been particularly vulnerable to adverse discrimination.

Section 2 of the Act provides a clear statement as to both the fundamental principles underlying the Act and its purpose:

The purpose of this act is to extend the present laws in Canada to give effect, within the purview of matters coming within the legislative authority of the Parliament of Canada, to the following principles

(a) 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,

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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 or

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marital status, or conviction for any offence for which a pardon has been granted or by discriminatory employment practices based on physical handicap.

The essence of the legislation is to advance equality of opportunity within a framework of our society's normative values. However, it is only on very particular grounds that discrimination is prohibited by the Act, and even discrimination on these grounds is deemed not be a "discriminatory practice" if it is carried out pursuant to a bona fide occupational requirement under section 14(a) or other exceptional circumstances as set forth in the Act.

The belief in the fundamental equality of all persons, as expressed in section 2 of the Canadian Human Rights Act, is fundamental to the fabric of Canadian society and to western liberal democracies generally.

Every statement about the nature of racial discrimination is based, more or less explicitly, upon an idea of the equality of human beings, which has advanced to its present form only relatively recently. The origins of this idea of human equality may be traced to the traditional Judaeo-Christian belief in the Fatherhood of God and hence in the brotherhood of men, each with equal humanity and significance.

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This perception of the fundamental equality of men, despite the manifold differences between individuals, lies at the heart of liberal and democratic thought in the West.

A. Lester and G. Bindman, Race and Law, pp. 73-4, Penguin, Eng. 1972.

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A society which espouses such a philosophy must also be flexible in its employment practices to ensure that its stated philosophy is more than simply words.

In discussing what constitutes "discrimination", Lord Reid stated in the House of Lords decision in Post Office v. Crouch, [1974] 1 All E.R. 229, at p. 238:

Discrimination implies a comparison. Here I think that the meaning could be either that by reason of the discrimination the worker is worse off in some way than he would have been if there had been no discrimination against him, or that by some reason of the discrimination he is worse off than someone else in a comparable position against whom there has been no discrimination. It may not make much difference which meaning is taken but I prefer the latter as the more natural meaning of the word, and as the most appropriate in the present case.

In a U.S. decision, in considering the meaning of the words "discriminate" and "discrimination", Mr. Justice Burton stated, referring to the general ordinances of the City of Dayton, Ohio:

"Discriminate" means to make a distinction in favour of or against the person or thing on the basis of the group, class or category to which the person belongs, rather than according to actual merit. "Discrimination" means the act of making a distinction in favour of or against a person or thing based on the group, class or category to which that person or thing belongs, rather than on individual merit.

Courtner v. The National Cash Registry Co., 262 N.E. 2d 586 (1970). Therefore, discrimination presumes a distinction between persons on a basis not related to merit. An unlawful "discriminatory practice" in refusing to employ, for the purpose of the Canadian Human Rights Act, occurs when the

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of the practice is one of the prohibited grounds listed in section 3, and there is not an exception allowed by the Act to what would otherwise be an unlawful discriminatory practice.

In Foreman et al. v. VIA Rail Canada Inc., (1980), 1 C.H.R.R. D/111, the Tribunal (Franks D. Jones, Q.C.), stated, at D/113:

Therefore in construing the Canadian Human Rights Act, I adopt the criteria of statutory construction propounded by Dreidger at page 67 and to which I referred to earlier. In reading the Act as a whole, in my opinion the object of the Act is not to create a presumption that differential treatment per se constitutes discrimination and the Act does not prohibit all discrimination, but its object is to prevent and eliminate certain discriminatory practices. Some forms of differentiation, for example those resulting from the invocation of bona fide occupational requirements, are expressly authorized.

In relation to employment, sections 7, 11 and 14 make it clear that the Act is not oriented towards compelling employers to treat all applicants or employees identically. The Act is directed towards ensuring fundamental equality in employment consistent with other goals such as eliminating incompetence,

lack of safety, inefficiency and job frustration. The provisions of these sections, as well as sections 8, 9, 10, 16 and 17 illustrate that the Act contemplates the special nature of the employment market place and is structured to take this into account.

This decision was appealed and reversed, but only on whether to award compensation: Butterill, Foreman and Wolfman v. VIA Rail Canada Inc. (1980), 1 C.H.R.R. D/233, reversed in part (1981), 3 C.H.R.R. D/1043 (Fed. C.A.).

It is implicit to the Act, and in particular section 32, that the onus of establishing a prima facie case that an employer has engaged in a discriminatory practice is upon the Complainant and/or the Commission, and that the standard to determine whether the onus has been met is the balance of probabilities: Foreman et al. v. VIA Rail Canada Inc. (1980), 1 C.H.R.R.

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111, at D/113; Little v. St. John Shipbuilding (1980), 1 C.H.R.R. D/1, at D/6; Bhinder v. Canadian National Railways (1981), 2 C.H.R.R. D/546.

The Tribunal in Bhinder held that intention on the part of the employer is not a pre-requisite to there being a discriminatory practice in employment in contravention of section 7 or 10 of the Act, arguing by analogy from several provincial board of inquiry decisions which had held that "intent" was not necessary under provincial legislation, Bhinder v. Canadian National Railways, supra, at D/588-9. The Tribunal argued that this interpretation of the Act as a whole is reinforced by section 41(3) which allows for special compensation where an employer has engaged in a discriminatory practice "wilfully". Comparing sections 41(2) and 41(3), it is clear that a Tribunal may make an order under section 41(2) with a variety of remedies without the necessity of finding that the respondent acted "wilfully". The requirement of "wilfully" in section 41(3) can be equated with "intention", and therefore, the argument goes, a Tribunal need not find that a respondent discriminated with intent before a claim of an unlawful discriminatory practice can be substantiated, intent being only a prerequisite to the awarding of special compensation as provided in section 41(3).

However, the Federal Court of Appeal recently allowed the appeal of the C.N.R. in C.N.R. v. Bhinder (April 13, 1983, Heald, J. and Kelly, D.J., with LeDain, J. dissenting). Every member of the Panel held that section 7 of the Canadian Human Rights Act requires a discriminatory intent or motivation or, alternatively, a differential in treatment based directly on a prohibited ground of discrimination: per Heald, J. at p. 2; per LeDain, J. at pp. 16-17. A majority held that the same is true in respect of section 10, distinguishing

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from the relevant American legislation per Heald, J. at pp. 2-9. In dissenting, LeDain, J. took the view that, under the language of section 10, the words "deprives or tends to deprive" make indirect discrimination unlawful, at p. 17. In differing from this view, the majority neglected to indicate what effect these words have under their interpretation. It would seem that the words "tends to deprive", in particular, may be redundant if section 10 does not cover indirect discrimination. Moreover, even though the Court expressly adopted the Supreme Court of Canada's articulation of Ontario's bona fide occupational qualification defence in Ontario Human Rights Commission et al. v. Borough of Etobicoke (1982), 132 D.L.R. (3d) 14 (that is, as a two-prong test: per Heald, J. at pp. 7-8), the Court did not discuss the argument that such a test necessarily implies that discriminatory intent is not necessary to establish unlawful discrimination since, even though an employer meets the subjective test of bona fide, he must still meet the objective test. The Court in Bhinder approved of the decisions of

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the Ontario Divisional Court and Court of Appeal in Ontario Human Rights Commission v. Simpsons-Sears Ltd. (1982), 38 O.R. (2d) 423 (C.A.); 36 O.R. (2d) 59 (Div. Ct.), which held that discriminatory intention was an essential element of a contravention, of section 4(1)(g): per LeDain, J. at p. 14. Simpsons-Sears is under appeal to the Supreme Court of Canada. The Divisional Court in Simpsons-Sears did not refer to the Supreme Court of Canada's decision in Etobicoke, except in an "Addendum" by Smith, J. in the Divisional Court, while the Court of Appeal summarily distinguished it on the facts.

The decision in Etobicoke means, in our opinion, that even in the absence of intent to discriminate because of sex, age or marital status, there could be a breach of the Ontario Human Rights Code, because the court did not

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the saving provision of section 4(6) of that legislation to be operative simply where an employment qualification was imposed with subjective good faith, that is, without intent to discriminate. To bring itself within the saving provision, the employer had to establish, as well, that the qualification related objectively to the performance of the job in issue. With respect, in our view the Divisional Court decision in Simpsons-Sears is inconsistent with the prior decision of the Supreme Court of Canada in Etobicoke.

In an "Addendum" to his reasons in Simpsons-Sears, Smith, J. would seem to be of the same opinion, as he refers to the Etobicoke decision as follows:

Since the hearing of this appeal and since dictating these reasons, the Supreme Court of Canada has rendered its decision

in The Ontario Human Rights Commission et al v. The Borough of Etobicoke.

...
There is a difference between the Etobicoke case and the instant one in that we must read into the legislation what was there spelled out, namely the bona fides. But Etobicoke illustrates in my view the necessity in a case such as this of drawing on intention as only one of many factors and accordingly without making intention a sine qua non. Once honesty of motive is conceded, the matter is not at an end; objective considerations then come into play.

In our opinion as a Tribunal, with great respect, we believe that the decision in Simpsons-Sears is not consistent with Etobicoke and that, for the same reason, the Court was in error in Bhinder, which decision is also under appeal to the Supreme Court of Canada.

In any event, even if the majority of the Federal Court of Appeal in Bhinder are correct in their interpretation, it would appear that under either

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- 24 section
7 or section 10 discriminatory intent or motivation is not a necessary element where there is a differential in treatment based directly on a prohibited ground of discrimination. This is stated most clearly by LeDain, J. at pp. 13, 14, 16-17, but is also incorporated into Heald, J.’s definition of unlawful discrimination, at p. 2. In the situation before us as a Tribunal, it is undisputed that Air Canada’s hiring policy provided for differential treatment on the basis of age, and, clearly, such differential treatment was intended. Thus, Bhinder does not apply to the case at hand.

In determining whether discrimination on the basis of age has taken place, a Tribunal must make a finding of fact as to whether the age of a complainant formed the basis of a respondent’s decision to deny services or refuse employment to the complainant. When the only reason for dismissing an employee is his or her age, the situation is relatively straightforward. For example, in the case of a lathe operator with a satisfactory work record, who was dismissed when he turned 65, a Manitoba Board of Inquiry found that the "only reason that Mr. Derkson was retired from his employment ... was that he had reached the age of 65": Derkson v. Flyer Industries Ltd. (June, 1977), at p. 35.

Conversely, when "age" is not truly a ground for dismissal, as determined by the evidence, then there is not, of course, discrimination on that ground under human nights legislation. An example is the Ontario case, Peterson and Carter v. Canadian Rubber Dealers (1980), 1 C.H.R.R. D/257. The Complainants alleged that

they had been dismissed because of their ages. Mrs. Peterson did not pursue her claim at the hearing.

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The Board of Inquiry (Professor Ian Hunter) found that the respondents had not dismissed Mrs. Carter as a waitress because of her age. Indeed, she had only recently been hired, with the respondent's knowledge that she was 52 years old. The Board stated that technically the complainant had not been "dismissed" contrary to s.4(1)(b) of the Ontario Human Rights Code since she had been offered alternative employment in the company and had turned the offer down. The Board also found that age was not a consideration in the action that the respondents took with respect to Mrs. Carter. Rather, she was treated as she was because of the complaints of customers about her arguments with Mrs. Peterson, and the speed at which she carried out her waitressing duties.

As the Manitoba statute does not provide for an upper age limit in considering age discrimination, the Board in Derkson (Professor Jack R. London) found that the respondent had discriminated against the complainant within the provisions of the Act. Having so found, the Board stated, at p. 37:

The onus then shifts ... to the employer to demonstrate, if it can, that there has been no contravention of the Human Rights Act because of one of the exceptional defences provided in the Act.

The situation is more difficult for a tribunal when there exists more than one reason for refusal to employ. In Burns v. Piping Industry Apprenticeship Board (British Columbia, April, 1977), an applicant was turned down for training as an apprentice plumber. The applicant was 31 years old, whereas the standards of the Apprenticeship Board required that applicants be between the ages of 18 and 25. After weighing the validity of other possible

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- 26 grounds
for not considering the application of Burns, the Board of Inquiry stated:

... [W]e have come to the conclusion that the predominant reason for the denial to the complainant of his application to be registered with the P.I.A.B. was that he was not between the ages of 18 and 25 as required in the standards...

Having found that the complainant was discriminated against on the basis of age, the Board denied the claim on the other grounds. The decision was affirmed on appeal to the B.C. Supreme Court: [1978] 2 W.W.R. 22.

If a Tribunal should find that an employer refused to employ a complainant on more than one ground, only one of which falls

within section 7, the Tribunal can find that the complaint is substantiated and make the required order under section 41. That is, it is sufficient to substantiate a complaint if a discriminatory practice is one of the proximate causes of refusal to employ.

In Britnell v. Brent Personnel, Ontario (Ontario, June, 1968), a woman was denied employment as an executive secretary. The respondent offered various reasons for not considering the complaintant's application, but the Board (Professor W.S. Tarnopolsky) found that the "correct reason" for the denial was the complainant's age, at p. 11. He went on to state, at p. 15:

... [T]he Act [Age Discrimination Act, R.S.O. 1970 c.7], in any case, makes my determination easier because it does not include any qualifications on the prohibition of discrimination because of age. Section 5(1) does not say "solely because of age", nor "age exclusively". The term "age" is qualified only in section 1(a) as being "any age of forty years or more and less than sixty-five years".

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This interpretation suggests that any finding that "age" is a proximate cause in the treatment of a complainant gives rise to a breach of the statute. The Age Discrimination Act was later repeated, with age discrimination being incorporated into the Ontario Human Rights Code.

In a British Columbia case, Wilson v. Vancouver Vocational

Institute (June 4, 1976), a 56 year old woman was dismissed from a graphic arts course given by the Vancouver Vocational Institute. She had completed the first two sections of the course, but was then denied the chance to progress further. The Institute's reasons for dismissal included allegations that she lacked practical skill, that other students had complained about her behaviour in the classroom, and that she constituted a hazard to safety. The Board of Inquiry stated, per Carolyn Gibbons at p. 4:

Where there is a denial of such a service or facility [prohibited by section 3(1)] and the reasons advanced are unsubstantial, an inference may be drawn when the elements of age and sex are present, that discrimination has occurred.

...
Where an assessment is subjective and elements like age or sex play some part, a prima facie case is established where as a result of that assessment there has been a denial of a service or facility.

An Ontario Board of Inquiry (Professor D.A. Soberman) decided the issue in a similar fashion in Hawkes v. Brown's Ornamental Iron Works (December 12, 1977). The complainant, Mrs. Hawkes, at 51

years of age had undertaken to learn the welding trade in order to obtain employment. The respondents at first agreed to hire her, but then changed their minds. The Board found that the subsequent decision was based on the respondent's belief

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- 28 that
Mrs. Hawkes was too old to fulfill the job requirements, at p. 13:

... Mrs. Brown believed that Mrs. Hawkes could not do the job not because of any evidence of bad health or insufficient weight or stature, but because of Mrs. Hawkes' age and an unsupported assumption about her lack of experience with heavy physical work. In my opinion, therefore, Mrs. Hawkes' age was a material consideration in Mrs. Brown's conduct.

Given that "age" was a "material consideration", the Board considered whether this amounted to discrimination under section 3(1)(b) of the Ontario Human Rights Code, at p. 13:

If Mrs. Hawkes' age were the sole or dominant reason for the Brown's conduct there would be a violation of section 4(1)(b) of the Ontario Human Rights Code. On the other hand, it is not a violation of the Code to refuse to hire a job applicant because of a mistaken belief in the physical capacity of the applicant in question. What is the effect of a refusal to hire when the reasons are in part outside the Code and in part a violation of it?

The Board referred to the treatment of section 110(3) of the Canada Labour Code, R.S.C. 1970, c.L-1 in the case of R. v. Bushnell Communications Ltd. et al (1973), 1 O.R. (2d) 442 (H.C.); affirmed (1974), 4 O.R. (2d) 288 (C.A.). There, an employee member

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of a trade union was dismissed by the defendant. Considering whether the employee was dismissed because of his membership in a union, Hughes, J. stated, at p. 447 of the judgment:

If membership is a trade union was present in the mind of the employer in his decision to dismiss, either as the main reasons or incidental to it, or as one of many reasons regardless of priority, section 110(3) of the Canada labour Code has been transgressed.

Professor Soberman reasoned, at p. 16:
It follows that if age was present in the mind of Mrs. Brown in her refusal to employ Mrs. Hawkes, there has been

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a violation of the Ontario Human Rights Code, s.4(1)(b),

regardless of the fact that other reasons may also have been present.

That reasoning has been adopted, citing Bushnell as authority, in several subsequent tribunal decisions. See, for example, Robertson v. Metropolitan Investigation Security Ltd. (Ontario, August 10, 1979), and Reid v. Russelsteel Limited (1981), 2 C.H.R.R. D/400.

An Alberta case has also followed this approach: Godowsky v. School Committee of the Court of Two Hills, No. 21, (August 14, 1979). In this case, the complainant was forced to retire at age 62, rather than accept an unreasonable change in her teaching position. To establish that Mrs. Gadowsky had been a victim of age discrimination, at p. 8:

... the Board must be satisfied that she was faced with an adverse change in her status and that a factor influencing the change in status was her age.

In weighing the factors that figured in the School Committee's decision, the Board referred with approval to a summary of the law in an article by Professor Ian Hunter: "Human Rights Legislation in Canada: Its Origin, Development and Interpretation" (1976), 15 U.W.O.L. Rev. 21, et p. 32:

... Canadian Boards of inquiry have consistently held that it is sufficient if the prohibited ground of discrimination was present to the mind of the respondent, however minor a part it may have played in the eventual decision.

The Canadian cases are reviewed by an Ontario Board of Inquiry (Professor P.A. Cumming) in Iancu v. Simcoe County Board of Education (1983), 4 C.H.R.R. D/1203, at D/1204-1207. The Board states, at D/1204:

Where there are a number of reasons for dismissing an employee, only one of which is a prohibited ground, the presence of that prohibited ground is sufficient to create an offence provided that it was a

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proximate cause of the dismissal.
The Courts in the United States have followed a similar approach. In Polstorff v. Fletcher, 452 F.Supp. 17 (1978), Guin, J. stated, at p. 23:

The Age Discrimination in Employment Act (ADEA) provides protection of persons between the ages of 40 and 65. The purpose of the ADEA was to alleviate serious economic and phychological suffering of persons within this age range, caused by unreasonable prejudice and job discrimination.

...
In short, the Act is designed only to attack these employers' personnel policies and practices which arbitrarily classify employees or potential employees on the basis of age. It does not seek to affect employer decisions based on individual assessments of a person's abilities, capabilities, or potential. (per Robson, J. in Magruder v. Selling Areas Marketing, Inc. (1977), 439 F.Supp. 1155, at 1164.)

As the purpose of the legislation is to require assessments by employers on the basis of merit, rather than age, the interpretation of what constitutes discrimination should be consistent with that purpose. In Wells v. Franklin Broadcasting Corp., Me., 403 A. 2d. 771 (1979), a case involving the Maine Human Rights Act, 5 M.R.S.A., ss.457-72 (1979), McKusick, C.J. stated:

The purpose of the ... ban on age discrimination is to assure that performance, not age, will determine an employee's marketability and job security.

That purpose would be undermined, if, in order to recover..., an employee had to establish that age was the sole, rather than a substantial factor motivating his discharge.

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Accordingly, we hold that in an age discrimination case...,
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even if more than one factor affects the decision to dismiss an employee, the employee may recover if one factor is his age and in fact it made a difference in determining whether he was to be retained or discharged.

In Langesen v. The Anaconda Company, 510 F. 2d 307 (1975), the complainant appealed from a jury trial in which the judge had instructed that age must be the "sole" reason for the complainant's discharge. In reversing the District Court decision, Engel, J. held, at p. 317:

However expressed we believe it was essential for the jury to understand from the instructions that there could be more than one factor in the decision to discharge him and that he was nevertheless entitled to recover if one such factor was his age and if in fact it made a difference in determining whether he was to be retained or discharged.

This decision has been followed in two more recent decisions: Carpenter v. Continental Trailways, 446 F.Supp. 70 (1978), and Cunningham v. Central Beverage Inc., 480 F.Supp. 59 (1980).

The above reasoning is appropriate to interpreting the Canadian Human Rights Act. In summary, if a human rights tribunal finds that a complainant's age was a proximate factor of the respondent's treatment of the complainant, even though other

factors may have been present as well, then prima facie, unlawful discrimination has occurred. However, "age" must be a proximate cause of the discriminatory treatment.

Minimum and maximum ages in respect of employment are legally sanctioned by the Canadian Human Rights Act, R.S.C. 1976-77, c.33 in certain circumstances. Section 14 of the Act provides:

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It is not a discriminatory practice if:
(b) employment of an individual is refused or terminated because that individual

(i) has not reached the minimum age, or
(ii) has reached the maximum age
that applies to that employment by law or under regulations, which may be made by the Governor in Council for the purposes of this paragraph; [or]

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

In Arnison v. Pacific Pilotage Authority (1980), 1 C.H.R.R. D/138 the complainant's name was removed from an eligibility list for employment as a river pilot when he turned age 50. According to regulations under the Pilotage Act, S.C. 1970-71-72, c.52, applicants for pilot licenses must be "not less than 23 and not more than 49 years of age."

The Tribunal considered whether section 14(b)(ii) of the Canadian Human Rights Act permitted the imposition of an upper age limit as provided by law or under regulations made by the Governor-in-Council. Under the Pilotage Act, section 42, the Governor-in-Council may only prescribe "minimum qualifications respecting ... age", and it was argued that this did not empower the setting of a maximum age. Thus, the Tribunal found that the Governor-in Council was acting beyond its authority in establishing

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a maximum age in the regulations. The Tribunal ordered that the complainant be placed on the top of the eligibility list.

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The Authority appealed the decision of the Tribunal to the Federal Court of Appeal: (1980), 1 C.H.R.R. D/225. LeDain, J. held, at D/226, that the setting of a maximum age amounted to the prescription of minimum qualifications under the regulations pursuant to section 42 of the Pilotage Act. As such, the Governor-in-Council was not acting ultra vires in setting the maximum age standard. Thus, the Court found that the

disqualification of the complainant was not a discriminatory practice.

In White v. Minister of Public Works Canada (1980), 1 C.H.R.R. D/136, the complainant alleged discrimination on the basis of age contrary to section 7(b) of the Canadian Human Rights Act. The complainant had been "retired" at age 65 after slightly more than three years employment with the Ministry. He claimed discrimination because, if he had simply been "laid-off", he would have received severance pay.

Under the collective agreement in force, laid-off employees were entitled to severance pay, as were employees who qualified for a pension. However, to be qualified for a pension, an employee had to have completed at least five years of pensionable service. Thus, Mr. White was not entitled to severance pay since he was retired, not laid-off, and had only completed just over three years of pensionable service.

The Chairman of the Tribunal (William Tetley, Q.C.) dismissed the claim. He stated that the complainant had not been discriminated against on the basis of age since the retirement itself was not discriminatory in light of section 14(b) and (c) of the Act, and lack of entitlement for severance pay was a question, not of age, but of length of service.

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- 34 Findings
With Respect to the Prima Facie Case of Age Discrimination.

In the instant case, the Canadian Human Rights Commission and five individuals challenge the hiring age-ceiling policy of the Respondents, Air Canada, which was an operative factor in the individuals not being considered as candidates to become pilots of the Respondent. The Complainants contend that Air Canada committed a discriminatory practice contrary to section 7 of the Canadian Human Rights Act in that it directly or indirectly refused to employ the complainants because of their age, age being a prohibited ground of discrimination by section 3 of the Act.

It is alleged further that Air Canada contravened section 10 of the Act by maintaining a discriminatory practice in that it followed a policy or practice tending to deprive an individual or

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class of individuals of employment opportunities on a prohibited ground of discrimination.

The Respondent, Air Canada, asserted before the initial Tribunal that there were reasons unrelated to age, for denying employment to each of the Complainants, and that therefore it did not conduct any discriminatory practice. The Tribunal found, in favour of the complainants, that the applications for pilot employment were rejected on the basis of age, in contravention of

section 7 of the Act. Further, Mr. Lederman found that Air Canada's hiring policy requires a chronologically older applicant to have additional qualifications beyond those of a younger candidate. Accordingly, he found that Air Canada's hiring policy deprives or tends to deprive a class of individuals, being those over the age of 27, of employment opportunities on

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basis of age, in contravention of section 10 of the Act, at pp. 122-123, Decision of Tribunal (March 9, 1982). The Review Tribunal agrees with Mr. Lederman's findings that there was a prima facie breach of sections 7 and 10. The proximate cause for not considering the Complainants for employment was the factor of age. Moreover, this involved differential treatment directly on the basis of a prohibited ground of discrimination. Therefore, it constituted a prima facie violation even on the narrow reading of sections 7 and 10 adopted by the majority of the Federal Court of Appeal in C.N.R. v. Bhinder (April 13, 1983).

The Bona Fide Occupational Requirement Exception Defence to the Employer in Respect of Discrimination on the Basis of Age.

The difficult issue pertains to whether Air Canada can succeed in its asserted defence that its hiring practice, prima facie discriminatory, is excepted from the operation of sections 7 and 10 of the Act, by reason of such practice being defensible under section 14(a) of the Act, which reads:

It is not a discriminatory practice if
(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement;

Discrimination presumes a distinction between persons on a basis not related to merit, and unlawful discrimination, as proscribed by sections 7 and 10, arises when a discriminatory practice is based upon a ground, such as age,

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by section 3, and the employer cannot bring itself within an excepting provision of the Act. The Complainants in the instant case established a prima facie case of an unlawful

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discriminatory practice, prohibited by sections 7(a) and 10(a) of the Act, as a result of the Respondent's employment requirement of an age hiring-ceiling of age 27. A prima facie case of discriminatory practice having been established, the onus of proof shifts to the employer Respondent to bring itself, on a balance of probabilities, within the exception of section 14(a) of the Act, establishing that the employer's policy or practice is based upon a bona fide occupational qualification.

The Federal Court of Appeal in C.N.R. v. Bhinder, (April 13, 1983), is the first court to interpret the "bona fide" occupational requirement exception of section 14(a) of the Canadian Human Rights Act. However, there are several court decisions with respect to similar provisions in provincial human rights' legislation. We shall review the provincial legislation generally with respect to the exceptional provisions and then consider section 14(a) of the Canadian Human Rights Act specifically.

Canadian society has expressed increasing concern in recent years for human rights protection, including protection from age discrimination in employment. There are unquestioned adverse psychological, social and economic consequences for the person whose employment is terminated, or who cannot obtain employment, because of an employer's discrimination on the basis of age. At the same time, the employer and society have an unquestioned interest

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allowing the employer to impose employment standards, including an age requirement, where such standards relate reasonably to legitimate business operations of the employer.

The economic efficiency of the employer must be considered, both from the standpoint of the employer's direct self-interest, and also society's indirect interest in the cost competitive and cost efficient production of goods and services within Canada. Similarly, the safety of the employee, his fellow workers, and the general public, are also necessary factors for consideration, both from the standpoint of the economic self-interest of the employer, co-workers and public, and the general well-being of society. There must be a balancing of the conflicting interests of the employee (and the underlying societal value and interest in protecting him) and the employer (and the underlying societal value and interest in protecting him). See, for example, Foreman et al v. VIA Canada Inc. (1980), 1 C.H.R.R. D/111, at D/112, and Lament v. Air Canada (1982), 34 O.R. (2d) 195 (H.C.).

Accordingly, it is lawful in some circumstances for employers to recognize age as a factor affecting an employee's capacity, and act accordingly. All the Canadian human rights statutes, except that of Nova Scotia, permit age discrimination when it is founded on a "bona fide occupational qualification" (hereinafter sometimes referred to as BFOQ) or where "reasonable cause" exists. Likewise, age discrimination is permitted if it is carried out pursuant to a "bona fide retirement or pension plan". This provision exists in all of the relevant Canadian statutes.

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Most of the litigation in Canada in respect of the BFOQ exception has been in respect of subsection 4(6) of the old Ontario

Human Rights Code, R.S.O. 1970, c.318, as am. (later R.S.O. 1980, c.340, s.4(6), repealed by S.O. 1981, c.53, s.48). It provided:

The provisions of this section relating to any discrimination, limitation, specification or preference for a position or employment based on age ... do not apply where age is a bona fide occupational qualification and requirement for the position or employment.

Many of the decisions involve a determination of what is meant by "bona fide" or "reasonable". In Hawkes v. Brown's Ornamental Iron Works of Belleville Ltd. (Ontario, December 12, 1977), the Board of Inquiry (Professor D.A. Soberman) stated, at p. 17:

... [I]t seems clearly established that the subsection [s.4(1)(6)] may only be used to justify discrimination based on age when the respondent has satisfied the Board that there are sound reasons for the qualification.

Professor Soberman found that the employer's reasons could not be "sound" since they brought forward no evidence which might have shown that the job could not have been performed by men or women over the age of 50.

In Derkson v. Flyer Industries, Inc. (Manitoba, June 2, 1977), the Board of Inquiry considered whether a "reasonable occupational qualification" or a "bona fide retirement plan" (as. 6(6) and 7(2) of the Human Rights Act S.M. 1974, c.65) existed to defeat the prima facie case put forward by the complainant. The Board stated, at p. 38:

The exception to the prohibition against discrimination on the basis of age which is contained in the words "reasonable occupational qualification and requirement for the position or employment" can only refer to two circumstances. The first is that case where the individual

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by virtue of his age alone does not have the physical, mental or technical capacity to carry out his duties as an employee. It would be incumbent upon an employer who sought to set up this exception as a defence to demonstrate by convincing evidence that one can infer in the particular circumstances that age alone would render an employee physically, mentally or technically incapable of performing his duties. The second case ... would be where it can be shown that the public or other persons might be adversely affected or harmed because the very age of the employee might make it obvious he could not as safely perform his duties as would someone younger in age... Once again, however, substantial evidence would have to be adduced by the employer to demonstrate the imcapacity or

reduced capacity occasioned by the age of the employee.
...
I find it difficult to interpret the words of subsection (2) of section 7 so as to reach the conclusion that the establishing of a mandatory retirement age, with or without economic benefit at that time, constitutes a permissible term of a "bona fide retirement" plan. The fact that the words "bona fide retirement" are lumped together with the words "superannuation or pension" preceding the word "plan" indicates to me that the type of plan envisaged in the section is one that provides economic benefits for an employee once he or she reaches a certain age, whether or not employment ends, or once he or she has left the employment of the company either voluntarily or for cause. Moreover the word used is "plan" not "policy". In short, I do not think that the mere setting of a retirement age constitutes a term of the type of plan envisaged in that subsection. The purpose of the subsection is simply to ensure that given a proper plan there may be distinctions or differentials in benefits which depend on age. If that were not the case the actuarial basis of such plans might be seriously affected and improper benefits might be provided.

Professor London’s interpretation of the "reasonable occupational qualification" defence is that evidence must be adduced to show age related impaired capacity of the employee or age related safety risks, and that a "bona fide retirement plan" defence requires the existence of a regime of employee benefits, not simply a mandatory retirement policy at a fixed age. Neither defence was established successfully in the Derkson case.

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The evidence necessary to establish a "bona fide occupational qualification" was considered in the New Brunswick case, Little v. St. John Shipbuilding and Drydock Co. Ltd. (1980), 1 C.H.R.R. D/1, at D/5:

... [I]f medical tests are available to accurately measure one’s biological or functional age, then such tests can eliminate the need to discriminate on the basis of chronological age... If such medical tests are not available then there is a greater possibility of a bona fide occupational qualification based on age being necessary.

...
Where medical tests are not practical for whatever reason and statistical data is available to show that there is a reasonable probability of individuals beyond a certain age having difficulty in meeting the minimally acceptable performance standards for a particular job, it can be logically argued that a bona fide occupational qualification ought to exist - that discrimination on the basis of chronological age is necessary.

The Board stated further, at D/8:
... [I]n situations where public safety is a major factor, the burden of showing the existence of a reasonable occupational qualification should be less onerous than what otherwise might be the case.

Thus, as suggested by the Tribunal in Little, the exceptional defence may rest upon either of two established evidentiary situations. In both situations the employer must establish that medical evidence is not obtainable from a practical standpoint. First, where medical evidence of incapacity is not obtainable from a practical standpoint, an age-related occupational qualification should be recognized as bona fide, if statistical data is available to show that there is a "reasonable probability" that incapacity to perform the job may ensue at a particular age. Second, where medical evidence

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capacity is not obtainable from a practical standpoint, and if the safety of the employee or others is at issue, then the evidentiary burden is less onerous to establish the age-related BFOQ.

Therefore, the type of job (is safety a factor) and the evidence of age-related capacity (is medical evidence not obtainable from a practical standpoint, and is statistical data available) are the two important evidentiary considerations. These factors have been weighed in a series of Ontario cases dealing with firefighters.

The first such case considered the forced retirement of a fire prevention officer at age 60. In Re Ontario Human Rights Commission and City of North Bay (1977), 17 O.R. (2d) 607 (C.A.), the complainant's job was described in evidence as potentially hazardous and both physically and mentally stressful, as he was required to examine buildings damaged by fire. No medical evidence was brought forward to suggest that the complainant was incapitated, given the demands of the position, but four experienced fire fighters testified that:

... [T]hey felt that age 60 was an appropriate 'rounding-off' figure to define the safe limits of employment in the interests of the individual himself and of his fellow workers.

quoted by the Divisional Court (1977), 17 O.R. (2d) 712, at p. 714, in affirming the appeal from the decision of the Board of Inquiry (Professor R.S. Mackay, Q.C.) in Cosgrove v. City of North Bay (May 21, 1976), at p. 8.

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Thus, Professor Mackay considered the nature of the job and the evidence brought forward as to incapacity. The Court of Appeal

also quoted Professor Mackay's interpretation of what is meant by "bona fide", at p. 715:

... [A]lthough it is essential that a limitation be enacted or imposed honestly or with sincere intentions it must in addition be supported in fact and reason "based on the practical reality of the work-a-day world and of life."

In my view the age 60 mandatory retirement provision satisfies both aspects of the word "bona fide". It is a condition honestly imposed and, on the basis of the evidence of the Corporation's witnesses, which I accept, it is a condition which reasonably and properly can be imposed in the special context of firefighters. Firefighters (along with policemen) belong to one of the most hazardous occupations in Ontario...

In a second Ontario Board of Inquiry decision handed down the same day, Hadley v. City of Mississauga (May 21, 1976), the complainant was also a fireman who was forced to retire at age 60. However, the Board (Professor S.N. Lederman), while acknowledging the job of fire-fighter to be hazardous, held that the complainant's claim was valid in the absence of any evidence brought forward by the City to show firemen deteriorated past age 60 to the extent that some safety risk was inevitable. As to what was required of an employer to establish a BFOQ defence, Professor Lederman stated, at p. 6:

The burden of proof to establish this fact lies upon the employer. The exception set out in s.4(6) was intended to be narrowly construed and the principle should be followed that in interpreting a humanitarian remedial statute which fulfills a public purpose, the burden should lie upon the Respondent who asserts an exception to the general policy of the legislation: See the Interpretation Act, R.S.O. 1970, c.225, s.10; Weeks v. Southern Bell Telephone and Telegraph Company (1969), 408 F 2nd 228.

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Professor Lederman referred, at p. 7, to the United States decision, Hodgson v. Greyhound Bus Lines Inc., 499 F.2d 859 (1974), where it was held that the employer, to discharge its burden of proof, must at least show a "rational basis in fact" for believing that elimination of its maximum hiring age would result in the likelihood of an "increase in risk of harm" However, in Hadley the employer "did not adduce a scintilla of evidence", at p. 11.

Consequently the Board has no concrete evidence before it to suggest that age is a bona fide occupational qualification and requirement of shift captain.

A third decision of an Ontario Board of Inquiry dealt with the same issues. In Hall and Gray v. IAFF and Etobicoke Fire Dept. (July 21, 1977), the Board (Professor Bruce Dunlop) followed the

Hadley decision. He held that, as there was no evidence to show that firefighters over 60 were less effective or less safe than younger employees, a BFOQ defence was not established. He said that he had heard "impressionistic" evidence from the deputy chief

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of the Etobicoke Fire Department, indicating that some firefighters were less capable in responding to the demands of the job after age 60. Professor Dunlop was of the opinion that this evidence went to show that firefighters ought to be allowed to retire at age 60, but should not be required to. Some "medical justification" by scientific or statistical evidence would be necessary before the Board could recognize that the age limitation was a bona fide occupational qualification.

This decision was overturned by the Ontario Divisional Court: Borough of Etobicoke v. Hall et al. (1980), 26 O.R. (2d) 308. Speaking for the Court, O'Leary, J. disagreed with the Board of Inquiry's formulation of the BFOQ defence, at p. 316:

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He appears not to have put his mind at all to the question of whether the borough in agreeing to the age limitation acted honestly and with sincere intentions and in requiring a scientific conclusion that there was a significant increase in the risk to individual firefighters, their colleagues or to the public at large in allowing firefighters to work beyond the age of 60, he was requiring the employer to do far more than to show that the age limitation was supported in fact and reason based on the practical reality of the work-a-day world.

In effect, the court was implying that the BFOQ defence was established if the respondent was acting with sincere intentions.

However, in both North Bay and in Etobicoke, the Boards had emphasized that the BFOQ was a two-pronged test. While good faith or sincere intention was the first prong of the test, there was a second prong.

Chairman Mackay stated in North Bay:
"Bona fide" is the key word. Reputable dictionaries whether general (such as Oxford and Webster) or legal (such as Black) regularly define the expression in one or several of the following terms, viz., honestly, in good faith, sincere, without fraud or deceit; unfeigned, without simulation or pretense, genuine. These terms connote motive and a subjective standard. Thus a person may honestly believe that something is proper or right even though, objectively, his belief may be quite unfounded and unreasonable. Applying this solely subjective standard I have no doubt whatsoever that the Corporation in enacting bylaw 2085 and negotiating the collective agreement upon which it is founded were acting honestly, as opposed to maliciously, deceitfully or for some oblique or ulterior purpose in disguise.

However, that cannot be the end of the matter or the sole meaning to be attributed to "bona fide" for otherwise standards would be too ephemeral and would vary with each employer's own opinion (including prejudices), so long as it is honestly held, of the requirements of a job, no matter how unreasonable or unsupportable that opinion might be. Thus an airline may sincerely feel that its stewardesses should not be

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over 25 years of age. However,
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if it requires such a limitation as a condition of employment or continuing employment I would have no doubt that such limitation would not qualify as a bona fide occupational qualification or requirement under the exemption created by section 4(6). Why? Because, in my opinion, such a limitation lacks any objective basis in reality or fact. In other words, although it is essential that a limitation be enacted or imposed honestly or with sincere intentions, it must in addition be supported in fact and reason "based on the practical reality of the work a day world and of life" (adopting the words of Mr. O'Neill in his summation).

quoted by the Divisional Court decision (1977), 17 O.R. (2d) 712, at p. 715.

Chairman Dunlop stated in Etobicoke:
One of the first things the board must determine is the meaning of the expression "bona fide" as applied to an "occupational qualification and requirement" in the context of an anti-discrimination statute. One of the objectives of the Code is to ensure that people in the age range forty to sixty-four, who in the past often have been discriminated against in respect of employment opportunities, are not prevented from working simply because they are believed to be too old. If they are to be prevented from filling available jobs it must be because they have shortcomings apart from age. The exception in s.4(6) recognizes that for some jobs people from forty to sixty-four may be too old. The meaning of "bona fide" that seems most consistent with this objective would be "real" or "genuine" i.e. that there is a sound reason for imposing an age limitation, and the onus of establishing this justification for discrimination is on the person alleging it to be justified."

Quoted by the Divisional Court decision (1979), 26 O.R. (2d) 308, at p. 314.

An appeal by the complainant and Commission to the Ontario Court of Appeal was "dismissed for the reasons given by O'Leary, J". A further appeal was taken to the Supreme Court of Canada: Ontario Human Rights Commission et al. v. Borough of Etobicoke (1982), 132 D.L.R. (3d) 14.

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McIntyre, J. speaking for a unanimous court in allowing the appeal, accepted the definition of "bona fide occupational qualification" formulated by the Board of Inquiry in the North Bay case, stating, at pp. 19-20:

To be a bona fide occupational qualification and requirement

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a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

McIntyre, J. held that the subjective component of the case had been satisfied, and then considered the objective component, at p. 20:

In cases where concern for the employee’s capacity is largely economic, that is where the employer’s concern is one of productivity, and the circumstances of employment require no special skills that may diminish significantly with aging, or involve any unusual dangers to employees or the public that may be compounded by aging, it may be difficult, if not impossible, to demonstrate that a mandatory retirement at a fixed age, without regard to individual capacity, may be validly imposed under the Code. In such employment, as capacity fails, and as such failure becomes evident, individuals may be discharged or retired for cause.

He expanded further upon the nature of the objective component of the two-pronged test of the bona fide occupational requirement exception, at pp. 20-21:

In an occupation where [as in the case of firefighters]... the employer seeks to justify the requirement in the interests of public safety, to decide whether a bona fide occupational qualification and

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requirement has been shown the board of inquiry and the Court must consider whether the evidence adduced justifies the conclusion that there is sufficient risk of employee failure in those over the mandatory retirement age to warrant the

early retirement in the interests of safety of the employee, his fellow employers and the public at large.

As to the evidence required by the Respondent to meet the onus, McIntyre, J. stated, at pp. 22-23:

It would be unwise to attempt to lay down any fixed rule covering the nature and sufficiency of the evidence required to justify a mandatory retirement below the age of 65 under the provisions of s.4(6) of the Code. In the final analysis the board of inquiry, subject always to the rights of appeal under s.14d of the Code, must be the judge of such matters. In dealing with the question of a mandatory retirement age it would seem that evidence as to the duties to be performed and

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the relationship between the aging process and the safe, efficient performance of those duties would be imperative. Many factors would be involved and it would seem to be essential that the evidence should cover the detailed nature of the duties to be performed, the conditions existing in the work place, and the effect of such conditions upon employees particularly upon those at or near the retirement age sought to be supported. The aging process is one which has involved the attention of the medical profession and it has been the subject of substantial and continuing research. Whereas a limitation upon continued employment must depend for its validity on proof of a danger to public safety by the continuation in employment of people over a certain age, it would appear to be necessary in order to discharge the burden or proof resting upon the employer to adduce evidence upon this subject... in cases such as this, statistical and medical evidence based upon observation and research on the question of aging, if not in all cases absolutely necessary, will certainly be more persuasive than the testimony of persons, albeit with greater experience in firefighting, to the effect that firefighting is a young man’s game.

It is not disputed that at all times Air Canada imposed its hiring policy with subjective good faith. However, with respect to the second of the

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fold test in Etobicoke, Mr. Lederman found that Air Canada faced "strong headwinds", at p. 123. The ’business necessity’ test requires that the bona fide occupational requirement

must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

Mr. Lederman concluded, at pp. 124-125, that Air Canada has not discharged the burden upon it to demonstrate from a business necessity point of view any factual basis for believing that all or substantially all pilots over the age of 27 with qualifications the same as younger candidates are incapable of safe and efficient job performance; or that it is impossible or impractical to test such individuals over a certain age on an individualized basis prior to the time of mandatory retirement to ensure that they meet the stringent qualifications required by the demands of safety. The evidence adduced does not justify a conclusion that there is a sufficient risk of pilot failure for persons over the age of 27 to warrant the imposition of Air Canada's age-at-hire restrictions. Consequently, I find the complaints herein to be substantiated.

There have been four other recent Canadian human rights tribunals dealing with the bona fide occupational requirement

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exception: Foreman et al. v. VIA Rail Canada Inc., Arnison v. Pacific Pilotage Authority, C.H.R.C. v. Voyageur Colonial and Canadian Motor Coach Association, and Bhinder v. Canadian National Railways.

In Foreman v. Via Rail Canada Inc. (1980), 1 C.H.R.R. D/111, the complainants had applied for the position of waiter and waitress on the trains of the respondent. All were refused employment on the basis that

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eyesight did not meet the employer's standard. They alleged discrimination because of physical handicap, and the employer relied upon the BFOQ defence.

The Tribunal (Frank D. Jones, Q.C.) adopted the two-pronged bona fide test set forth in North Bay, and specifically, the objective component test of whether the employer's practice was "based on the practical reality of the work-a-day world and of life", at D/111.

The employment position was found to be demanding, involving "long hours on a train up to four car lengths", at D/115, and an eyesight standard was necessary to perform the job which also had a safety factor. The Tribunal weighed the medical evidence given by both parties and found that a BFOQ defence was not established.

In Arnison v. Pacific Pilotage Authority (1980), 1 C.H.R.R. D/138, the complainant's name was removed from an eligibility list for employment as a river pilot when he turned age 50. According to the regulations under the Pilotage Act, S.C. 1970-71-72, c.52, applicants for pilot licenses must be "not less than 23 and not more than 49 years of age."

The Tribunal (R.G. Herbert) found that these age limits did not satisfy section 14(a) of the Canadian Human Rights Act as a bona fide occupational qualification. Pilots were required to complete an apprenticeship period and thereafter satisfy medical and technical standards from time to time imposed during which their abilities could be accurately tested. The

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- 50 decision
was reversed by the Federal Court of Appeal, but on the basis of the exception for minimum and maximum age requirements prescribed by law, as provided for by section 14(b) of the Canadian Human Rights Act, rather than as a bona fide occupational requirement: Pacific Pilotage Authority v. Arnison (1980), 1 C.H.R.R. D/225. In the result, the Court found it unnecessary to express an opinion on the BFOQ defence, at p. 27.

In Canadian Human Rights Commission v. Voyageur Colonial Ltd. (1980), 1 C.H.R.R. D/239, a complaint was made based upon the respondent's policy of refusing employment as bus drivers to applicants over the age of 40. The respondent contended that the

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age limitation was based upon a bona fide occupational qualification within the meaning of paragraph 14(a) of the Canadian Human Rights Act.

The employer asserted that new drivers were placed in low seniority positions, were put on call and worked unpredictable schedules under a "spare board system", all of which were sources of stress. The Tribunal (R.D. Abbott) found that a person's ability to cope with such sources of stress decreased with age, that the stress must be minimized to enhance public safety, and that the employer was accordingly obliged to eliminate applicants who might not successfully cope with stress. The 40-year age limit at hiring was a BFOQ because, at D/244:

[T]here now exists no way of predicting a person's capacity to cope with those stresses... [T]he one reasonably reliable predictor of ability to cope with these stresses now available is age. It can be concluded that if the 40-year age limit were eliminated, in the absence of a more reliable test which could be substituted, the likelihood would be greater that a number of new bus

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drivers, over the age of 40, would be unable to cope with the stresses of low seniority and the spare board system, and the risk of harm to the travelling public would increase.

Mr. Abbott's decision is instructive on the question of the nature and sufficiency of the evidence an employer must adduce to establish a BFOQ. He stated, at D/240:

If I were dealing with the issue of whether age is an appropriate measure of physical capacity, then I would expect there to have been submitted evidence of a scientific and statistical nature to show the relation of age to physical capacity. Alternatively, or in addition, I would have expected there to have been evidence based on experience: the observations of bus drivers of their own and others' ability to cope with the physical demands of their work as they increased in age. But in the present case, there was no reliable scientific or statistical evidence produced to establish the relationship, if any, between age and the ability to cope with psychological stress. Nor was there satisfactory evidence of an experiential or observational nature regarding this matter.

The safety-cordinators for the employer, a physician who had experience in testing its applicants, and an industrial psychologist, testified on behalf of the employer. The psychologist testified that the ability to cope with stress, "especially abrupt changes in working conditions", at D/243, decreases with advancing age, and that no test existed or could be developed to predict on an individual basis whether a 40 year-old applicant could cope with the respondent's "spare board" system. Although on the evidence the Tribunal found that the employer had "only adequately" tipped the burden of proof in its favour, a BFOQ defence was established. The Tribunal applied with approval the

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two-pronged test for BFOQ set forth in
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Bay, at D/244. With respect to the objective component of the two-pronged bona fide test, the Tribunal also considered with approval the United States' case of Hodgson v. Greyhound, 499 F. 2d 859 (7th Cir., 1974); cert. denied, 95 S. Ct. 805 (1975).

The Respondent in Hodgson argued that its policy of hiring only persons under age 35 for the position of bus driver constituted a bona fide occupational qualification. The evidence of experienced transportation officials substantiated the Respondent's claim that the age limitation was bona fide, but Swygert, C.J. held that evidence, in itself, to not be sufficient, at p. 863:

The testimony of these officials, although persuasive in view of their accumulated experience in the transportation industry, is not of itself sufficient to establish a bona fide occupational qualification. In our view we find more compelling Greyhound's evidence relating to the rigors of the extra-board work assignments; the degenerative physical and sensory changes in a human being brought on by the aging process which begins in the late thirties in the life of a person; and the statistical evidence reflecting, among other things, that Greyhound's safest driver is one who has sixteen to twenty years of experience with Greyhound which could never be attained in hiring an applicant forty years of age or over.

Therefore, where statistical and medical evidence was available, the simple opinions of experienced officials would not have been sufficient to establish a bona fide occupational qualification. In the particular situation, once the scientific statistical and medical evidence was adduced, the Court held that it would not be possible or practical to detect all of the degenerative changes that accompanied advancing age, and as such, the age limitation was reasonable.

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- 53 -
The Court also referred to the nature of the occupation of bus driver, at p. 863:

... [A] public transportation carrier, such as Greyhound, entrusted with the lives and well-being of passengers, must continually strive to employ the most highly qualified persons available for the position of inter-city bus driver for the paramount goal of a bus driver is safety. Due to such compelling concerns for safety, it is not necessary that Greyhound show that all or substantially all bus driver applicants over forty could not perform safely ... Greyhound need only demonstrate, however, a minimal increase in harm for it is enough to show that elimination of the hiring policy might jeopardize the life of one more person than might otherwise occur under the present hiring practice.

Another American decision on the nature of the evidence required is Aaron v. David, 414 F. Supp. 453 (1976), dealing with the mandatory retirement of firemen. Eisele, C.J. states, at p. 461:

It is apparent that the quantum of the showing required of the employer is inversely proportional to the degree and unavoidability of the risk to the public or fellow employees inherent in the requirements and duties of that particular job. Stated another way, where the degree of such risks is high and methods of avoiding same (alternative to the method of a mandatory retirement age) are inadequate or unsure, then the more arbitrary may be the fixing of the mandatory retirement age. But at no point will the law permit, within the age bracket designated by the statute, the fixing of a mandatory retirement age based entirely on hunch, intuition, or stereotyping, ie., without any empirical justification.

The Court then found that, as there was no evidence that substantial risk would result if the age limitation was eliminated, the restriction was not a bona fide occupational qualification. The Greyhound decision was distinguished on the basis that in Greyhound evidence of risk was adduced and

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deterioration was not measurable. In Aaron, evidence of risk

was absent and, in any event, it was held that individual periodic medical examinations would reveal deterioration in employees' capacities.

The Court's analysis in Hodgson is similar to the analysis of the Supreme Court of Canada in Etobicoke. With both the position of bus driver and firefighter, the courts found on the evidence adduced by the employer that the concern for public safety was present in the nature of the duties to be performed. The onus was upon the employer to go further, and show an increase in risk of harm by the removal of the employer's age ceiling policy. To do so, medical and statistical evidence is to be led on the question of aging. The "nature and sufficiency of the evidence required" will vary with the circumstances of each case, but the onus is always upon the employer to adduce whatever medical or statistical evidence is available: Etobicoke, at pp. 22-23.

If scientific or statistical evidence is available, it must be used to meet the objective component of the two-pronged test. Thus, in Foreman v. VIA Rail, (1980), 1 C.H.R.R. D/111, the Tribunal found that the employer failed to discharge the onus upon it to establish a bona fide occupational requirement, as no scientific evidence was produced, at D/117.

The question to he answered is whether or not these standards are bona fide based on the practical reality of the work-a-day world. In my opinion, there is no evidence to establish that this is the case. The experts testifying on behalf of VIA Rail would merely state that they were "reasonable" but there was no scientific basis to back up this contention.

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In Bhinder v. Canadian National Railways (1981), 2 C.H.R.R. D/50, the complainant was a Sikh who wore a turban for religious reasons. He worked in the respondent's railway yard as an electrician, but was fired when his employer changed its employment practices to require all employees working in the railway yard to wear hard hats for safety reasons. The complainant could not comply, as to do so would be in violation of his religious tenets. One issue was whether the employer's hard hat requirement was a BFOQ.

The employer established that there was a real, if slight, increase in risk of harm to the complainant if he did not wear a hard hat. Consistent with the narrow construction to be given to exceptions, such as the BFOQ exception to prohibited discrimination, the Tribunal held that, where an employment requirement is discriminatory and only the complainant is at increased risk by non-compliance, "all reasonable effort should be made to accommodate the person or persons discriminated against... [assuming] the absence of any undue hardship to the employer", at D/94.

The majority of the Court in Federal Court of Appeal in Bhinder applied Etobicoke, in interpreting the defence of bona fide occupational requirement of section 14(a) of the Act. They allowed the appeal on the basis, in part, that, as the Tribunal had found "that the safety hat requirement was related to the performance of his employment [and] ... employees ... not wearing the safety hats would be more likely to be injured", the employer had met the evidentiary burden of establishing a BFOQ defence on the basis of the objective test: per Heald, J. at p. 8. One member of the

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- 56 majority
also held that there was no "duty to accommodate" on the part of an employer: per Kelly, D.J. at p. 3. Leave to appeal this decision was granted by the Supreme Court of Canada on June 6, 1983.

In dissenting, LeDain, J. would have upheld the Tribunal's finding that a BFOQ defence was not established by the employer. He stated, at pp. 21-22:

In the present case the Tribunal adopted the position, and this was the contention of counsel for the Commission and Bhinder, that the duty to accommodate is a necessary aspect of the application of the exception of bona fide occupational requirement in a particular case. It is a corollary of the concept to adverse effect or indirect discrimination that the exception must be considered in relation to the employee affected; otherwise the exception could render the concept of indirect discrimination illusory. It is thus necessary in weighing the various factors, including the discriminatory effect in order to determine whether the requirement is

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reasonably necessary in relation to the employee affected, that consideration be given to whether an exemption from or substitution for the requirement could be allowed by the employer in the particular case without undue hardship to his business.

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In my opinion this is a sound approach that is open as a matter of law to a human rights tribunal under section 14(a) of the Canadian Human Rights Act, and it is not excluded by the definition given to bona fide occupational requirement by the Supreme Court of Canada in the Etobicoke case.

We shall now consider the United States' pilot cases and the BFOQ defence.

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Smallwood v. United Airlines Inc., 661 F. 2d 303 (4th Cir., 1981), cert. denied, 102 S. Ct. 2299 (1982), raised issues similar to those before this Tribunal. United had a cut-off age for pilot

applicants of 35 years of age, and in raising the "bona fide occupational qualification" defence afforded by the Age Discrimination in Employment Act, 29 U.S.C. ss. 621-34, the airline contended that airline safety would be adversely affected if the age limitation was not observed. The trial court had found that United had sustained its burden of showing that its age requirement was a BFOQ. In reversing, the Court of Appeals, at p. 307, emphasized that the BFOQ exception is to be narrowly applied and quoted from its previous decision in Arritt v. Grisell, 567 F. 2d 267 (4th Cir., 1977), at p. 1271:

To justify a refusal to hire under the BFOQ exception contained in the Age Discrimination in Employment Act, the burden is on the employer to meet a two-prong test:

(1) that the BFOQ which it invokes is reasonably necessary to the essence of its business... and

(2) that the employer has reasonable cause, i.e., a factual basis for believing that all or substantially all persons within the class... would be unable to perform safely and efficiently the duties of the job involved, or that it is impossible or impractical to deal with persons over the age limit on an individualized basis.

In our opinion, this test is substantively similar to the one set forth in Etobicoke by the Supreme Court of Canada. The Court of Appeals in Smallwood rejected the several arguments of United that safety would be adversely affected by removing the age limitation, finding that United had "provisions in place for the medical testing of its pilots of all ages", and thus, United had "failed to show the impossibility or impracticality of dealing with applicants individually", at pp. 308-309. The Court noted, at pp.

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309:
It was conclusively shown at trial that United’s physical examination program was effective in detecting potentially disabling medical conditions, one that future cardiovascular problems could be detected with a high degree of predictability. These preventive medical examinations must have the same degree of predictability as to future medical disabilities for newly-hired 48-year-old pilots from other airlines as they would for career United pilots. In short, United’s evidence at trial while probative of the incidence of medical problems in pilots of advanced age and of the effectiveness of its own examination system, failed to show a relationship between a maximum age-at-hire limitation and airline safety.

Therefore, the plaintiff’s appeal of the trial court’s decision in favour of United was allowed.

A similar situation arose in Murname v. American Airlines Inc., 667 F. 2d 98 (D.C. Cir., 1981), cert. denied, 102 S. Ct. 1770 (1982). Murname was not referred to in the Smallwood decision which was handed down only seven days later. At the trial level, American Airlines had successfully defended its policy not to hire persons over 30 year as a second flight officers by invoking the bona fide occupational qualification exception to discriminate under the Age Discrimination in Employment Act of 1967. Section 623(f)(1) of that Act provides:

It shall not be unlawful for an employer to take any action otherwise prohibited under [subsection (a)]... of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.

The appellate court affirmed the trial court's decision in favour of American Airlines on the basis that the airline adduced evidence that the best experience an American pilot as captain can have is by flying its aircraft in

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three cockpit positions. The Court stated, at pp. 100-101: "by limiting its new hiring to relatively young pilots, American thereby ensures that the experience with American of its active captains will be maximized. This, as we pointed out earlier, maximizes safety".

The Court held further that, although safety might only be marginally increased by the age limitation rule, the bona fide occupational qualification defence was established, referring to Hodgson. That is, if public safety is involved, and there is a minimal increase in the risk of harm through removal of the age limitation policy, and assuming medical, statistical or other

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scientific evidence also supports the employer's claim that a blanket policy, rather than individual testing, is the only way of minimizing risk and enhancing safety, a BFOQ defence will have been established.

The policy of American Airlines was to require all second officers to advance to the position of captain, no one being hired without this objective being in mind. This is referred to as an "up or out" policy.

However, Air Canada does not have an "up or out" policy, but rather permits some permanent career second and first officers. Mr. Lederman distinguished Murname on this basis at the Tribunal level in the case before us, at pp. 121-122:

Air Canada is desirous of maximizing the number of years that a pilot serves as a captain in order to provide a greater

return on its investment of expensive training. There is nothing, however, in the evidence before this Tribunal to suggest that Air Canada's hiring policy is directed specifically, as it was in the Murname case, towards maximizing its captains' record of experience in

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the interests of safety. Indeed, with Air Canada it is not a policy at all since it allows individuals to stagnate at the second officer or first officer levels without imposing a necessity of seeking a higher cockpit position. Promotion to the next higher position depends upon the economic circumstances of Air Canada and the individual desire of the pilot to upgrade when he has the opportunity. If, on such occasion, he wishes to remain a permanent second officer for example, and declines to upgrade, or, chooses to advance later at a more convenient time for him, he thereby frustrates any principle of maximizing the number of possible years of service as a captain that he could otherwise provide if he had to adhere to an "up or out" rule. In the absence of an "up or out" rule, therefore, it cannot be said that Air Canada's hiring age policy is directed to the advancement of safety by maximizing the experience of its group of captains. For this Tribunal to give effect to the principle in Murname in the circumstances of this case would be to act upon pure supposition or evidence which is "impressionistic" rather than substantive. (See The Ontario Human Rights Commission v. The Borough of Etobicoke, supra, at pp. 8-9). The mere general assertion by Captain Sanderson that it looks upon every applicant as an "eventual captain" from an economic viewpoint cannot result in a conclusion, justified by probative evidence, that Air Canada's hiring policy is reasonably necessary for the enhancement of public safety. Even though the onus to establish bona fide occupational qualification on Air Canada is lighter in view of the hazardous nature of a pilot's occupation, it is not absolved from adducing credible evidence on the importance of maximizing its captains' experience from a safety point of view. Consequently, the Murname decision has little applicability to the actual evidence adduced in this hearing.

In Murname, the aging process was not really the issue. Rather, the issue was whether an age-ceiling hiring policy was justified on the basis that in limiting its hiring to relatively young pilots, American Airlines was maximizing experience with American and this in turn maximized safety. This argument had also been made by United Airlines in Smallwood, it being asserted that "older pilots whose experiences were with other airlines might not safely integrate with United's crews", at p. 306, it being better for pilots to learn only one method of operation - United's throughout their career.

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Although the court in Smallwood agreed that "United's crew concept was designed to foster safer flight techniques", at p. 307, it rejected this asserted defence on the basis that the evidence was clear that "most new pilots [of United] are hired from a pool of ex-military pilots with many years flying experience", at p. 308. Therefore, in the court's view, the employer's evidence with respect to its "crew concept" was not accepted. Although the employer's subjective motive was safety, the age-ceiling was not viewed as necessary to minimize the risk to safety. In short, the employer's evidence to meet the second prong of the bona fide test, the objective requirement, was rejected.

Thus, the courts in Smallwood and Murname differed on the question of the acceptability of the evidence offered by the employers in the respective cases in support of an age-hiring ceiling policy to further the "crew concept" and in turn enhance safety.

Mr. Lederman rejected Air Canada's asserted BFOQ defence in part for the same reason that United's was rejected in Smallwood, at p. 122 of his decision:

In any event, it would be difficult to reconcile the Murname principle with Air Canada's habit of ignoring, on occasion, its own policy and hiring older pilots in times of economic necessity. If public safety really is the paramount reason for adhering to a hiring age ceiling in order to enlarge the years of captaincy, then Air Canada's conduct in hiring older pilots when it is to its economic advantage would appear to belie this rationale.

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Therefore, given that Air Canada does not have an "up or out" policy and has hired applicants who are older than its present standard of age 27 when economic conditions warranted (i.e. its supply of pilots was less than the market demand for its services) it seems clear that Air Canada is either prepared to accept a greater risk through hiring older-than-27 applicants to be pilots when it is convenient to Air Canada, or Air Canada does not really consider the stated safety concern to be of more than marginal significance at most. We think the second explanation to be the

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plausible one. Air Canada prefers to hire younger-than-27 pilots, but is prepared to waive that requirement even though it believes there may be a marginal increase in risk from the standpoint of safety, if economic or other circumstances make it expedient. There is really a single question that then arises. If Air Canada subjectively believes that there is a greater risk of safety, has it adduced sufficient evidence (within the Etobicoke framework) to meet the objective test of the BFOQ defence? If this test is met, the undisputed evidence that Air Canada is itself prepared to compromise safety on expedient, economic grounds, would not be determinative. The BFOQ defence would still be established.

However, Air Canada's own practices in violating its otherwise imposed age-limit in hiring is evidence that remains pertinent to the preliminary issue as to whether there is actually any real risk insofar as safety is concerned in hiring older pilots.

Findings with Respect to the Bona Fide Occupational Requirement Defence

The strongest evidentiary support of age as a bona fide occupational requirement for airline pilots on the record before this Tribunal is found in

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- 63 the
medical evidence. This evidence came from five principal sources. This involved oral testimony from three medical doctors, and the filing of two reports made by committees of medical experts in the United States.

Air Canada called as witnesses Dr. Antoine St. Pierre, its Senior Medical Officer (Air), and Dr. Douglas E. Busby, Chairman of the Department of Environmental Health at the Cleveland Clinic Foundation. Dr. St. Pierre had no special expertise on the question of aging, but had practical experience as a medical examiner for Air Canada. He was also a permanent member of Air Canada's Pilot Selection Committee and was responsible for its pilots' health maintenance program. Because of these responsibilities, he was well-informed in matters of aviation medicine, including relevant aspects of the question of aging.

Dr. Busby had previous experience as Deputy Federal Air Surgeon of the United States and as a Medical Director for Continental Airlines. In his position with the Cleveland Clinic he was involved in the continuing provision of consulting services with respect to aviation medicine. While his basic expertise appeared, like that of Dr. St. Pierre, to be in the area of aviation medicine generally, rather than in the area of aging, he was involved heavily in preparation for Congressional hearings on the age 60 retirement question in 1978-79 while with the Federal Air Surgeon's office. Thus, he was highly knowledgeable on the aging question. It is also clear that in his personal view he considered age a bona fide occupational requirement for airline pilots, both with respect to age 60 retirement and with respect to hiring at around age 30.

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The Canadian Human Rights Commission called Dr. Stanley R. Mohler, Director of Aerospace Medicine at Wright State University School of Medicine in Ohio. He was formerly Chief of the Aeromedical Applications Division of the Office of Aviation Medicine of the U.S. Federal Aviation Administration. He had been engaged in specialized research on the question of aging in

addition to his more general involvement in aviation medicine. Until about 1978 he was a supporter of the age 60 retirement rule, but he then came to believe that, in light of developments in medical science, age can no longer be regarded as a bona fide occupational requirement either for retirement or hiring purposes.

The two medical committee reports were both prepared as part of a Congressionally mandated review of the age 60 retirement rule for airline pilots in the United States. The first was the report of the Institute of Medicine of the National Academy of Sciences which was engaged under contract to review the relevant scientific evidence and prepare a report thereon to the National Institute on Aging of the National Institutes of Health. The Institute on Aging was charged with the primary responsibility for reporting to Congress on the desireability of a mandatory retirement age for pilots and the second report was that of a panel established by the Institute. Its report was based on consideration of the Institute of Medicine Report and other submissions. It must be noted that the relevancy of these two reports to the question of a maximum hiring age is limited by the fact that the focus was on the state of pilot health at age 60, not on the medical condition of potential applicants for employment as pilots at and above age 28.

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The areas of medical concern with respect to the hiring of pilots, as well as to the continuing performance of pilots, can be divided into those of a physical nature and those of a psychological nature. The evidence of psychological concerns was relatively weak and it is convenient to dispose of it first.

Basically, two potentially age-related psychological problems were noted. These may be referred to as the dead-end phenomenon and the age reversal problem.

The dead-end phenomenon related to possible frustrations felt by an individual facing the prospect of remaining in a position for an extended period without being able to achieve the career objectives implicit in that position. Specifically in the case of pilots, it was suggested that the natural career objective is the captaincy of the most advanced model of aircraft being operated by the airline. Because of the seniority system, a newly hired pilot may face a period of up to 13 years before being able to advance even to a first officer position. With mandatory retirement at age 60, pilots hired at advancing ages would face the prospect of not achieving a captaincy or first officer position until late in their careers, or perhaps not at all.

The evidence of the dead-end phenomenon involved relatively isolated observations. The phenomenon appears to involve many

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factors, particularly economic ones related to the situation of both the airline and the individual. Opportunity for advancement improves when an airline is expanding

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- 66 and
declines when the airline is in a stable or contracting state. The individual's financial status and objectives influence ambitions for advancement. The evidence is not adequate to show that this is an age-related problem supporting a bona fide occupational requirement. It is, at best, merely impressionistic.

The age reversal problem involves potential conflict in the cockpit where, because of the seniority system, a younger pilot might be placed in command over a more recently-hired, but older, pilot. The older person may question the authority of the younger, leading to a critical breakdown in the chain-of-command.

Once again, the evidence in support of the problem involved only isolated observations. It was, at best, impressionistic. It was countered by evidence that age reversal is not uncommon in military aviation and is not known to create problems there.

To the extent that age reversal might create the problem suggested, it would seem to bo so only because of an attitude of the older individual reflecting an age bias. An older pilot questioning the authority of a younger pilot in command on the basis of age is acting on the view that older age entitles one to a superior position. If such attitudes can give rise to a bona fide occupational requirement, then a whole variety of the most objectionable forms of discrimination could he supported because attitudes based on prejudice will in fact give rise to problems if discrimination is not carried out. The objections of existing employees to working with members of

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- 67 some
other group will undoubtedly give rise to problems if members of the other group are employed. The employer could argue that this created a bona fide occupational requirement excluding members of the other group from employment. This Tribunal is of the view that this result would so clearly violate the intent of the legislation that problems arising from attitudes which reflect bias on a ground of discrimination prohibited under the Canadian Human Rights Act cannot as a matter of law justify a bona fide occupational requirement. For this reason, as well as because there is not adequate evidence that age reversal is a significant problem, age reversal does not support a bona fide occupational requirement.

Areas of medical concern of a physical nature with respect to the hiring age of pilots can be grouped into problems with respect to the cardiovascular system, the nervous system and brain functioning, eyesight, hearing, the respiratory system and the musculoskeletal structure. As well, concern was noted with the potential development of cancer, and problems in coping with

stress.
The evidence of Dr. St. Pierre and Dr. Busby on the relevancy of age to potential impairment of pilots in these various areas was in conflict with that of Dr. Mohler. The differences lay in the appropriate significance to be attached to age as a causal factor in relation to potential impairments and in the degree of reliance that can be placed upon medical science to detect impairments in persons employed as pilots.

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- 68 -
The evidence of Dr. St. Pierre and Dr. Busby emphasized that the incidence of impairments increases with age which supports distinctions based on age. In addition both doctors were skeptical of the ability of medical science to adequately detect impairing conditions. This led them to the conclusion that, as the incidence of impairment increases with age, the risk of undetected impairment increases, making age a justifiable screening device against the resulting risk to safety in aircraft operation.

Dr. Mohler, on the other hand, subscribed to the view that the aging process is not itself responsible for significant impairments in most individuals until a very advanced age in the 80's or 90's. Earlier impairments are the result of other factors and should not be judged on the basis of age. Moreover, he was of the view that medical science is capable, with the implementation of more intensive and individualized testing procedures for which the technology now exists, of detecting impairment so as to reduce the risk involved in the employment of pilots having no detectable impairment to an acceptable minimum, regardless of age. Therefore, age was not a bona fide occupational requirement in his view.

At the outset, it must be observed that each of these opposing views contains a fallacy which renders it inadequate as a full answer to the question of whether age is a bona fide occupational requirement for pilot hiring. In both cases, the fallacy actually involves the question of law as to what constitutes a bona fide occupational requirement.

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- 69 -
The fallacy in Dr. Mohler's view is as to the meaning of age for the purpose of such requirement. He would confine the meaning of age to the aging process with the result that, if it can be shown that impairments are caused by other factors, they are not age related and, therefore, do not justify age discrimination. His evidence indicated that in many cases the alternative causal explanation involves length of exposure to the vicissitudes of life. Impairments become more common in older persons, not because of their age, but because it takes time for the impairing condition to develop.

In a common sense view, age encompasses a period of exposure to the life environment, including the individual's life-style as well as factors over which the individual has little or no control

such as pollution or contagious disease. Indeed, it is far more doubtful whether in ordinary usage the term "age" includes the scientific concept of aging advanced by Dr. Mohler.

Of course, this works both ways. Just as one cannot refute a claim that age is a bona fide occupational requirement by showing that the real basis of concern is a period of exposure to the life environment, rather than the aging process, neither can one avoid a charge of age discrimination by basing the distinction on the period of exposure to the life environment, rather than age. In other words, Air Canada would not escape the prima facie charge of age discrimination if its criterion were not age, but rather the length of time that the person had been living. This proposition is so obvious as to render it indisputable that age has a wider meaning under the Human Rights Act than that implicit in Dr. Mohler's reliance on the lack of a causal relationship between impairment and the aging process as an answer to the

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- 70 question
of whether age is a bona fide occupational qualification. If impairments are correlated to age due to exposure to environmental factors, including life-style, age is potentially a bona fide occupational requirement, even if the impairments are not caused by age itself.

The fallacy in the approach of Dr. St. Pierre and Dr. Busby is that it tends to assume that a correlation between age and impairment is not only a necessary, but also a sufficient, basis to support age as a bona fide occupational requirement. The basic premise of human rights legislation is that the merits of the individual should be assessed. Otherwise, bona fide occupational requirements might be established simply on the basis of statistical averages of group characteristics. This would merely be stereotyping in a new format which is, if anything, more invidious than traditional prejudices because it has an apparently scientific base. Even if the correlation between a discriminatory characteristic and a legitimate disqualification is shown to involve a causal relationship, such as, in this case, the undisputed relationship between exposure to the life environment and the development of impairing conditions in some pilots, consideration must still be given to the rights of individuals for whom the correlation does not hold.

The correct legal test of a bona fide occupational requirement, as stated in the Etobicoke case, is whether the requirement is reasonably necessary to the performance of the job. This means the Tribunal must examine both the necessity of the rule and the reasonableness of the rule in the light of that necessity.

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- 71 -
Another preliminary observation is that the evidence in this case does not in any sense indicate that age, in and of itself, is

an occupational requirement for the piloting of an aircraft within the age range at issue here. Apart from the lack of any evidence

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to this effect, any such contention would be clearly inconsistent with Air Canada's policy of continuing to employ pilots up to age 60 if they are not otherwise impaired. While there is some evidence that pilots as a class are less subject to the effects of age than other persons, that evidence is quite insufficient to support a conclusion that in terms of age alone persons employed by Air Canada through their 50's are somehow superior to applicants for such employment in their 30's and 40's. The fact that Air Canada continues to employ pilots to age 60, therefore, demonstrates that in terms of age alone persons are not disqualified for such employment by the fact that they are over 27.

The real concern in terms of pilot qualification is one of physical impairment, not age. This is shown by the areas of medical concern already noted. This concern actually has two aspects - first, that at any given point in time pilots actually engaged in flying are free from impairment such as might jeopardize the performance of their job, and, secondly, that pilots remain free from such impairment into the future. Analytically, it must be recognized that what may appear as concern over future impairment has two parts, one of which actually pertains to concern over the current condition of pilots engaged in flying. In light of the practicalities of medical examination, there is a risk that undetected impairment will occur either because the condition has developed to a significant stage only in the interval since the person was last examined or because the condition escapes

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- 72 detection.
Concern over future impairment in this sense is part of the airline's desire to ensure that pilots actually engaged in flying to any given time are free of impairing conditions.

The other part of Air Canada's concern over the future condition of its pilots is that it wants to employ pilots who have a potential for a long productive career with the airline. In part, this is a question of cost-consciousness since there is a substantial investment in recruiting and training pilots which must be recouped out of the subsequent productivity of pilots employed. The longer the period of employment of each pilot is, the lower will be the cost of hiring pilots and consequently the greater will be the profitability of the airline. Another part of this concern related to a need for experience in the training of pilots, who are normally hired as second officers, for the progressively more demanding positions of first officer and captain. In both respects, the possibility of employing pilots for a long productive career is ultimately confined by the age 60 retirement rule which is not in question here. If it is determined that a potential career of any given length is reasonably necessary to Air Canada's employment of pilots, the age 60 retirement rule would necessarily support a maximum hiring age which is under 60 by the length of the reasonably necessary potential career.

The question of potential for a long productive career does not, for the most part, involve medical factors. Further discussion of it is best left until after the medical issues have been fully dealt with, particularly since, as already noted, the strongest evidentiary support of age as a bona fide

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- 73 occupational
requirement lies in the medical evidence. One part of the medical evidence does relate to this question, that is, evidence that the early hiring of persons as pilots permits the airline to develop longitudinal medical records for the individual and to implement a health maintenance program which promote both safe operation and career longevity. These questions will be examined at the end of the discussion of the medical evidence and will serve as a transition to discussion of economic factors and the career longevity question.

Air Canada's concern with respect to freedom from impairment in pilots engaging in flying at any given time is, of course, a safety-related concern. It was not disputed that safety is a key concern in the operation of an airline and that the ability of pilots to operate aircraft safely is essential to the performance of their job. In assessing the ability of pilots to operate safely, Air Canada requires, not merely the minimum ability needed to operate safely under normal circumstances, but a substantial margin of ability to operate safely notwithstanding extraordinary and difficult circumstances.

Although considerable evidence was introduced in this case as to the procedures by which Air Canada assesses the capabilities of its pilots from a medical perspective, there is not much evidence as to what the actual requirements are, apart from vision requirements. Dr. St. Pierre testified that the standard required of applicants for employment as pilots is one of normal health but, even viewed in the context of the policy of preferred hiring in the 21-27 age range, this evidence is at best ambiguous. No issue

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- 74 was
raised as to the validity of Air Canada's medical requirements in this case, and this lack of evidence is, therefore, understandable. The need for a safety margin would serve to justify relatively demanding medical requirements, but prima facie such requirements could be imposed at any age level. Thus, the need for a safety margin does not necessarily justify the use of age as a requirement with respect to applicants for employment as pilots.

The rationale for Air Canada's age requirement in the hiring of pilots is that it is a practical necessity in order to maintain the required standard of capability from a medical perspective throughout its pilot force. Since the validity of Air Canada's medical requirements themselves has not been questioned, Air

Canada's objective of maintaining these standards must be considered legitimate. The use of age as a bona fide occupational requirement in this respect, therefore, depends on whether it is reasonably necessary to maintain Air Canada's medical requirements related to the potentially impairing conditions already noted.

The most age specific medical evidence before the Tribunal is

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the testimony of Dr. St. Pierre. He testified specifically as to the age range at which impairments begin to appear for most of the types of medical problems raised in his evidence. While there are some variations with respect to different types of impairment, in most cases the age range named begins at 40. While the other evidence is not equally specific, there is a variety of evidence which seems to confirm Dr. St. Pierre' opinion that the incidence of impairment starts to become significant at sometime during the forties and tends to increase thereafter.

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- 75 -
Against this there must be considered the evidence of Dr. Mohler that there is a wide variation between individuals as to their medical condition at any given age and that these variations widen with advancing age. This is also supported by other evidence. Moreover, the evidence indicates that, while impairment becomes an increasing problem after age 40, impairments can occur at any earlier age and that, even by the mandatory retirement age of 60, the yearly rate of impairment is not high. If the yearly rates of impairment from age 40 to age 60 are added together, it does appear that the total rate of impairment of pilots at some point during that age range may be fairly substantial.

To put it in other words, there is some risk that a pilot will be impaired before reaching the age of 40, but the risk begins to show a noticeable increase at about age 40. The risk remains small at any particular age level right through age 60, but there is a sizeable risk that an impairment will occur to the individual pilot sometime between the ages of 40 and 60. When this is viewed against Air Canada's legitimate objective of maintaining a margin of safety against possible impairment of pilots engaged in flying, there is an arguable basis for saying that age is a bona fide occupational requirement for pilots, at least in the age range above 40. If a period of experience as a pilot is necessary for the training of pilots as captains, this could further provide an arguable basis for a hiring age in the range of Air Canada's existing policy.

Before this arguable basis can be taken as establishing that such an age requirement is reasonably necessary to maintain Air Canada's margin for

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- 76 safe
operations, there are other factors to be considered. For one

thing, the risk demonstrated by the evidence actually relates to pilots who would in fact be continued in employment by Air Canada, absent actual impairment, until they reach age 60. In other words, Air Canada obviously does not consider the risk of employing pilots past age 40 to be incompatible with its margin for safe operation. While there is evidence that pilots as a group are healthier than the general population, just as they are less subject to the effects of age, this evidence does not show the risk of impairment in the non-pilot population to be so much greater as to make credible the conclusion that the risk of impairment in the

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non-pilot population is unacceptable if the risk of impairment among pilots is acceptable. The Tribunal must conclude that, although there is an increased risk of impairment among persons over 40, the risk is within the range that Air Canada believes acceptable. This in no way implies that Air Canada's operations may be unsafe since there are alternative methods of guarding against the risk of impairment.

These alternative methods of guarding against the risk of impairment are other considerations to be weighed in determining if a hiring age requirement is reasonably necessary. In an effort to avoid impairment in a pilot engaged in flying, Air Canada requires periodic medical examinations of its pilots which exceed the government's similar requirements for purposes of pilot licensing. It educates its pilots in self-detection of impairing conditions. Flights operate with three pilots in a position to monitor each other. Two of these pilots are fully trained to operate the aircraft and, in the extremely unlikely event that both of these should be incapacitated during a flight, the third pilot is trained to a capability of operating the aircraft as well, even though not fully qualified to do so.

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Indeed, the evidence of the incidence of impairment among pilots referred to above appears to reflect impairment which was in fact detected through such a system of safeguards. Actual incidents of undetected impairment resulting in unsafe operation of an aircraft appear to be rare, although it is admittedly true that such incidents may normally come to light only if they result in some sort of an accident or near-accident which, fortunately, the back-up system referred to above tends to prevent. The fact remains that the system appears to provide a substantial margin of safe operation, notwithstanding a risk of undetected impairment.

It has been noted that the general objective of human rights legislation is to give individuals the right to be assessed on their own merits, and not be judged by those characteristics which are listed as prohibited grounds of discrimination. The system of medical checks against impairment is in line with this objective, while the making of determinations based on age is not. The policy of the law is, therefore, a further reason for favouring reliance on these alternative safeguards over the use of age as an occupational requirement.

Certainly in any case where an impairment appears readily detectable, there is little justification for using age, rather than individual assessment, to determine who is qualified and who is not. Looking at the specific areas of medical concern, the evidence is persuasive that problems with eyesight and hearing are readily detectable. While problems with the respiratory system and the musculoskeletal structure may be less detectable, there is really no evidence that undetectable levels of impairment in these

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areas would affect the safe operation of an aircraft. The same is true of cancer. This leaves problems with the cardiovascular system and the nervous system and brain functioning, along with stress-related problems, as the areas of potentially serious medical concern, which, on the basis of the evidence, are related to age and may involve undetected impairment.

The evidence that ability to cope with stress significantly declines with age in a manner relevant to piloting of aircraft is sketchy at best. Indeed this is one of the few questions on which the Institute of Medicine report declined to draw any conclusions with respect to a relationship to age, noting instead that research is needed. The evidence is definitely insufficient to support a bona fide occupational requirement on this ground.

This is the answer to what Air Canada raised as the apparent anomaly that age of hire was recognized as a bona fide occupational requirement for bus drivers in Canadian Human Rights Commission v. Voyageur Colonial Ltd. (1980), 1 C.H.R.R. D/239, but denied for airline pilots by the initial Tribunal in this case. The decision in the Voyageur case reflected findings that newly hired bus drivers were subjected to special stress by the nature of their work assignment under the spare board system and their ability to cope with such stress underwent an age-related decline. The evidence before us does not support similar findings with respect to Air Canada’s pilots.

There may be a number of reasons for this. It does not imply that pilots are subject to less stress than bus drivers. While it is not necessary for purposes of making a decision in this case to reach any conclusion as to

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the evidence differs in this respect from that concerning bus drivers in the Voyageur case, the explanation probably lies in the obvious differences between the way in which Air Canada operates and the way in which a bus company like Voyageur operates.

Air Canada contended that its seniority system is the equivalent of the spare board system of Voyageur. Nonetheless, there are significant differences which may explain the different

evidence on the stress question. Both the spare board and the seniority system result in new employees receiving the least desireable work assignments. However, the findings in the Voyageur case indicate that these assignments were not merely less desirable, but also involved a work environment which was qualitatively very different from that enjoyed by bus drivers with more seniority. The evidence before us does not indicate that the work assignments of new pilots, while they may be less desireable, involve a work environment which is qualitatively very different from that in which more senior pilots work. Indeed, under the three-pilot crew system, each new pilot shares the very same work environment as two pilots who necessarily have considerably more seniority.

Apart from stress, medical concern over age related problems with the nervous system and brain functioning involve, more

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specifically, slowed transmission of signals by the nervous system, deterioration of short term memory, difficulty in processing information and in problem-solving, and problems in learning. These problems may affect both the pilot's ability to function in a continuing position and the pilot's ability to train for a new cockpit position or aircraft which is necessary periodically throughout the pilot's career.

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Apart from the fact that the evidence is weak that any of these constitutes a serious problem for pilots up to the age of retirement, the actual practice of Air Canada in the deployment of its pilot force is much at odds with this contention. The technology of modern aircraft places increasing emphasis on mental abilities, rather than physical skills. Under the seniority system applicable to pilots, the pilots who are responsible as captains for the operation of the most advanced aircraft will tend to be the oldest pilots. Moreover, these pilots are entitled to obtain training for a new cockpit position or aircraft virtually up to the date of retirement. While it is claimed that practice and experience compensate for age-related deterioration in the nervous system and brain functioning, this seems to be more a matter of theory, than demonstration. In any event, the benefits of practice and experience must be lost to some extent when a pilot moves to a new cockpit position or aircraft, notwithstanding that Air Canada has standard operating procedures which are similar between different aircraft. It is hard to imagine a system more inconsistent with the view that the mental abilities of pilots decline with age.

It is true that a decline in mental abilities occurs in some cases, as evidenced by disqualifications of pilots for failure to maintain proficiency standards in a continuing position or to satisfy training requirements for conversion to a new cockpit position or aircraft. However, the seniority system is the result of agreement between Air Canada and the pilots' union, both of which must be concerned about the safety of flying and the

well-being of pilots. It is impossible to believe that the seniority system would be allowed to operate as it does if deterioration in the nervous system and brain functioning is a serious problem before the age of retirement.

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Ultimately, therefore, the only credible evidence of a serious and potentially undetected health problem with a demonstrable age-related increase in risk relevant to the safe operation of an aircraft by pilots appears to be that of cardiovascular problems. While methods of detection of cardiovascular defects before they develop into some system failure do a very effective job, the evidence indicates there is still a definite risk of a defect remaining undetected. When a system failure occurs, moreover, it can easily be suddenly and seriously incapacitating. It is also possible that the very conditions of stress which may occur at critical stages in aircraft operations are capable of precipitating

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a system failure.
In the final analysis, however, the Tribunal is faced with the question of how the risk of cardiovascular failure can create a bona fide occupational requirement with respect to applicants for employment as pilots if there is no comparable requirement with respect to pilots already employed. It is true, once again, that the health status of pilots appears to be better than that of the general population. On the other hand, it must be observed that this situation is surely due in large part to the careful screening of pilots to exclude detectable cases of a significant risk of cardiovascular failure. Even when members of the general public are similarly screened and a risk of cardiovascular failure detected, the affected individuals remain part of the general public for statistical purposes. The Tribunal sees no reason to conclude that similar screening of older applicants for employment as pilots will not similarly restrain the risk of

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- 82 cardiovascular
failure in newly hired older pilots. As with other undetected impairments, the actual occurrence of safety problems because of cardiovascular failure appears to be rare so that the problem seems more theoretical, than practical.

In summary, the medical evidence indicates that there is some basis for claiming that age is a bona fide occupational requirement for the hiring of pilots because of the risk of impairment which increases with age. However, because the continued employment of pilots up to the age of 60 indicates that the risk is acceptable up to that age, because the risk can be substantially eliminated or reduced through medical detection of the impairing condition and by the back-up system of the three-pilot team, and because, with the exception of cardiovascular problems, the evidence does not in any event show that the risk of serious undetected impairment is significant in the age range with which we are concerned, the Tribunal concludes that the medical concerns listed above do not

make it reasonably necessary for Air Canada to impose its present age preference in hiring to maintain its margin of safety in the operation of its aircraft. With respect to cardiovascular problems, the first two reasons for concluding that the test of reasonable necessity has not been met still persuade the Tribunal to the same conclusion, although the risk of serious impairment is recognized to exist, as it exists for presently employed pilots over 40 who were hired at younger ages. Assessment of the capability of the individual, regardless of age, provides an alternative which is both legally preferable and adequate.

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- 83 -
Before leaving the medical evidence, it is necessary to consider certain medically related aspects of the question of pilot career longevity. Air Canada's witnesses testified that the age requirement in hiring is necessary to develop longitudinal records of the health of individual pilots which are important in assessing the health of pilots in their later years. They similarly

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testified that the age requirement is necessary to permit implementation of a health maintenance program among pilots at an early age which is important to prevent developing impairment.

With respect to longitudinal health records, it must be observed that it is possible for a person to have a longitudinal record of medical examination without being employed by Air Canada. If such records are a requirement, they could be demanded directly. It is not necessary to exclude all persons on account of age in order to obtain such records.

The evidence indicates that Air Canada's health maintenance program consists of counselling and educating pilots, rather than any formal fitness program. There does not appear to be anything about the program that is not readily available from other sources to members of the general public who are concerned about fitness and a health-promoting lifestyle. The fruits of such a program are the resulting standard of health of the individual. While Air Canada's program probably helps to maintain better health among its pilots than members of the general public enjoy on average, it is not credible that mere exposure to such a program provides any more assurance as to the state of health of particular individuals at older ages than can he obtained from individual assessment of older individuals through medical examination.

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- 84 Economic
Factors
One final issue to be considered is whether an employer can establish a BFOQ defence on the basis that economic factors underlie the employer's age limitation which restricts the opportunities of an employee.

The issue was addressed in the U.S. case of Marshall v. Arlene Knitwear Inc., 454 F.Supp. 715 (1978). A 62 year old designer was dismissed and the court found that the reason for dismissal was not "age" in itself, but rather was an economic reason directly related to age. Because of seniority, the complainant had a higher salary than any of the other designers. Also she was dismissed before her pension benefits vested, so the employer was able to reduce the amount of its contribution to the plan. Neaker, J. held, at p. 730:

The evidence compels the conclusion that the savings in salary and the unpaid pension benefits accruing to defendants as a result of [her] ... discharge were the controlling economic factors behind her termination. Since such economic factors are directly related to age, ... reliance on them to discharge [her] constitutes age discrimination.

In Smallwood v. United Airlines Inc., 661 F. 2d 303 (4th Cir., 1981), cert. denied, 102 S. Ct. 2299 (1982), when considering an asserted "bona fide occupational qualification" defence under the U.S. Age Discrimination in Employment Act, 29 U.S.C., ss. 621-34, the court held, at p. 307:

In reviewing the trial court's resolution of this issue we are

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impressed with United's overriding theme that hiring older pilots threatens it with burdensome economic effects. United, during pre-trial discovery, reiterated the position taken in its second letter to Smallwood, that is, that there are substantial costs involved in maintaining its pilot progression system, including a significant investment in training as an officer moves between

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positions and aircraft type. Therefore, by insisting that new pilots be under 35 years of age, the period of peak productivity" would be extended. Economic considerations, however, cannot be the basis for a BFOQ - precisely those considerations were among the targets of the Act. See 29 C.F.R.S. 860.103(h) (1980); cf. City of Los Angeles v. Manhart 435 U.S. 702, 716 (1978) (coat-justification defense not available in Title VII action).

However, this view is not universal. In Reid v. Memphis Publishing Co., 369 F. Supp. 684 (1973), the employer was found to have unreasonably failed to accommodate its employee's religion but this was, in part, because to do so would impose no economic burden on the employer. In Trans World Airlines v. Hardison, 97 S. Ct.2264 (1977), it was held that an employer was not obliged to pay overtime to another employee to replace the complainant who could not work at the time in question for religious reasons. The Court held that the employer need not pay more than de minimis costs in accommodating an employee's religion.

The issue was mentioned in the New Brunswick case of Little v. St. John Shipbuilding and Drydock Co. Ltd. (1980), 1 C.H.R.R. D/1, at D/5-6:

Generally with respect to the hiring of individuals, an employer is free to pick the individual whom it considers is best qualified to perform the job. If the employer can show that the person hired was better qualified to functionally perform the job, the fact that the person is younger or older than another individual who was not hired does not amount to age discrimination. Problems involving age discrimination may arise with respect to hiring policies, however, where the job requires that an individual receive a substantial amount of on-the-job training. Unless such an employee stays in the job for a long period of time, the employer will be unable to recoup the investment it has made in training that employee.

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In a British Columbia case, Burns v. P.I.A.B. et al. (April 20, 1977), the complainant was an apprentice plumber dismissed from employment when it was realized he did not comply with the age standards of the respondent Apprentice Board (i.e., between 18 and 25 years). The reason for the establishment of these standards was stated, at p. 11, as follows:

... [I]n respect of a particular apprentice, it would have a greater expectation of recovering its share of his training costs if he were younger and likely to pay dues over a longer period of time.

In deciding whether this reason constituted a defence of "reasonable cause" for the Apprenticeship Board, the Board of Inquiry held:

It is therefore our conclusion that on the evidence placed before us at this hearing, the Complainant was, by the refusal to enroll him in the training programme of the P.I.A.B. on the ground that he was more than 25 years old, and his resulting inability to comply with one of the conditions of employment stipulated in the collective agreement between the employers and the union, discriminated against without reasonable cause in respect of his qualification, ... his occupation and employment.

The Apprenticeship Board had not adduced evidence to support the economic reasons underlying the standards. If the Board had shown by evidence that it would, indeed, suffer economic loss by not adhering to the age limits, perhaps "reasonable cause" might have been found.

A decision in the United States considered the ability of an Apprenticeship Council to prevent the employment of an apprentice on the grounds that he was 43 years of age: Judson v.

Apprenticeship and Training 495 P. 2d 291 (Or. App., 1972), permitted employers to consider the apprentice's ability to complete his or her training, and the length of time

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- 87 to
be employed after training, but the Council was not permitted to erect maximum age limits for potential apprentices.

In the recent Canadian human rights tribunal case, Arnison v. Pacific Pilotage Authority (1980), 1 C.H.R.R. D/138, which held that regulations under the Pilotage Act. S.C. 1970-71-72, c-52, requiring applicants for pilot licenses to be between 23 and 49 years of age did not create a BFOQ, the Tribunal also considered the issue of economic factors. If the complainant were granted a licence at say age 52, and became fully qualified after three years' experience on a probationary basis at age 55, then there would remain only ten years of active employment until retirement at age 65. This allegedly diminished his "economic utility" as compared to that of a younger pilot. Mr. Herbert did not consider this situation to give rise to the age 50 limit being a bona fide occupational qualification. Perhaps this was because very little evidence seems to have been given on the economic factor. However, Mr. Herbert stated:

It might, for example, be possible to regard a minimum of 5 years fully qualified availability for service prior to retirement as a basis for fixing an upper age limit on eligibility and be regarded as a bona fide occupational qualification.

This decision was reversed by the Federal Court of Appeal, Pacific Pilotage Authority v. Arnison (1980), 34 N.R. 22, but on other grounds.

Many of these cases were reviewed by an Ontario Board of Inquiry in O'Brien v. Ontario Hydro (1981), 2 C.H.R.R. D/504, with the suggestion that economic factors might, in an appropriate situation, afford an employer a BFOQ

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- 88 defence.
In that case, the complainant, age 40, applied for an apprentice electrician position with Ontario Hydro. The Complainant was successful, but the employer did not defend upon the basis that an age preference (18 to 31 year old applicants) constituted being a BFOQ within section 4(6) of the Ontario Code.

In summary, the American cases reviewed suggest that when an employee is dismissed for economic reasons that are directly related to age, there is unlawful discrimination: Marshall v. Arlene Knitwear. Further, there is some case law that suggests that economic considerations may not be the basis of a BFOQ defence by the employer, for the reason that the purpose of age

discrimination legislation is to extend equality of opportunity in employment: Smallwood v. United Airlines.

However, Canadian human rights' boards of inquiry have suggested that, where the appropriate evidence is adduced by an employer, economic factors may well give rise to a BFOQ defence: Little; Burns; Arnison; O'Brien. This possibility is also contemplated, although not decided, by the Supreme Court of Canada in Ontario Human Rights Commission et al. v. Borough of Etobicoke (1982), 132 D.L.R. (3d) 14, when it refers to questions of "economy" and "economic performance" in defining the objective aspect of the bona fide occupational requirement, at p. 20.

The Tribunal is of the opinion that economic considerations are capable of constituting a BFOQ defence for an employer within paragraph 14(a) of the Canadian Human Rights Act. We disagree with the view expressed in

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- 89 Smallwood
that "economic considerations... cannot be the basis for a BFOQ [because] precisely those considerations were among the targets of the Act." We have referred to the principles underlying the Canadian Human Rights Act, and the purpose of the legislation, as expressed in section 2. The essence of the legislation is to advance equality of opportunity, inter alia, in employment. While "age" is a prohibited ground, the overall effect of sections 7, 8, 9, 10, 11, 14, 16 and 17 makes it clear that the Act is not compelling employers to treat all applicants or employees in an identical manner.

The Act is directed to eliminating "age" as an arbitrary

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factor in employment opportunity and to ensuring that employment opportunity is related to merit, thereby furthering the purpose of the legislation.

However, these provisions recognize that there are societal goals, fully consistent with the goal of equality of opportunity, such as efficient productivity and the enhancement of safety: Foreman et al. v. VIA Rail Canada Inc. (1980), 1 C.H.R.R. D/111, at D/113. Section 2 of the Act provides that an individual has the right to make the type of life he or she wants consistent with his or her duties and obligations as a member of society..." This phrase takes into consideration that there is an outer limit to individual freedom. An underlying premise to individual freedom in our society is that such freedom cannot interfere with the equal right to freedom of other individuals. The target of the legislation is the elimination of "age" as an arbitrary distinction in employment, and where serious economic considerations underlie an age-limitation employment practice or policy, then a bona fide occupational qualification defence seems desirable.

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On the other hand, the Tribunal is also of the opinion that a bona fide occupational requirement cannot be established by showing merely that non-discrimination entails an economic cost. This would open the door too widely for many forms of discrimination. One is reminded, for example, of the frequent claim that the presence of minorities in a business negatively affects patronage by other customers. It is not possible to believe that Parliament intended the Canadian Human Rights Act to apply only if there was no cost involved to employers.

The role of economic considerations with respect to age discrimination is particularly problematic because cost is in fact the traditional justification of much age discrimination in employment, rather than any stereotypical view about the characteristics of the group which is subject to discrimination. Any hiring of a new employee involves some costs, and there are frequently sizeable costs involved. Unless the hiring is to be for a fixed period without regard to the productive life-expectancy of the person hired, it is statistically more costly to hire an older employee than a younger one because the older employee is likely to remain employed for a shorter period. This means the cost of hiring must be amortized more quickly and is, therefore, higher in effect.

Parliament must have realized this when it enacted section 7 of the Code, which specifically prohibits discrimination in hiring because of age. If the increased cost of hiring resulting from the age of the employee can readily give rise to a BFOQ defence, Parliament substantially took away by section 14(a) the right to freedom from age discrimination in hiring which it

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granted by section 7. It would take clear and

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unmistakeable language to convince this Tribunal that Parliament had such contradictory intentions. The Tribunal concludes, therefore, that increased hiring costs resulting from non-discrimination normally cannot support a bona fide occupational requirement.

The Tribunal is reinforced in this view by the fact that other alternatives exist to excluding persons from employment on account of age in order to deal with initial hiring costs. The alternatives involve recouping the cost in some way from the employee over a period shorter than a life time career. One alternative is to require applicants to bear the cost prior to hiring, such as by demanding that they meet certain qualifications as to education and training. Where on-the-job training is essential, the most common method used by employers to achieve early recoupment of initial costs is probably through a pay scale graduated to experience. Hiring costs can be recouped in this way

if the pay scale during the initial years is less than the current value of the employee's productivity.

While the Tribunal is satisfied that as a general rule hiring costs cannot give rise to an age of hire BFOQ, there is the problem of the case in which substantial hiring costs are involved and it is clear that, on account of age, the career expectancy of the applicant will be short. Such cases can create an age of hire BFOQ but, to avoid undermining the protection of section 7 with respect to age discrimination in hiring, the availability of a BFOQ defence on the basis of hiring costs must be narrowly circumscribed.

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The Tribunal is of the view that hiring costs can only support a BFOQ under the business necessity standard when two conditions are present. First, the employment in question must be subject to a retirement age which is itself justified under section 14. Otherwise there is no basis for the employer to say that it must adopt some maximum hiring age in order to amortize its hiring costs prior to retirement. Secondly, the employer must show that it cannot reasonably be expected to amortize the hiring costs with respect to an applicant for the employment over the period before the applicant reaches the age of retirement. Otherwise the age limitation cannot be said to be reasonably necessary.

In the event that such case by case defence of hiring age limitations on the basis of hiring costs appears in itself to place an undue economic burden on employers, the solution lies in regulations by the Governor in Council which are authorized under section 14(b) of the Canadian Human Rights Act. This provision states:

It is not a discriminatory practice if:
(b) employment of an individual is refused or terminated because that individual

(i) has not reached the minimum age, or
(ii) has reached the maximum age

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that applies to that employment by law or under regulations, which may be made by the Governor in Council for the purposes of this paragraph;

While a literal reading of this provision might raise some question as to whether more than one maximum age can be prescribed for a

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employment, that is, whether a maximum age for hiring can be fixed which is different from the maximum age for retirement, the Federal Court of Appeal in Arnison v. Pacific Pilotage Authority (1980), 1 C.H.R.R. D/225 indicates that such regulations would be valid. In that case, the Court upheld a

maximum age of 49 prescribed for purposed of hiring by regulation, notwithstanding that the maximum age for purposes of retirement was by statute set at 65. LeDain, J. stated at D/226,

> Such a qualification, which involved the consideration of what is an appropriate age to enter the field of pilotage, is not in my opinion incompatible or in conflict with the provision of a mandatory retirement age of 65 pursuant to s. 15(7) of the Act.

> While the Arnison case dealt with age requirements fixed by law apart from section 14(b), rather than with regulations adopted under the authority of that provision, both types of requirement are placed on an equal footing by section 14(b). Thus, if age requirements fixed by law apart from section 14(b) qualify for exemption even though different maximum ages are fixed for hiring and retirement, regulations passed under that paragraph could also fix different ages for these respective purposes.

> This shows that Parliament was aware of the special problems with respect to age in hiring and retirement since it enacted a separate provision designed for the relatively arbitrary type of decision that such age distinctions involve. This reinforces the Tribunal's conclusion that age discrimination based on hiring costs was not viewed as being normally a matter for a BFOQ exemption.

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the Tribunal's conclusion that age discrimination based on hiring costs was not viewed as being normally a matter for a BFOQ exemption.

> Other economic factors may also give rise to a BFOQ defence. Whether the employer has met the onus of establishing this defence in any case would depend upon the particular circumstances. It is our view that there is an inherent costs benefits assessment in Parliament's espousal of individual freedoms set forth in section 2 of the Act, and in extending protection to all individuals in Canada. In any situation, the added possible direct economic cost to an employer, and possible indirect costs to society, through the employer having to be flexible in its hiring or employment policy,

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> should be weighed against the obvious benefits to society through the protection and enhancement of the freedoms recognized in human rights legislation. They are so fundamental to the fabric of Canadian society that Parliament has stated clearly that the benefit of protection extended to an individual is to the ultimate benefit of all Canadians.

> The Tribunal is not unmindful of the view of the majority of the Federal Court of Appeal in C.N.R. v. Bhinder (April 13, 1983) that, in the absence of a clear and unmistakeable provision, there is no authority in the Canadian Human Rights Act for requiring an employer to accommodate the special requirements of minority

groups: per Heald, J., at p. 10. However, the Court was referring to a

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- 95 ruling
of the Tribunal being reviewed that would compel an employer to exempt an employee from a general requirement imposed on all other employees. Moreover, it was a requirement which, in the view of the majority of the Court, was not discriminatory (that is, not a breach of section 7 or 10 of the Act). To say that an employer is under no obligation to accommodate an employee in such circumstances is quite another thing from suggesting that an employer has no obligation to seek alternatives to differential treatment on a prohibited ground of discrimination. Every member of the Court, it must be remembered, accepted the view that such differential treatment is prima facie a discriminatory practice.

In any event, in examining possible alternatives, this Tribunal is not imposing any obligation on an employer to accommodate. Rather, it is carrying out its own obligation to assess whether or not a bona fide occupational requirement is reasonably necessary, in accordance with the objective aspect of the test approved by the Supreme Court in Etobicoke. If there is a reasonable, non-discriminatory alternative to the discriminatory practice used by the employer, it cannot be said that the objective aspect of the two-pronged test (i.e., reasonable necessity in relation to performance of the employment concerned) has been met.

Findings with Respect To Economic Factors
There are two aspects to Air Canada's claim of an age-related BFOQ based on economic factors. First, there is the pure cost question. The recruitment and training of pilots is costly and, the longer the career of the individual pilot, the lower this cost will be relative to the productivity of

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pilot. Secondly, there is the need for pilots to gain experience in the second officer and first officer positions respectively as part of their training towards the first officer and captain positions.

The first aspect of this claim by Air Canada falls squarely within the area of hiring costs. While Air Canada does have a mandatory retirement age of 60 for pilots which was not challenged before this Tribunal, and it did prove sizeable hiring costs, there was little other evidence before us with respect to the economic implications of these hiring costs.

Insofar as the evidence in this case goes, it appears that the actual initial training costs for Air Canada's second officers in 1981 dollars are in the approximate range of $11,000 to $15,000. Even this may exaggerate somewhat the training costs that are properly chargeable against the full career of a pilot. It appears

that part of the initial training duplicates training that must be repeated periodically throughout a pilot's career. To the extent that this is so, Air Canada must necessarily plan on recouping the cost out of the pilot's productivity during the interval between such refresher training if it is not to run an accumulating deficit, rather than a return on investment, from hiring a pilot. Such costs are not properly related to the entire career of newly hired pilots, except for any who might be hired in their late 50's and would retire before the stage of their first

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- 97 refresher
training. On the other hand, it also appears that this figure does not include the overhead costs of recruitment which are legitimately chargeable against the career productivity of a pilot. For this reason, these figures may be somewhat lower than the true cost attributable to hiring a new pilot. There was no evidence to establish what is the actual period over which Air Canada amortizes this cost or of how significant this factor is in terms of the total cost of its workforce.

In order to make a case that a bona fide occupational requirement is reasonably necessary as a matter of economic cost, far more evidence as to the actual cost and benefit implications is necessary than has been provided to the Tribunal. The evidence does not provide any basis for deciding what is the minimum period over which Air Canada can reasonably be expected to amortize the cost of hiring a new pilot. Since the burden of proof with respect to the BFOQ defence falls upon the employer, this is fatal to Air Canada's claim for a BFOQ with respect to hiring at age 27 on the basis of hiring costs.

This leaves another economic factor to be considered, namely the need to have pilots employed for a number of years to provide experience in their training to be first officers and captains. Air Canada's claim that such experience is necessary is certainly credible. The evidence is unclear, however, as to exactly how much experience is required before a pilot can safely advance to these more demanding positions. It is presumably an individual matter to some extent. Some individuals may absorb the necessary experience rapidly while some may take much longer.

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In the recent past during a period of expansion, Air Canada hired pilots directly into the first officer positions on DC-9 aircraft. While not every deviation for a general policy will undermine the validity of that policy since special circumstances may force a temporary deviation, this does at least raise a question as to how essential the three-step progression from second officer to captain is. It is also unclear whether the potential for hiring pilots directly into a first officer position is feasible only on the DC-9 aircraft, or was simply more feasible on

that aircraft and proved unnecessary with respect to the staffing needs for other aircraft.

Air Canada's policy does not actually require pilots to move up through the three-step progression, in contrast to the "up or out" policy of some major airlines. This undermines Air Canada's case to some extent since it indicates that it is not essential to Air Canada to use all its first and second officer positions to train persons to become pilots. Thus, it can be argued that it is not reasonably necessary that everyone hired as a second officer be able to advance to the captain's position prior to retirement.

On the other hand, Air Canada's evidence that it expects pilots normally to advance through the system is persuasive. It seems unlikely that the system of freedom of choice whether to advance would long endure if Air Canada did in fact have problems in filling the positions of first officers and captains. The present system surely reflects the fact that this has not been a problem because pilots do very predominantly opt for advancement. There may be some advantages in terms of pilot co-operation in maintaining a voluntary system as long as it presents no practical problem.

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Because the rate at which pilots advance is affected by this system of voluntarism, as well as by the overall economic situation of the airline, it is difficult to pinpoint the length of time that might be reasonably necessary for a pilot to train to the captain's position. The normal time for progression presently is in the range of two to ten years in the second officer's position and six to twenty-three years in the first officer's position.

If age is a bona fide occupational requirement for this purpose, one would also have to allow for a certain period of service in the captain's position since, obviously, the airline could not operate if everyone retired shortly after becoming captain. Against this, however, would have to be considered the practical reality that many, if not most, pilots will continue to be hired at younger ages. Such pilots will be available to serve as captains for longer periods so that no real staffing problems may materialize as a result of hiring some older pilots.

The Tribunal is persuaded that, because of the mandatory retirement at age 60 rule and because some training is necessary in the positions of second officer and first officer for advancement to the position of captain, Air Canada might justify a bona fide occupational requirement for hiring on the basis of age solely for the purpose of meeting its pilot staffing requirements. Any such

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requirement would have to be no more than reasonably necessary to ensure that it has a viable pilot force in each of the three cockpit positions. Since this is not the nature of the case before the Tribunal, Air Canada's age of hiring policy under consideration

here (i.e., an age 27 policy) cannot be supported as a bona fide occupational requirement.

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- 100 Summary

The Tribunal concludes that Air Canada's use of age as a factor in its present hiring policy is a discriminatory practice contrary to sections 7 and 10 of the Canadian Human Rights Act. This policy is not supported by a bona fide occupational requirement since the evidence does not show that it is reasonably necessary to assure the performance of the job without endangering the employee or others. There are reasonable alternative measures already in use by Air Canada to achieve its objective of a healthy and safe pilot force. Neither is such a requirement supported on economic grounds.

The appeal is, therefore, dismissed. Although the Review Tribunal has exercised its jurisdiction to approach the record de novo and has not dealt in much detail with the reasoning in the decision of the initial Tribunal, the Tribunal does not intend thereby to imply any significant disagreement with the reasoning of Mr. Lederman. The matter is remanded to Mr. Lederman to deal with the question of relief under section 41(2) of the Canadian Human Rights Act.

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- 101 Dated
the 26th day of October, 1983.

Robert W. Kerr, Tribunal Chairperson
Peter A. Cumming, Tribunal Member
M. Wendy Robson, Tribunal Member