Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Robert Adamson, Robert David Anthony, Jacob Bakker, Donald Barnes, Michael Bingham, Doug Boyes, Kenneth Buchholz, Daniel Burrows, David G. Cameron, Wayne Caswill, George Cockburn, Bert Copping, Gary Delf, James E. Denovan, Maurice Durrant, Colm Egan, Eldon Elliott, Leon Evans, Robert Ford, Larry Forseth, Grant Foster, Guy Glahn, Kenwood Green, Jonathan Hardwicke-Brown, Terry Hartvigsen, James Hawkins, George Herman, James Richard Hewson, Brock Higham, Larry Humphries, George Donald Iddon, Peter Jarman, Neil Charles Keating, George Kirbyson, Robin Lamb, Stephen Lambert, Les Lavoie, Harry G. Leslie, Robert Lowes, George Lucas, Donald Madec, Don Maloney, Michael Marynowski, Brian Mcdonald, Peter Mchardy, Glenn Ronald Mcrae, James Millard, Brian Milsom, Howard Minaker, George Morgan, Greg Mutchler, Hal Osenjak, Sten Palbom, Donald Paxton, Michael Pearson, David Powell-Williams, Paul Prentice, Michael Reid, Patrick Rieschi, Steven Ross, Gary Scott, Phillip Shaw, Andrew Sheret, Michael Shulist, Donald Smith, Owen Stewart, Ray Thwaites, Dale Trueman, Andre Verschelden, and Douglas Zebedee

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Air Canada
Air Canada Pilots Association

Respondents

Decision

Member: J. Grant Sinclair
Date: August 10, 2011
Citation: 2011 CHRT 11

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I. Introduction

[1] This proceeding involves seventy complainants, sixty-eight of whom are represented by counsel ("Complainants"). They allege that Air Canada and the Air Canada Pilots Association (ACPA) ("Respondents") have discriminated against them by reason of their age by requiring them to retire from employment as pilots with Air Canada on reaching the age of 60, contrary to ss. 7 and 10 of the *Canadian Human Rights Act* (*CHRA*). Their mandatory retirement dates vary and run from 2005 to 2009.

[2] To succeed in their complaints, the Complainants must establish a *prima facie* case of discrimination and once having done so, the onus shifts to the Respondents to establish a defence on a balance of probabilities.

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

[4] The Respondents have offered two defences to the allegation of discrimination. First, under s. 15(1)(c) of the *CHRA* and secondly, under s. 15(1)(a) and15(2) of the *CHRA.*

A. Normal Age of Retirement, section 15(1)(c) *CHRA*

[5] In its April 9, 2009 decision in *Vilven & Kelly v. Air Canada & ACPA*, the Federal Court rejected the Tribunal's conclusion in *Vilven* that the appropriate comparator group for the purposes of s.15(1)(c) of the *Canadian Human Rights Act* were pilots who flew regularly scheduled, international flights on wide-bodied aircraft to international destinations with a major international airline.

[6] The Court stated that s. 15(1)(c) requires two questions to be answered. First, "what is the proper comparator group to identify the positions that are *similar* to that occupied by Air Canada and secondly, what is the normal age of retirement".

[7] And when assessing whether a position is "similar" to that occupied by the complainants, the focus should be on the objective duties and functional responsibilities of the position in question. That is, what do Air Canada pilots actually do?

[8] For the Federal Court, "*the essence* of what Air Canada pilots do is to fly aircraft of varying sizes and types, transporting passengers to both domestic and international destinations, through Canadian and international airspace", (para. 111).

[9] Thus the appropriate comparator group for the complainants should be "pilots working for Canadian airlines who fly aircraft of varying sizes and types to both domestic and international destinations, through Canadian and international airspace", (para.112) ("Test").

[10] The Court reiterated the Test later in paragraph 125 of its decision where it said, "To summarize my findings to this point: the essence of what Air Canada pilots do can be described as flying aircraft of varying sizes and types, transporting passengers to both domestic and international destinations, through Canadian and foreign airspace. There are many Canadian pilots in similar positions, including those working for other Canadian airlines. These pilots form the comparator group for the purposes of paragraph 15(1)(c) of the CHRA."

[11] The Court observed that, as of the date of the Agreed Statement of Facts that the parties submitted to the *Vilven* Tribunal, there were five airlines in Canada, apart from Air Canada, that transported passengers to domestic and international destinations. They were Jazz, Air Transat, CanJet, Skyservice and WestJet. However, there is nothing in this observation that suggests that the Court accepted that these five airlines satisfied all of the comparator criteria set out in paragraphs 112 and 125.

[12] Interestingly, the Court went on to say in paragraph 170 of its decision that, "as explained earlier, the Tribunal erred in its identification of 'positions similar'". It is "pilots working for

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

[13] As to the second question of "what is the normal age of retirement," the Court found that a binding rule in place mandating retirement at a fixed age is not required for the purposes of s. 15(1)(c). The *CHRA* does not contemplate that the defence under s. 15(1)(c) is only available if there is a binding rule in a given industry mandating retirement at a particular age. Rather, the age of retirement in issue must be the normal, customary or standard within the relevant industry sector. As was the case in *McAllister v. Maritime Employers Association*, (1999) 36 C.H.R.R. D/446 (F.C.T.D.) where the Court held that there is a significant difference between the normal age of retirement and the mandatory age of retirement.

[14] The Court agreed with the *Vilven* Tribunal that the determination of the normal age of retirement requires a *statistical analysis* of the total number count of similar positions. This involves a factual determination of the age at which a majority of employees working in similar positions retire, whether required to or normally do so.

[15] In *Campbell v. Air Canada* (1981), 2 C.H.R.R. D/602, age 60 was found to be the normal age of retirement where approximately 81% of Canadian flight attendants were required to retire at that age according to the terms of their collective agreement. In *Canadian National Railway v. Prior* (1983), 4 C.H.R.R.D/268, where 60% of the employees were subject to mandatory retirement at age 65, this age was found to be the normal age of retirement.

[16] In its decision in *Vilven*, the Court referred to the statistical evidence before the Tribunal with respect to airline pilots working for both Air Canada and other comparator Canadian airlines. This evidence showed that 56.13% of Canadian airline pilots retired by the time they attained age 60. The Court considered this to be the normal age of retirement for the purposes of s. 15(1)(c) of the *CHRA*. (This was also the result reached by the *Vilven* Tribunal but using a different test to determine the comparator group).

[17] The Complainants challenge the use of a statistical analysis arguing that the Tribunal is required to read s. 15(1)(c) in its entire context, in its grammatical and ordinary sense harmoniously with the scheme of the *CHRA* and the intent of Parliament, which may or may not be consistent with other judicial decisions relating to this provision. In support of this position, the Complainants rely on various sources including, principles of statutory interpretation; regulations under the *CHRA*; Parliamentary proceedings; Directive from the Supreme Court of Canada and other judicial authorities.

[18] These sources do not contemplate a statistical analysis to determine the normal age of retirement. The Complainants go further and suggest that, relying on this contextual approach, it may not be possible to determine the normal age of retirement. Thus, they argue that the statutory defence under s. 15(1)(c) would not be available to the Respondents.

[19] Although a very intriguing argument, I do not see how I can ignore other judicial decisions as urged by the Complainants including those of the Federal Court. These decisions deal with the same issues as here and are binding on this Tribunal.

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

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

[21] Both the Complainants and the CHRC point to paragraph 170 of the *Vilven* decision position as support and propose that the Test should be "*pilots working for Canadian airlines flying aircraft to either domestic or international destinations through Canadian or foreign airspace*". They say that the Court inserted "both" in relation to domestic and international destinations in the Test to emphasize that the Tribunal erred in limiting the comparator group to

those airlines that fly only to international destinations. The Court did not intend that the definition of the comparator group to be more restrictive than that of the Tribunal. It should be read disjunctively to include an airline whether it operates only domestically or only internationally.

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

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

[24] It is unfortunate that the Court went on to state the comparator test for yet a third time and somewhat differently as it did in paragraph 170 of its decision. There is no explanation from the Court, at this late stage of its decision, as to why the comparator test should be modified. In my view, it should be regarded more as a matter of inadvertence rather than a restatement of the comparator group test.

[25] What the Tribunal must do in this case is what the Court did in *Vilven*, which is to ask and answer the question, what is the essence of what Air Canada pilots do? The evidence in this case demonstrates that what Air Canada pilots do is as described by the Court in *Vilven* in paragraphs 112 and 125. Thus, the criteria to be applied in this case will be the same as the criteria applied in *Vilven* to determine the appropriate group.

(i) The Respondents' Comparator Group

[26] The Respondents have the burden of answering the *prima facie* case of discrimination established by the Complainants. To do so, the Respondents have put forward in evidence two tables, "Table of Canadian Airlines, Criteria of Comparator Group-2005 to 2008", ("R-Table 1") prepared by Captain Steven Duke, Six Sigma Black Belt, Flight Operations. The second table,

"Revised Table of Canadian Airlines, Criteria of Comparator Group as of October 2009", ("R-Table 2") was prepared by Harlan Clark, Director, Labour Relations for Air Canada.

[27] Both of the Respondents' Tables deal with the activities of the same airlines that were referenced by the Complainants, Captain Duke for the years 2005-2008 and Mr. Clark for 2009. Both Tables include 37 Canadian airlines for consideration. Both Tables indicate either "yes' or "no" under each of the five Test criteria. Where there is "yes" for all of the criteria, the airline was included in the comparator group.

[28] For Varying Size, both Captain Duke and Mr. Clark relied on the definition provided by the Canadian Transportation Agency ("CTA") in its Application Guide for Canadian Applicants for a Licence to operate a Domestic or Non-scheduled International Service. They chose the CTA definition rather than Transport Canada ("TC") 703/704/705 definition because it refers to the number of seats and if considering airlines that transport passengers, the number of seats was a common denominator for all the airlines.

[29] The CTA classifies aircraft on the basis of the Certificated Maximum Carrying Capacity ("CMCC"). A "large aircraft" means an aircraft equipped for the carriage of passengers and having a CMCC of more than 89 passengers. A "medium aircraft" means an aircraft equipped for the carriage of passengers and having a CMCC of more than 39 but not more than 89 passengers. A "small aircraft" means an aircraft equipped for the carriage of passengers and having a CMCC of not more than 39 passengers.

[30] Captain Duke and Mr. Clark defined Domestic to mean from one point in Canada to another point in Canada, scheduled or non-scheduled and whether or not it overflies the U.S. enroute. They considered an International as a flight between two city pairs, one in Canada and one outside of Canada.

[31] Both The Canadian Transportation Act (s.55) and the CTA Application Guide: For Canadian applicants for a licence to operate a domestic or non-scheduled international air service, define "domestic service" as air service between points in Canada, from and to the same point in Canada or between Canada and a point outside Canada that is not in the territory of

another country; and "International service" as an air service between Canada and a point in the territory of another country. The CTA Air Carrier Licence Search ("ACLS") for type of licence shows Domestic as Service within Canada.

[32] For Varying Types, Mr. Clark referred to the TC OLS website that outlined the various types of aircraft for a particular airline and used that as a guideline for determining airline types. Captain Duke relied on what the airline representatives told him about the types of aircraft they operated.

(ii) The Complainants' Comparator Group

a. Evidence of Captain Paul Prentice

[33] Captain Prentice is a complainant in this matter. He was employed as a first officer with Air Canada. He retired on October 1, 2005, the first day of the month following his 60th birthday. At one point in his career at Air Canada from about 1997 to 2001, he was the manager of flight operations and flight safety. He returned to line flying because he was due to retire about 18 months later and wanted to go back to flying aircraft.

[34] Captain Prentice prepared three Tables. His first Table ("C-Table 1") entitled "Retirement Ages of Pilots working for Canadian Air Carriers" December 31st 2005 combines each airline's activities, their pilot totals and their retirement age and policy. It includes the following headings: Air Carrier; Pilots; Retirement Age; Retirement Policy; International Flights; Passenger; Freight; Part 705; Data provided by; and Contact Info. There are no categories for Domestic Flights or Varying Sizes and Types.

[35] The genesis of C-Table 1 is found in Captain Prentice's Statement of Facts, February 6, 2006, that he submitted to the CHRC in support of his human rights complaint. He reviewed what he considered to be the relevant jurisprudence on s. 15(1)(c) and compiled a list of Canadian airlines from the TC website that he considered comparable to Air Canada. These airlines are designated as part 705 air carriers under the *Canadian Aviation Regulations* ("*CAR*s") and hold the same Air Operating Certificate ("AOC") as Air Canada.

[36] He came up with the list of nine airlines which had a total of 3,090 pilots compared to 3,066 for Air Canada. He obtained this information by contacting key personnel whom he knew at these airlines who had access to seniority lists which showed the number of pilots employed in similar positions to Air Canada pilots. From these sources, he also obtained confirmation that their pilots were not required to retire at age 60.

[37] Once he determined that Air Canada was in the statistical minority, he did no further investigation and submitted this information to the CHRC.

[38] For the purpose of this hearing, Captain Prentice continued his information gathering. In obtaining the information for C-Table 1, Captain Prentice said that it was a group effort, a group of five pilots including him. In some cases he was given the information by others in the group and in some cases he researched the website. Where he indicated on C-Table 1 that the data was provided online, he would determine if the airline had a website. If so, either he or one of the group would contact the airline.

[39] As to the phone numbers of the airlines listed on this Table, Captain Prentice said he would have called a fair portion of those but was not certain which airlines other people called.

[40] As to the Pilot totals for each airline, he had the Air Canada, January 1, 2006 pilot seniority lists and the Jazz pilot position lists for 2005. He also referred to Schedules A and B of the *Vilven* Agreed Facts which has pilot numbers for Air Canada, Jazz, Air Transat, CanJet, Skyservice and Westjet. For the other airlines listed on C-Table 1, he or other members of the group obtained this information from someone who had worked or worked at the airline.

[41] Captain Prentice believed that the pilot numbers that he acquired would be more accurate at year-end because seniority lists were the most stable for the latter part of the year. So he chose December 31, 2005 as a snapshot. To acquire data month by month or year by year was an acquisition nightmare. Pilot seniority lists go up and down and it was beyond his ability to get information by month or year. If the numbers for pilots were close to that data he had acquired, he used the *Vilven* data.

[42] For “Retirement Age” on C-Table 1, Captain Prentice said that he used data from the *Vilven* Agreed Facts. The Table shows that all of the airlines he listed have a retirement age of 65. Only Air Canada has a retirement age of 60. For “Retirement Policy” on C-Table 1, some of the data comes from the *Vilven* Agreed Facts and for the rest of the listed airlines it may have come from calling the references listed.

[43] As to the Air Carriers that he listed as comparators, C-Table 1 shows thirty-four, Part 705 airlines and two, Part 704 airlines (Air Alliance/Georgian and Air Inuit). The TC website, Part VII, *CAR*s, defines a Part 705 AOC and a Part 704 AOC.

[44] A Part 705 certificate, Airline Operations, is issued to an air operator that operates an aircraft with a maximum takeoff weight (“MCTOW”) in excess of 19,000 lbs and for which a Canadian type certificate has been issued for the transport of 20 or more passengers.

[45] A Part 704 certificate, Commuter Operations, issues for an airline that operates aircraft having a MCTOW of 19,000 lbs or less and a seating configuration excluding pilot seats of 10 to 19 inclusive.

[46] A Part 703 certificate, Air taxi Operations, is issued for aircraft having a MCTOW of 19,000 lbs or less and a seating configuration, excluding pilot seats, of nine or less.

[47] Captain Prentice searched the TC website, Operator List Search (“OLS”) in October 2009 for Part 705 airlines that produced a total of thirty-seven airlines. He also searched the TC, OLS website for Part 704 airlines that showed eighty-seven airlines.

[48] Although Captain Prentice did not include Part 704 airlines in C-Table 1 (except for Air Alliance and Air Inuit) the Complainants say that these airlines arguably meet the comparator Test. They want the Tribunal to take them into account as backup comparators if there is problem in terms of numbers to support their position.

[49] Captain Prentice said that he did not contact any of these Part 704 airlines nor did the Complainants offer any analysis beyond the information on the TC website to show that any of

them fall within the comparator group. There was no evidence on the number of pilot positions for these Part 704 airlines other than Captain Prentice's estimate, based on his experience in the industry, that you need at least 1,500 pilots to keep these airlines in business.

[50] With respect to "International Flights", Captain Prentice said that he consulted the airline's website to see if it had a charter operation. If it was not apparent from the website, either he or one of the other pilots who were assisting him contacted the airline. Captain Prentice included airlines as comparators if they actually did fly internationally, scheduled or charter or whether they were licenced, or were willing and able to do so.

[51] For those airlines that he called, he asked if he wanted to charter an aircraft to the US could they do that. This was in 2009. He did not ask them about 2005. He could not vouch for what questions the other group members asked. So all the data under "International" on C-Table 1 is 2009 data.

[52] Captain Prentice did not include on C-Table 1 any category for Varying Types or Varying Sizes of aircraft and did not provide any explanation as to why these criteria were not considered.

[53] The conclusion that Captain Prentice reached from C-Table 1 is that the number of pilots employed by the comparator airlines as of December 31, 2005 total 5,350, compared to the total number for Air Canada pilots of 3,037. In terms of percentage, the total for the comparator pilots constitutes 63.8% of the total number of pilots.

(iii) Conclusion on C-Table 1 and the Normal Age of Retirement

[54] In my opinion, there are problems if the Complainants are relying on Captain Prentice's C-Table 1 to establish the normal age of retirement for the purposes of s.15(1)(c). As he explained, C-Table 1 is a snapshot of the situation at December 31, 2005. But some of the pilot numbers are taken from the *Vilven* Agreed Facts which are from 2006. Other pilot numbers were obtained either by Captain Prentice or by his colleagues contacting the airlines in 2009. Data for

International is as of 2009. So C-Table 1 is a hybrid of 2005, 2006 and 2009 data but purports to represent the situation as it was in December 2005.

[55] Last but certainly not least, Captain Prentice has constructed his own formula as to what criteria should be used to determine the comparator group. He includes only two of the five criteria enunciated by the Court. I have decided that all five should be used to determine the comparator. Even if paragraph 170 of the Court's decision governs, his factors don't match. It may be arguable to wander away somewhat from the Court's formulation. But there must be some justification for doing so. Here there is none unless it is rooted in his initial submission to the CHRC. That may be an explanation but it is not a justification.

[56] For these reasons, I cannot accept his C-Table 1 as the basis for establishing the normal age of retirement.

[57] Captain Prentice prepared a second table, "Table of Canadian Airlines, Criteria of Comparator Groups, 2005 to 2009". The Complainants submitted this as reply evidence. It responds to both Captain Duke's R-Table 1 and Mr. Clark's R-Table 2. What Captain Prentice did was highlite, airline by airline, under each of the five criteria, where his conclusion differed from that of Mr. Clark and Captain Duke.

[58] In constructing C-Table 2, Captain Prentice used different definitions than Captain Duke and Mr. Clark for the Test. The differences related mainly to Domestic, International and Varying Size. As to Type if an aircraft was a different model as shown on the OLS or company website, Captain Prentice would consider it is a different type.

[59] For Varying Size he did not use the CTA definitions of small, medium and large as determined by the maximum passenger carrying capacity. Instead he relied on the TC OLS maximum weight.

[60] In particular, if there was a weight difference of more than 500 lbs, Captain Prentice would classify them as being of a different size. Captain Prentice said that his cut off point is not based on any official document but rather on logic. He gave the example of a BE100 at

11,500 lbs and a BE99 at 11,000 lbs. They would be different types but not different sizes. A BE100 at 11,500 lbs and a DHC8 at 34,500 lbs, they would be different types and different sizes.

[61] On the question of International Flights, Captain Prentice relied on the ACLS to determine whether an airline is licenced to fly internationally. He also relied on the company website and on email information from airline representatives. If he could not obtain further information from the website or by contacting the airline, he would rely solely on the ACLS.

[62] The criterion he used for International was whether it was licenced and operated international charters or whether the airline was licenced to operate internationally and was capable and willing to quote on and provide an international charter flight.

(iv) Combined Comparator Group Tables

[63] I have combined R-Table 1, R-Table 2 and C-Table 2 into one Table which shows only those airlines where the parties disagree as to whether or not the Test is met and the reasons therefor.

[64] ***Duke*****: Air Transat: Issue: Domestic:** *No* **Size:** *No* **Data Source: Testimony of Anne Bujold, Human Resources Advisor.** She testified that Air Transit is a charter vacation airline that operated scheduled flights to 60 destinations in Europe, the Caribbean, Mexico, US and South America and did so in 2005-2009. She also testified that Air Transat did not fly any domestic flights during 2005-2009. The airline had two types of aircraft A310 and A330 in 2005-2009. These are both large.

[65] ***Clark*****: Air Transat for 2009: same as above**. Further, Mr. Clark tried to book a flight on Air Transat from Montreal to Toronto; from Montreal to Vancouver; and from Toronto to Vancouver and was unable to do so. His explanation was that Air Transat does not provide service between one Canadian city and another.

[66] ***Prentice***: **Air Transat: Issue: Domestic:** *Yes* **Size:** *Yes* **Data Source: CTA website, Air Carrier Licence Search ("ACLS" 2009)**. This shows that Air Transat holds a Domestic licence

to fly domestically. He also produced **Schedule Notice Change** from **Nolitours dated November 2009**, showing an Air Transat flight from Puerto Vallarta to Toronto and a **letter from Janet Brock, owner of Travel Plus (2009)**, that says that Air Transat frequently connect domestic cities in Canada to fly their passengers to international destinations. Captain Prentice relied on this to show that Air Transat flies to domestic destinations. The **TC Canadian Civil Aircraft Register (2010) ("CCAR")** for Air Transat shows that it operates the A310-300, A330-243 and A330-342.

[67] ***Duke*: SkyService: Issue: Domestic:** *No* **Size:** *No* **Data Source: Director, Planning and Scheduling.** SkyService stopped flying passenger domestic flights in 2005. During the years from 2005-2008, Skyservice flew three sizes of aircraft, B757, A320 and A330. Under the CTA definition, these are all large aircraft.

[68] ***Clark*: Skyservice for 2009: same as above except for Data Source: Testimony of Phillip Goss.** Mr. Goss is a Human Resources Specialist with Skyservice. Skyservice was a charter operation that would be contracted by tour operators who would provide the aircraft and Skyservice would provide the pilots and flight attendants to operate the aircraft. Currently Skyservice does not fly to any domestic destinations. When he joined Skyservice in 2007, it operated exclusively international but is licensed to fly both international and domestic. In 2009, Skyservice had 16 aircraft provided to it and one of its own. They were comprised of eight A320's and eight 757's, two aircraft types but all large aircraft.

[69] ***Prentice*: Skyservice: Issue: Domestic:** *Yes* **Size:** *Yes* **Data Source: Wikipedia** which shows the types of aircraft Sky service flies, B767-300, A319-100 and A330-340. **CCAR (2010)** which shows aircraft types for Skyservice Business Aviation 1. **Printouts from Sabre Airline Solutions (2007).** These are pairing print reports for Captain Robert Kelly showing Skyservice Flight 393, YYC-YVR and Flight 394, YVR-YYC on 12FEB07 and 13FEB0, Calgary–Vancouver return. There are other pairings shown for YWG-YVR, YVR-YYZ (23Dec06); YWG-YQR (Regina) YQR-YYZ (December 2005).

[70] ***Duke*: WestJet: Issue: Size:** *No* **Type:** *No* **Data Source: Exec. Vice-Pres., Operations**, who advised that in 2005 WestJet flew two sizes of aircraft, B737A and B737C, both large

aircraft. As to types, WestJet stopped flying the B737A in 2005 so that from 2006-2008 it only flew one type of aircraft, B737C. They continue to fly only the B737C.

[71] ***Clark*: Westjet for 2009: same as above except for Data Source: Testimony of Fazel Manji.** Mr. Manji is a Compensation Analyst for Westjet. Westjet transports passengers to 66 destinations including Canada, US, and to sun destinations. In 2009, it operated the B737-600-700-800 series which is a large aircraft as per the CTA definition. The B737 is one type of aircraft.

[72] ***Prentice*: Westjet: Issue: Size:** *Yes* **Type:** *Yes* **Data Source: TC CCAR (2010).** This shows that Westjet flies the B737-600-700-800 series. It retired the B-737-200 in 2006. Captain Prentice relied on this for different sizes and different types from 1996-2006.

[73] ***Duke*: Air Georgian: Issue: Size:** *No* **Data Source: Payroll and HR Manager** who he spoke to and who also advised him by email that Air Georgian's fleet consisted a number of different types of aircraft for those years but they were all small as per the CTA definition.

[74] ***Clark*: Air Georgian for 2009: Issue: Size:** *No* **Type:** *No* **Data Source: Testimony of Marjorie Vivanco.** Air Georgian does not meet the Test because it does not fly varying sizes or types of aircraft. According to Ms. Vivanco, as of 2009, it only operated the BE1900 aircraft, a small aircraft. It stopped flying the BE300-350 BE90 and Cessna 550 in 2007.

[75] ***Prentice*: Air Georgian: Issue: Size:** *Yes* **Type:** *Yes* **Data Source: TC OLS (2010);** shows aircraft types, BE90 9,300 lbs, 703; BE300, 14,000 lbs, 703; BE1900, 17,000 lbs, 704; and Cessna550 13,300 lbs, 704. CCAR (2010) shows types of aircraft as the BE and a BAE25.

[76] ***Duke*: Bearskin Airline: Issue: Size:** *No* **Type:** *No* **Data Source: Chief Pilot.** In 2005-2008 Bearskin only operated small aircraft and only one type of aircraft. Captain Duke also relied on his personal knowledge as a pilot with Bearskin for five years.

[77] ***Clark*: Bearskin Airline for 2009: Issue: International:** *?* **Size:** *No* **Type: No Data Source: Exhibit R-14, Tab 7.** Mr. Clark referenced the Company's website for his conclusion

of No under the above three issues. He did not however, refer to that part of the website that indicates that Bearskin conducts private charters throughout North America. He would not agree that the No should be changed to Yes, but would agree to a question mark be placed in the International column on R-Table 2.

[78] ***Prentice*: Bearskin Airline: Issue: International:** *Yes* Size: *Yes* **Type: Yes Data Source: OLS (2009)** which indicates that Bearskin operates BE99-100, 11,000 lbs and SW-4-5-17,000 lbs, all TC 704 aircraft. **Email request from Dr. Kelly to Bearskin Airlines (2009)**. This document is an email which incorporates data taken by Dr. Kelly from CTA ACLS website and answers from James Reszitnyk Bearskin Flight/Charter Coordinator to questions asked by Dr. Kelly. It shows that Bearskin is licenced for scheduled and non-scheduled international service. It also shows that Bearskin has flown international charters between 2005-2009, the last such charter being in August 2009 and could and would be able to provide an international charter anytime between 2005-2009.

[79] ***Duke*: CanJet: Issue: Domestic:** *No* **Size** *No***. Data Source: Chief Pilot.** CanJet ceased flying domestic operations in 2006 and in 2007-2008 operated only between Canada and sun destinations. In 2005, CanJet had a mixed fleet with two different types B737 A and B. In 2006, they stopped flying the B737A and the B737B in 2007. From 2008 it operated exclusively a B737 C fleet.

[80] ***Clark*: CanJet for 2009: Issue: Domestic:** *No* **Size:** *No* **Type:** *No* **Data Source: Testimony of Kim Maguiness.** Ms. Maguiness is the Director of Human Resources with CanJet. Her evidence was that until September 2006, CanJet operated to cities in Canada as a discount passenger airline. In September 2006, it ceased domestic flights and continued to operate as a charter airline. Between 2005-2006, its fleet consisted of Boeing 737-300-500 aircraft. In 2009, it operated the B737-800.

[81] ***Prentice*: CanJet: Issue: Domestic:** *Yes* **Size:** *Yes* **Type:** *Yes* **Data Source: CTA ACLS website (2009)** indicates that CanJet is licenced for domestic flying and for scheduled and non-scheduled international service. **TC OLS website (2009)** which lists the CanJet fleet as including B737 300-400-500, B737 600-700-800-900. **Letter (undated) from Manager Scheduling &**

Charter Planning stating that CanJet operated a scheduled airline up to September 2006 when it switched to a solely charter operator. It is currently licenced for charters within North America and internationally. Its fleet from 2005-2009 was B737-200-300-500, 120 seats, 132 seats and 118 seats. Currently it operates the B737-800, 189 seats.

[82] ***Duke*: Kelowna Flightcraft: Issue: Passenger:** *No* **Data Source: Chief Pilot.** Kelowna qualified as a comparator for the years 2005-2006, but not for the years 2007-2008. According to the Chief Pilot, in 2007-2008, they were exclusively a freight/cargo operation.

[83] ***Clark*: Kelowna Flightcraft for 2009: Issue: International:** *No* **Passenger:** *No* **Data Source: Exhibit R-14 Tab 9. Company website (2009)**, Kelowna was a freight operation only in 2009, serviced all major cities across Canada and was available for freight service to any location in North America or internationally.

[84] ***Prentice*: Kelowna Flightcraft: Issue: International:** *Yes* **Passenger:** *Yes* **Data Source: CTA ACLS (2009)** shows that Kelowna is licenced for non-scheduled international service. **November 2009 email from Dr. Kelly to Captain Prentice**. This email contains information about Kelowna's history and current operations. The information relied on is that Kelowna has 3 main bases in Kelowna, Hamilton and Portage la Prairie as well as 9 satellite bases that stretch across Canada from British Columbia to Newfoundland and significant operations across Canada. It also indicates that Kelowna provides executive jet services.

[85] ***Duke*: Arctic Sunwest: Issue: Size:** *No* **Data Source: Chief Pilot.** In the years 2005-2008, its fleet consisted of Dash-8-100 models Twin Otters, Buffalos all of which are small aircraft.

[86] ***Clark*: Arctic Sunwest for 2009: International:** *No* **Size:** *No* **Data Source: Exhibit R-14 Company website Tab 10 (2009)** shows small aircraft (except for the DH5 Buffalo which is a cargo aircraft) and has a schedule which indicates domestic flights in the North only.

[87] ***Prentice*: Arctic Sunwest: Issue: International:** *Yes* **Size:** *Yes* **Data Source: ACLS website (2009).** This shows that Arctic is licenced as a non-scheduled international carrier. **TC**

OLS website (2010). This indicates the aircraft types and weight of their fleet which consists of BE99-100, 11,000 lbs; DH2 6,000 lbs; DH6 12,500 lbs; DH5 Buffalo 38,000 lbs; and DH8 34,500 lbs. maximum takeoff weight, being a mix of TC 702 703, 704 and 705 aircraft. **Email (Nov 2009) from Renee Mayne, Charter Sales, Arctic Sunwest to Dr. Kelly.** This says that they are able to arrange charters to the US if given at least a week's notice and recently completed a US charter in September.

[88] ***Duke*: Central Mountain Air: Issue: International:** *No* **Size:** *No* **Data Source Airline Vice- President.** This airline has not flown internationally since 2005. Their fleet consists of Beech 1900 and Dornier 328 aircraft, both of which are small aircraft.

[89] ***Clark for 2009*: Central Mountain Air for 2009. Issue:** Same as above. **Data Source: Exhibit R-14 Tab 11, Company website: (2009)** indicates that CMA offers scheduled and charter flights to over 17 BC and Alberta communities. Its aircraft fleet includes the BE19 and Dornier328, 18 and 30 passenger seats.

[90] ***Prentice*: Central Mountain Air: Issue: International:** *Yes* **Size:** *Yes* **Data Source: CTA ACLS (2009)** shows licenced for scheduled and non-scheduled international carriers. **TC OLS (2009)** for size of aircraft, BE19, 17,000 lbs, and D328 28,000 lbs. **Email Nov 2009 from Vancouver Dispatch, Northern Thunderbird Air to Dr. Kelly** that they are currently licenced to fly charters to and from Canada and the US. They are a charter company and will provide quotes on an ad hoc basis for a group charter, which if accepted the customer can be airborne in less than 2 hours. The OLS for Central Mountain Air does not show anything for Northern Thunderbird. Another OLS shows Northern Thunderbird as holding a Part 704 operating certificate Captain Prentice agreed that it would appear to be a separate airline.

[91] ***Duke*: Air Labrador: Issue: International:** *No* **Size:** *No* **Data Source: Director, Flight Ops.** Their fleet in 2005-2008 was Dash-6s, Dash-8s and Cessna 208s. These are all CTA small aircraft, TC 703-704. Captain Duke asked did they fly to the US in this time period and the answer was no.

[92] ***Clark*: Air Labrador for 2009: Issue:** Same as above. **Data Source: Exhibit R-8 Tab-12, Company website (2009):** flight map and Schedule Listings indicate that this airline operates only in Canada. **OLS (2009):** shows that it operates BE1900, Cessna208 and DHC6 all small aircraft.

[93] ***Prentice*: Air Labrador: Issue: International:** *Yes* **Size:** *Yes* **Data Source: ACLS (2009)** indicates that licenced for non-scheduled international service. OLS (2009) shows BE19 17,000 lbs TC 704; C-208 8,800 lbs TC 703; DH6 12,500 lbs TC 704.

[94] ***Duke*: Calm Air: Issue: International:** *No* **Data Source: Director Flight Ops.** In 2005-2008, Calm Air did have domestic passenger flights but they did not fly internationally.

[95] ***Clark*: Calm Air for 2009: Issue:** Same as above. **Data Source: Exhibit R-8 Tab 13. Company website (2009),** scheduled service to communities in Manitoba and Nunavut and charters to just about anywhere in Canada.

[96] ***Prentice:* Calm Air: Issue: International:** *Yes* **Data Source: ACLS (2009)** licenced for non-scheduled international service. **Oct. 2009 Email from B. Sutherland, Sales Rep. Calm Air to Dr. Kelly** advising that they have flown charters internationally between 2005-2009, most recently October 2009 and potentially able to provide this service, pending availability and customer requirements.

[97] ***Duke*: Voyageur Airways: a comparator for the years 2005-2008.**

[98] ***Clark*: Voyageur Airways for 2009: Issue: International:** *No* **Data Source: Exhibit R-16 October 2009 email from Sharon Campbell, Manager Accounting and Corporate Administration, Voyageur** advising that Voyageur is a charter company and does not operate international flights.

[99] ***Prentice*: Voyageur Airways: Issue: International:** ***Yes*** **Data Source: CTA ACLS (2010):** shows licenced for non-scheduled international service.

[100] ***Duke*: Air Inuit: a comparator for the years 2005-2008.**

[101] ***Clark*: Air Inuit for 2009: Issue International:** *No* **Data Source: Exhibit R-8 Tab-14. Company website (2009)** shows that Air Inuit offers service only to destinations in Nunavut and Quebec.

[102] ***Prentice*: Air Inuit: Issue: International:** *Yes* **Data Source: CTA ACLS (2009)** shows that Air Inuit is licenced for scheduled and non-scheduled international service.

[103] ***Duke*: Canadian North: Issue: Size:** *No* **Data Source: Chief Dash-8 Pilot.** In 2005-2006, this airline operated only one size of aircraft, B737A. In 2007 they acquired Dash-8-100s so that in 2007 and 2008 they had two different sizes of aircraft. So for 2007-2008, Canadian North qualified as a comparator airline

[104] ***Clark*: Canadian North for 2009: Issue: International:** *No* **Data Source: Exhibit R-8 Tab-16. Company website (2009).** The route map and community links on the company website shows that the airline flies to communities in the NWT, Nunavut and some cities in southern Canada.

[105] ***Prentice*: Canadian North: Issue: International:** *Yes* **Data Source: CTA ACLS (2009)** shows that this airline is licenced for non-scheduled international service. **November 2009 email from VP Operations, Airports and Charters to Dr. Kelly** that Canadian North does fly to international destinations and did between 2005-2009 and can and do provide quotes to customers for international charter flights. Their last international charter was in June 2009.

[106] ***Duke*: CargoJet; Issue: Passengers:** *No, 2008* **Size:** *No* **Data Source: Sales Manager.** In 2005-2008, CargoJet operated three types of aircraft, B727, B757 and B767, all large aircraft. From 2005-2007, CargoJet operated the B727s as charter flights for sports teams and political parties under the Starjet brand name. Their other aircraft were used for strictly cargo operations.

[107] ***Clark*: CargoJet: Issue: Passengers:** *No* **Data Source: Exhibits R-5 and R-8 Tab 17**. The company website (2009) indicates that CargoJet is Canada's leading provider of overnight

time sensitive air cargo services. Its fleet consists of Boeing 727,757 and 767 used as cargo aircraft.

[108] ***Prentice*: CargoJet: Issue: Passengers: Yes Data Source: CargoJet Flight Operations Manual (2009)** refers to passengers boarding, deplaning, passenger briefing and passenger baggage match policy.

[109] ***Duke*: Flair Airlines: Issue: Size:** *No* **Type:** *No* **Data Source: Testimony of David Atkins, Director Flight Ops.** Flair currently operates a fleet of three B747-400 aircraft. It operates domestic scheduled charters and scheduled international passenger and cargo flights. Flair began revenue flights in January 2006 with B727-300 aircraft. It then transitioned to the B737-400.

[110] ***Clark*: Flair Airlines for 2009: Issue and Data Source: Same as above.**

[111] ***Prentice*: Flair Airlines: Issue: Size:** *Yes* **Type:** *Yes* **Data Source: TC OLS (2009)** shows aircraft type B737-300/400//500, 13,5000 lbs, TC 705. Prentice said these are different sizes and types because they have a different seating capacity and configuration.

[112] ***Duke*: Air Tindi:** qualifies as a comparator for 2005-2008. Air Canada's Revised Outline of Argument, Table 1 shows Air Tindi as Yes as meeting the Test for 2005-2009, referencing Captain Duke's discussion with Teri Arychuk, VP Operations.

[113] ***Clark*: Air Tindi: Issue: International:** *No* **Data Source: Exhibit R-8 Tab 21. The Company website (2009)** indicates that Air Tindi offers air ambulance, cargo and scheduled flights across Canada's North. Its Flight Schedule shows operations only to communities in the North.

[114] ***Prentice*: Air Tindi: Issue: International:** *Yes* **Data Source: CTA OLS (2010)** shows Air Tindi is licenced for non-scheduled international service. **Company website:** company offers air charter for passengers and cargo throughout Canada's north and beyond.

[115] ***Duke*: Buffalo Airways: Issue: International:** *No* **Size:** *No* **Data Source: Chief Pilot.** According to the Chief Pilot, Buffalo Airways does not fly internationally and did not do so in 2005-2008. Their largest passenger aircraft is a DC-3, a small aircraft. They also have other types of aircraft all small. Buffalo operates larger aircraft but they are freighters.

[116] ***Clark*: Buffalo Airways for 2009: Issue: International:** *No* **Data Source: Exhibit R-8 Tab-22. Company website (2009)** indicates that Buffalo has scheduled passengers flights from Yellowknife to Hay River, NWT and passenger/combi charters, anytime, anywhere.

[117] ***Prentice*: Buffalo Airways: Issue: International:** *Yes* **CTA ACLS (2010)** shows that licenced to operate non-scheduled international charters. **November 2009 email from Scott Blue to Dr. Kelly** advising that Buffalo is licenced to fly charters to and from the US and receives quote requests for passenger charters and make every attempt to accommodate them. He was not sure when they last flew a group to the US.

[118] ***Duke*: Hawkair Aviation: Issue: International:** *No* **Size:** *No, 2007-2008* **Data Source: Chief Pilot.** Captain Duke spoke to Hawkair's Chief Pilot who told him that Hawkair does not fly internationally and did not in 2005-2008. For the years 2005-2007, their fleet consisted of smaller aircraft including the Dash-8-100. They added the Dash-8-300 in 2008 which is a medium size aircraft

[119] ***Clark*: Hawkair Aviation for 2009: Issue: International:** *No* **Data Source: Exhibit R-8 Tab-23. Company website (2009)** indicates that Hawkair operates as a regional airline serving communities Terrace-Kitimat, Smithers-Houston, Prince Rupert & Vancouver, all in BC.

[120] ***Prentice*: Hawkair Aviation: Issue: International:** *Yes* **Data Source: CTA ACLS (2009):** Hawkair is licenced for non-scheduled international service. **September 2006 letter from US DOT** advising that Hawkair has been registered with the DOT as a Canadian charter air taxi service. **November 2009 letter from Director, Sales and Marketing Hawkair** advising that they can provide on an ad hoc basis for a group charter to the US. The last time they flew a charter group to the US or an international destination was in the summer 2008.

[121] ***Duke*: Kenn Borek Air: Issue: Size:** *No* **Data Source: Pilot Administration.** Their fleet consists of many different types of aircraft, DH-6, BE-10, BE-20, Be-90, all of which are small aircraft and that was so for all the relevant years.

[122] ***Clark*: Kenn Borek Air for 2009: Air: Issue: Size:** *No* **Data Source: 2009 email from Catherine McDade.** This email indicates that the airline fleet consists of a DC 3T freighter, BE99 15 passengers, BE100 10 passengers, Twin Otter 19 passengers.

[123] ***Prentice*: Kenn Borek Air: Issue: Size:** *Yes* **Data Source: Company website (2010):** Kenn Borek fleet consists of DH6 19 seats; DC3 cargo; DC3T combi; BE100/200 seats 12; EMB110 seats 15.

[124] ***Duke*: Nolinor Aviation: Issue: Size:** *No* **Type:** *No both for 2005-2007* **Data Source: Airline President.** From 2005-2007, their fleet had one aircraft type, the Convair 580. In 2008, they added the B737A. So Nolinor is *YES* for all the criteria for 2008-2009.

[125] ***Clark*: Nolinor Aviation for 2009: Issue: International:** *No* **Data Source: Exhibit R-8 Tab 25. Company website (2009)** which states that Nolinor only flies cargo to the US. Passenger flights to the US are not currently available.

[126] ***Prentice*: Nolinor Aviation: Issue: International:** *Yes* **Types:** *Yes* **Data Source: CTA ACLS (2009):** shows that licenced for non-scheduled international service. **November 2009 letter from Director & TDG Coordinator to Dr. Kelly** advising that they would provide quotes on an ad hoc basis for a group charter to the US and require either a 7-day or a 30-day notice depending on the departure time. Nolinor last flew a charter group to the US in June 2009. **TC OLS (2009):** indicates two aircraft types, B737100/200, 11,6000 lbs and CV5 8,000 lbs, both TC 705.

[127] ***Duke*: Morningstar: Issue: International:** *No* **Passenger:** *No* **Data Source: Dispatch Manager.** Morningstar is a freight operation, they don't carry passengers nor did they in 2005-2008. Captain Duke was told that they did not fly internationally in 2005-2008.

[128] ***Clark*: Morningstar for 2009: Issue: International:** *?* **Passenger:** *No* **Data Source: Exhibit R-6 TC OLS (2009)**. For International, Mr. Clark was not able to confirm a Yes or No so he left it a question mark. For passengers, he referred to the **TC OLS** website which does not indicate whether or not it operates passengers aircraft.

[129] ***Prentice*: Morningstar: Issue: International:** *Yes* **Passengers:** *Yes* **Data Source: CTA ACLS (2009):** shows that the airline is licenced for non-scheduled international service. **November 2009 letter from Supervisor, Morningstar Jetdesk to Dr. Kelly** advising that they are licenced to operate charter flights to the US and are able to provide quotes on an ad hoc basis for groups up to 13 people. They require a minimum of 48 hours notice for an international flight. They have not yet done a charter to the US. There are two operations Morningstar Express which operates a cargo airline and Morningstar Partners Ltd. which has just recently expanded into charter flights.

[130] ***Duke*: North Cariboo: Issue: Size:** *No* **Data Source: Manager, Ops. Control Center.** This airline operated Dash-800s, Beech 1900s and a series of smaller aircraft in 2005-2008, all of which were small aircraft as per the CTA definition. In November 2009, they acquired a Dash-8-300 which is a medium aircraft.

[131] ***Clark*: North Cariboo for 2009: Issue: Size:** *No* **Data Source: Discussion with Human Resources Manager.** Mr. Clark spoke to with Ms. Civitela, the HR Manager who told him that they only operated the DH8 which had 37 seats.

[132] ***Prentice*: North Cariboo: Issue: Size:** *Yes* **Data Source: TC OLS (2009):** shows **that** North Cariboo operates BE100 11,500 lbs; BE200 12,500 lbs; BE1900 17,000 lbs; CE 550 13,300 lbs, and the DHC8-100-400 34,500 lbs, TC 702, 703 704 705.

[133] ***Duke*: Pacific Coastal Airlines: Issue: International:** *No* **Size:** *No* **Data Source: Chief Pilot.** They have a series of types of airplanes including float planes, SF34 and SF33. All these aircraft types are small. Captain Duke was also told by their Chief Pilot that they did not fly internationally in 2005-2008.

[134] ***Clark*: Pacific Coastal Airlines for 2009: Issue:** Same as above. **Data Source: Exhibit R- 8 Tab 8: Company website (2009) Route Map** shows that the airline operates aircraft to destinations only within BC. As to size, they operate the SF340, 30 passengers; SH360, 33 passengers; BE1900, 19 passengers; Goose, 9 passengers and DHC2 float plane, 9 passengers.

[135] ***Prentice*: Pacific Coastal Airlines: Issue: International:** *Yes* **Size:** *Yes* **Data Source: CTA ACLS (2009)** shows licenced for non-scheduled international service. **TC OLS (2010)** for sizes and types which the BE200 12,500 lbs; BE1900 17,000 lbs; DHC 6,000 lbs; Goose 8,000 lbs; SF 340 28,000 lbs and the SH360 25,000, TC 703 704 705.

[136] ***Duke*: Perimeter Aviation: Issue: international:** *No* **Size:** *No* **Data Source: Chief Pilot.** Their fleet, through 2005-2008 consisted of Dash-8-100s, SW-2s, 3s and 4s, all small aircraft. Their international flying was cargo only.

[137] ***Clark*: Perimeter Aviation: Issue:** Same as above. **Data Source: Exhibit R-8 Tab 29. Company website (2009)** indicates that Perimeter operates small aircraft to destinations in Manitoba and Ontario.

[138] ***Prentice*: Perimeter Aviation: Issue: International:** *Yes* **Size:** *Yes* **Data Source: CTA ACLS (2009):** shows that Perimeter is licenced for non-scheduled international service. **TC OLS**: indicates BE55 5,300 lbs; BE60 8,000 lbs; BE95 4,000 lbs; BE99 1,000 lbs; DHC8 34,500 lbs; SW2 1,000 lbs; and SW3 12,500 lbs, TC 703 704 705.

[139] ***Duke*: Prince Edward Air: Issue: Passengers:** *No* **Size:** *No* **Data Source: Discussions with Robert Bateman, DFO.** All the aircraft they flew in 2005-2008 were small, SW-34, BE1900. In June 2009, they were bought by CargoJet and stopped flying passengers in 2009.

[140] ***Clark*: Prince Edward Air for (2009): Issue: same as above. Data Source: Same as above.**

[141] ***Prentice*: Prince Edward Air: Issue: International:** *Yes* **Size:** *Yes* **Data Source: CTA ACLS (2009)** shows Prince Edward Air carrying on business as CargoJet Regional licenced for

non-scheduled international service. November 2009 email from Dr. Kelly to Paul Prentice that references “Prince Edward Air-Colleen”. The email records that Prince Edward Air specializes in corporate charters and medical evacuations and their Fleet consists of SF34, BE1900, BE200, BE99, Caravan and Navajo. The TC OLS (2009) shows BE1900, 17,000 lbs; BE200 12,500 lbs; BE99, 11,000 lbs; Cessna172, 2,300 lbs; Cessna208, 8,800 lbs; PA31, 7,000 lbs, all TC 703.

[142] ***Duke*****: Provincial Airlines: Issue: Size:** *No* **Data Source: Dispatch.** Provincial’s fleet consists of DH8-100, SF34, BE20 and SW3, all of which are small aircraft.

[143] ***Clark*****: Provincial Airlines for 2009: Issue: International:** *No* **Size:** *No* **Data Source: Exhibit R-8 Tab 31. Company website (2009)** Schedule and Route map indicates that Provincial operates only in eastern Canada and flies only small aircraft, SF34 31 seats; DCH8 37 seats; SA227 19 seats; DCH6 19 seats. The website offers executive charter flights across North America.

[144] ***Prentice*****: Provincial Airlines: Issue: International:** *Yes* **Size:** *Yes* **Data Source: CTS ACLS (2009):** shows licenced for non-scheduled international service. **November 2009 email from YYT Dispatch to Dr. Kelly** advising that Provincial does fly internationally mostly to the US but that is all the information he could provide. **TC OLS (2009):** indicates that Provincial operates Air Tractor301, 7,200 lbs; SC2R, 7,200 lbs; PZL, 11,000 lbs, all TC 702.

[145] ***Duke*****: Regional 1 Airlines: Issue: Size:** *No* **Data Source: Ops. Manager.** In 2005-2008, Regional 1 operated DH-8-100, DH-8-300 and the BE30 which are all small aircraft. They acquired CRJ aircraft in 2009 which are medium size.

[146] ***Clark*****: Regional 1 Airlines for 2009: Issue: Type:** *No* **Data Source: Exhibit R-14 Tab 32. The TC OLS website (2009)** indicates that this airline operated only the DCH100-400, 34,500 lbs, TC 705. **Company Website**: shows that it operates BE300, DCH100-400 and CRJ200.

[147] ***Prentice*****: Regional 1 Airlines: Issue: Type:** *Yes* **Data Source: TC OLS (2009):** shows BE300/350, 14,000 lbs; DHC100-400 34,500 lbs. TC 703 705.

[148] ***Duke*: Transwest Air: Issue: International:** *No* **Size:** *No* **Data Source: Chief Pilot.** Their fleet consists of SF-34, BE-19 and DH-6, all small aircraft. The Chief Pilot also told him that they did not fly internationally in 2005-2008.

[149] ***Clark*: Transwest Air for 2009: Issue:** Same as above. **Data Source: Exhibit R-8 Tab 34. Company website (2009)** shows that Transwest operates SF340 34 seats; BE1900, 19 seats; Jetstream 3100, 16 seats; KingAir 200, 7 seats; DHC6 12-15 seats; DHC3 9 seats; DHC2, 5-6 seats; Piper Navajo, 7 seats and Cessna 185, 3 seats. Its schedule shows that it operates in Manitoba, Saskatchewan and Alberta.

[150] ***Prentice*: Transwest Air: Issue: International:** *Yes* **Size:** *Yes* **Data Source: CTA ACLS 2009:** shows that it is licenced for non-scheduled international service. The **TC OLS (2010)** indicates BE100, 11,500 lbs; BE1900 17,000 lbs; BE200, 12,500 lbs; BE55, 5,300 lbs; BE99 1,100 lbs, TC 702 703 704. What appears to be from the **Company Website (2010)**, indicates that Transwest has the largest fleet of fixed wing and rotary aircraft in Saskatchewan and also has a charter base in Lynn Lake Manitoba. They can meet all of your charter needs at an affordable price.

[151] ***Duke*: Wasaya Airways: Issue: Size:** *No* **Data Source: Email from the Director, Flight Ops.** According to the email, Wasaya, between 2005-2008 operated domestic scheduled and ad hoc international charter flights. They operate a HS748, BE1900, PC12 and C208 aircraft, all small aircraft except for the HS748 which is a medium size aircraft, but is used only for cargo.

[152] ***Clark*: Wasaya Airways for 2009: Issue: International:** *No* **Size:** *No* **Data Source: Exhibit R-8 Tab 35. Company website (2009) Where We Fly:** shows that this airline operates only in Manitoba and Ontario. Its fleet is BE1900, 18 seats; Caravan 208, seats 9; PilatusPC12, seats 9; PilatusPC 9,900 lbs.; TC 703 704 705.

[153] ***Prentice*: Wasaya Airways: Issue: International:** *Yes* **Size:** *Yes* **Data Source: CTA ACLS (2009):** shows licenced for non-scheduled international service. **TC OLS (2009):** indicates BE1900 17,000 lbs; Cessna208, 8,800 lbs; Pilatus12, 9,900 lbs, TC 703 704.

November 2009 email from the Wasaya Charter Sales and Marketing Representative to Dr. Kelly advising that they are licenced to fly charters to the US and can provide a quote for a group charter and can do so with the appropriate notice required for border clearance.

[154] ***Duke*: Westwind:** Meets the Test for 2005-2008.

[155] ***Clark*: Westwind for 2009: Issue: International:** *No* **Data Source: ExhibitR-14 Tab 36. Company website (2009):** indicates that Westwind operates to only three communities in Saskatchewan.

[156] ***Prentice*: Westwind; Issue: International:** *Yes* **Data Source: ACLS (2010):** shows licenced for international service but no evidence that operates internationally or willing and able to do so.

[157] **Harmony Airline and Zoom Airline:** Captain Duke and Mr. Clark did not include Harmony Airline or Zoom Airline in R-Table-1 or R-Table-2. However, the Respondents subsequently included these two airlines as comparators for 2005-2007 for Harmony and 2005-2008 for Zoom. Harmony did not operate after 2007 and Zoom not after 2008.

(v) Which Airlines Should be Included in the Comparator group?

[158] The exercise to be done now is to choose from the Combined Comparator Tables which of the airlines listed there should be included in the comparator group as meeting the Test. But before this can be done, there are two preliminary questions that need to be dealt with.

[159] First, how are Domestic, International and Varying Sizes to be defined. I have concluded on the evidence that Domestic mean between points in Canada or from and to the same points in Canada. It is interesting that the Complainants, in their BFOR argument take the position that the "over/under rule" does not apply to Air Canada "domestic" flights. They say that a flight that transits foreign airspace is domestic so long as it takes off and lands in Canada. I appreciate that the Test speaks in terms of Canadian Destinations. But I do not accept the characterization put

forward by the Complainants that a flight by a Canadian airline from New York to Toronto satisfies the Domestic criterion of the Test.

[160] Nor does a Canadian airline that operates a charter flight directly from a Canadian city or picks up passengers in another Canadian city enroute to an international destination meet the Domestic test.

[161] On the question as to whether an airline flies to International destinations, the Test refers to pilots working for Canadian airlines flying to international destinations. I accept Captain Prentice's approach to International. In my opinion, if an airline has operated international flights or is licenced to do so and will provide quotes and arrange for an international charter on request, that is sufficient to satisfy the international criterion.

[162] For Varying Size, the Respondents relied on the CTA classification of small, medium or large, according to the seating capacity of the aircraft. The Complainants relied on the maximum weight of the aircraft. In this respect, a 500 lb weight difference is the measure used by Captain Prentice to differentiate between aircraft sizes. He did not explain as to why he chose this as the cutoff point.

[163] The *Application Guide* for a CTA operating licence for domestic air service or international air service provides that the operator must hold an Air Operator Certificate ("AOC") in respect of the class of service to be provided under the licence. The class of service is defined in terms of the size of the aircraft, namely, small, medium and large.

[164] Part VII, 704 and 705 of the *CAR*s (which the Complainants rely upon) classify aircraft both by its MCTOW and by its seating configuration. As indicated earlier in this decision, a Part 705 certificate has a specified MCTOW and an authorized seating configuration for transporting 20 or more passengers; a Part 704 certificate has a specified MCTOW and seating configuration of 10-19 seats inclusive. A Part 703 certificate has specified MCTOW and seating configuration of nine seats or less.

[165] Also instructive is Article 1.01.06 of the Air Canada/ACPA collective agreement which classifies aircraft size by seating capacity for the purpose of restricting the size of aircraft that can be flown by feeder airlines.

[166] These references indicate that for various purposes in the airline industry, the seating capacity or configuration of an aircraft is more the common measure than aircraft weight. In my opinion, this should be the basis to determine Varying Size.

[167] The second question is for what are the relevant years for determining the comparators and the normal age of retirement. The Respondents have provided data for 2005-2009. The Complainants' C-Table 2 on its face indicates that it covers the years 2005-2009.

[168] But that is not the case. Captain Prentice testified that he included 36 of the 39 Canadian airlines listed on this Table in the comparator group. He did so for each of the airlines, if at any point in time during 2005-2009, these airlines met the Test. He agreed that this does not mean that the Test was met for each of those years.

[169] It is apparent from the Combined Comparator Group Tables that in constructing C-Table 2, Captain Prentice relied (with a few exceptions being 2010 data) on 2009 data sources. Thus, C-Table 2 is really a representation of the facts as they were in 2009.

[170] But in doing the statistical analysis for pilot numbers and retirement age in the Complainants' "Table of Comparator Pilot Employment Statistics for January 1, 2006, Based on Replies: December 21, 2009" ("C-Table 3"), Captain Prentice used data only for 2006.

[171] Thus, from the Complainants' side, the data for the comparators is on a global basis and the data for the pilot numbers and retirement age is for 2006. The parties have provided data on pilot numbers and retirement age for the whole period, 2005-2009.

(vi) Conclusion on Comparable Airlines

2005-2008

[172] In my view, the C-Table 2 conclusions and supporting evidence, based as it is on 2009 data, cannot be used for the years 2005-2008. Only evidence that reflects the facts for those years can be considered and that evidence came from Captain Duke.

[173] That being the case, I have concluded that, on the basis of Captain Duke's evidence as set out in the Combined Table of Comparators and on my definitions of Domestic, International and Size, the following airlines qualify as comparators for 2005-2008:
Jazz - Meets the Test for all years.

- First Air - Meets the Test for all years.
- Kelowna Flightcraft - Meets the Test for 2005, 2006.
- Voyageur - Meets the Test for all years.
- Air Inuit - Meets the Test for all years.
- Canadian North - Meets the Test for 2007, 2008.
- Air North Charter - Meets the Test for all years.
- Air Tindi - Meets the Test for all years.
- Nolinor - Meets the Test for 2008.
- Westwind - Meets the Test for all years.
- Harmony - Meets the Test for 2005-2007.
- Zoom - Meets the Test for 2005-2008.

2009

[174] For the year 2009, referring to the evidence of Captain Prentice and of Mr. Clark as set out in the Combined Table of Comparables, I have listed those airlines that qualify as comparables and those that don't and the reasons therefor.

- Jazz – Yes. Meets the Test.
- Air Transat – No. Does not meet the definition of Domestic. Operates only large aircraft.
- Skyservice - No. Does not meet the definition of Domestic. Operates only large aircraft.
- Westjet - No. Operates only one type and only large aircraft,
- Air Georgian - No. Operates only one type of aircraft as per testimony of airline representative; and operates only small aircraft, 704 and 703 as per the OLS.
- First Air - Yes. Meets the Test.
- Bearskin - No. Operates only small aircraft as per the OLS.
- CanJet - No. Operates only one size aircraft, large.
- Kelowna - No. Freight operation, no passenger service.
- Arctic Sunwest - No. Operates only small aircraft except for the DCH5 Buffalo a cargo aircraft.
- Central Mountain Air - No. Operates only small aircraft.
- Air Labrador - No. Operates only small aircraft.
- Calm Air - Yes. Meets the Test including International.
- Voyageur - No. Licenced to operate international service but no evidence that it does or is willing and able to do so. Company email advising that it does not operate international flights.

- Air Inuit - No. Company website states that it operates only in Canada and although licenced to operate international service, no evidence that it does or is willing and able.

- Canadian North - Yes. Licenced to operate international service, willing and able to do so and last international charter was in June 2009.

- CargoJet - No. No passenger service.

- Flair - No. One size and type of aircraft.

- Air North - Yes. Meets the Test.

- Air Tindi - Yes. Meets the Test as per Captain Duke's discussions.

- Buffalo Airways - Yes. Licenced to operate international service and willing and able to do so.

- Hawkair - Yes. Licenced to operate international service, willing and able to do so and last flew charter to US in summer 2008.

- Kenn Borek Air - No. Operates small aircraft.

- Nolinor Aviation - Yes. Licenced for international service, willing and able to do so and flew a charter group to US in June 2009.

- Morningstar - Yes. Licenced to operate international service and willing and able to do so.

- North Cariboo - Yes. The DCH8 series seats 37-39, 50-56, 68-78 passengers depending on the model. It is not clear from Mr. Clark's evidence which model it operates. The OLS shows different sizes, small and medium.

- Pacific Coastal - No. Operates only one size, small aircraft. Licenced for international service but no evidence that operates international service. Company website indicates otherwise.

- Perimeter Aviation - No. Licenced for international service but no evidence that operates internationally. Company website indicates otherwise.

- Prince Edward Air - No. Operates small aircraft. Purchased by CargoJet in 2009 and stopped flying passengers.

- Provincial Airlines - No. Operates only small aircraft.

- Regional 1 Airlines - Yes. Meets the Test. Operates varying types of aircraft.

- Transwest Air - No. Operates only small aircraft and, although licenced for international service, no evidence that it does or willing and able to offer this service.

- Wasaya Airways - No. Operates only small aircraft.

- West Wind Aviation - No. No evidence that operates internationally or willing and able to do so.

- Harmony - No. Did not operate in 2009.

- Zoom - No. Did not operate in 2009.

(vii) Conclusion on the Normal Age of Retirement

[175] As stated by the Federal Court in *Vilven*, the determination of the normal age of retirement requires a statistical analysis of the total number count of similar pilot positions. To determine the pilot totals for each of the years 2005-2009, I relied on the "Survey-Retirement Age of Pilots" provided to the parties by the airlines.

[176] In 2005 Air Canada employed 3,037 pilots all of whom were subject to mandatory retirement at age 60. The total number of pilots of the pilots working for the comparator airlines in 2005 was 1,876. The total number of pilots working for Canadian airlines in 2005 was 4,913. Statistically, Air Canada pilots represented 61.8% of all Canadian airline pilots in similar positions to that of the Complainants.

[177] For the year 2006 the total number of pilots at Air Canada was 3,182. For the comparator airlines, the total number of pilots was 1,853 for a total of 5,035 pilots. This constituted 63% of all Canadian airline pilots in similar positions.

[178] In 2007 there were 3,308 pilots at Air Canada. The comparator airlines pilots total was 2,120. The total for all Canadian airline pilots was 5,428 and Air Canada represented 61.4% of the total.

[179] In 2008, Air Canada had a total of 3,327 pilots. The total of the comparator pilots was 2,175 for a total of 5,502 for all pilots, Air Canada being 60.5% of the total number pilots.

[180] For 2009 the total number of pilots at Air Canada was 3,204. The total number of pilots employed by the comparator airlines in 2009 was 1,982. The total number of pilots employed by Air Canada and the comparator airlines in 2009 was 5,186 of which 61.85% were Air Canada pilots.

[181] Assuming without deciding, that for the years 2005-2009, the comparator airlines had either had a mandatory retirement age of 65 or above or no mandatory retirement age, nonetheless, the evidence demonstrates that, for each of the years 2005-2009, the majority of pilots working for Canadian airlines, including Air Canada, in similar positions to that of the Complainants, retire by the age 60. The conclusion must be that age 60 was the normal age of retirement for the years 2005-2009.

[182] Given this conclusion, the mandatory retirement imposed on the Complainants at age 60 pursuant to the collective agreement between the Respondents by virtue of s. 15(1)(c) of the *CHRA* does not constitute a discriminatory practice.

C. Sections 15(1)(a) and 15(2) *CHRA*

(i) Rodney Stone

[183] He is the Manager of Operations and Air Traffic Control at Air Canada. He is a certified flight dispatcher. There are 70 flight dispatchers at Air Canada whose main duties and the responsibilities are to develop an operational flight plan for each Air Canada flight. An aircraft cannot move without an operations flight plan which is filed with the air traffic agency as an International Commercial Aviation Organization (“ICAO”) flight plan.

[184] The flight plan will include such information as flight route weight points, fuel calculation, electronic notation etc. The flight plan is built about three-four hours before departure. There are several methods to determine routings, the majority of which are based on

en route winds. Also considered are overfly costs. For an overseas flight, they may run 30-40 different scenarios to choose the one that is appropriate for that particular flight on that day.

[185] Air Canada submitted a list of 34 destination countries all of which require overflights or planned alternative airports, whether destination alternates or en route alternates. Overflights means an Air Canada flight utilizing the air space of other countries to get to its destination. Mr. Stone said that there are no destinations to which Air Canada flies that do not involve the US as an overflight or alternate. Further he said, even for destinations in Canada there are occasions when Air Canada will overfly US airspace.

[186] Once the flight plan is finalized it is released into the operations computer and is given to the flight crew. It is also filed with the appropriate Air Traffic Agency. ATC usually gives a pre-departure clearance which generally echoes the flight plan filed with the ATC. There are many ATC agencies who view the flight plan as a contract between the ATC and Air Canada so that minimal changes will be accepted.

[187] ATC will accept minor changes to a routing. There are occasions where the aircraft will request from ATC routings around en route weather. Military airspace is another situation where ATC will vary the flight plan. Apart from an emergency, Mr. Stone could not think of any other situations where the captain could obtain an alternate routing from the ATC.

(ii) Samuel Elfassy

[188] Mr. Elfassy is currently the Senior Director of Corporate Safety and Environment for Air Canada and has worked at Air Canada for 22 years. In his previous role of Manager, Regulatory Affairs for flight operations he was involved with the application of the standards and recommendations of the ICAO as they applied to Air Canada's operations. He testified on behalf of the Respondents.

[189] ICAO was established in 1948 under the Chicago Convention on International Civil Aviation whose purpose was to harmonize the standards for international commercial aviation operations. Canada is a Contracting State and signatory to the Convention. There are about 190

Contracting States to the Convention and, according to the List of Air Canada Destinations, Air Canada operates to 34 of these States. According to Mr. Elfassy, of these, six of them, Cayman Islands, Bermuda, Guadeloupe, Korea, St. Lucia and Turks & Caicos are not signatories to the Convention.

[190] Mr. Elfassy referred to Annex 1 of the Convention which sets the standards for the international recognition of flight crew licences. Prior to November 23, 2006, s. 2.1.10.1 of Annex 1 provided that a Contracting State, having issued pilot licences, shall not permit the holders thereof to act as pilot-in-command ("PIC") of an aircraft engaged in scheduled international air services or non-scheduled international air transport operations for remuneration or hire if the licence holders have attained their 60th birthday.

[191] For co-pilots, it was only a recommendation not a standard. The recommendation under s. 2.1.10.2 provided that a Contracting State, having issued pilot licences, should not permit the holders thereof to act as co-pilot of an aircraft engaged in scheduled international air services or non-scheduled air transport operations for remuneration or hire if the licence holders have attained their 60th birthday.

[192] On March 10, 2006, ICAO amended Annex 1, effective November 23, 2006. The amendment provides that a Contracting State, having issued pilot licences, shall not permit the holders thereof to act as pilot-in-command of an aircraft engaged in international commercial air transport operations if the licence holders have attained their 60th birthday or, in the case of operations with more than one pilot where the other pilot is younger than 60 years of age, their 65th birthday. The upper age limit for co-pilots also increased to 65, but otherwise the ICAO recommendation remained the same.

[193] The practical effect is as follows. A PIC age 60 or over but less than 65, operating an aircraft with a crew of two pilots, cannot be prevented by reason of age from operating in the airspace of any ICAO Contracting State so long as the other pilot is under age 60 (the "over/under rule").

[194] There is also the matter of augmented crews. According to ICAO, in commercial long range international air transport, the designated flight crew may be augmented and may consist of three, four or more pilots. It is the intent of s. 2.1.10.1 to ensure that when the PIC is over 60 but less than 65, the operating crew includes at least one pilot who is licenced, appropriately rated for all phases of flight, current and is under age 60.

[195] Mr. Elfassy said that on long haul flights, Air Canada will augment the flight crew by putting additional flight crew members on those flights in order to comply with the collective agreement and the *CAR*s. The *CAR*s provide prescriptive rules for flight duty hours. But the Regulations allow flight crew members to extend the duty day provided that the flight crew is augmented with additional pilots.

[196] The collective agreement requires a basic crew plus one augment pilot and one relief pilot or two augment pilots where the flight is outside the Northern American zone and exceeds fifteen hours.

[197] A Contracting State may impose a lower maximum age limit than that specified in the ICAO standard for the licences it issues to its pilots. But it cannot prevent, by reason of age, an aircraft from another ICAO Contracting State operated by a PIC holding a licence issued by that State, who is below the ICAO upper age limit standard, from operating in that State.

[198] Articles 39 and 40 of the Convention are also relevant. Article 39 requires that licences issued by a Contracting State that do not meet the ICAO standard must be endorsed with a complete enumeration of the particulars that do not satisfy the standard.

[199] Article 40 allows international flights by flight crew having licences that do not meet the ICAO standard to operate in international navigation so long as authorization is given by the State into which the aircraft is operated. Canada does not impose any age limit in licencing its pilots and permits pilots who are 60 years or older, holding a medically valid ICAO Contracting State licence, to fly into Canadian airspace.

[200] Mr. Elfassy said that he was not aware of any of the Contracting States into which Air Canada operates that have granted authorization for Air Canada pilots over the age of 60 pre-November 2006, or over the age of 65 post-November 2006 to operate in their airspace. This would be a matter of negotiation between the Contracting States, not something that Air Canada could request.

[201] As to the potential consequences for an airline that breaches the ICAO standard, Mr. Elfassy referred to the memorandum from the Director General Aviation, France. In that document, the Director stated that in the course of audits done by their ramp inspectors, they were finding captains over the age of 60 and had to ground the aircraft which was only then allowed to leave with another captain. In future they would be taking appropriate measures to deal with such a situation. These measures could include delaying of a flight until appropriate documentation is provided or it could be grounding of a flight.

[202] Mr. Elfassy testified that, in addition to the ICAO requirements, Air Canada is also subject to the provisions of 14 CFR Part 129, Foreign Operations Specifications, with respect to its operations into the U.S. He explained that under Part 129, the Federal Aviation Authority ("FAA") had issued pre-November 2006 operations specifications, which provided that the foreign air carrier (Air Canada) shall not use the services of a PIC, nor shall any person act as a PIC if that person has reached his/her 60th birthday.

[203] The Operations Specifications ("OPSPEC") for Air Canada were amended in December 2006 to provide that the foreign air carriers shall comply with the current age requirements of ICAO Annex 1 as amended and the foreign air carrier shall not use the services of a pilot, nor shall any person act as a pilot of a civil airplane of U.S. registry in any of the operations under the authority of these operations specifications, if that person has reached his/her 60th birthday.

[204] Mr. Elfassy explained that for Air Canada this means that the current ICAO standards apply to its operations into the U.S. The latter part of the OPSPEC is an example of a State imposing a more restrictive age requirement than the ICAO standard. At that time, the US had a maximum age limit of 60 for licencing its pilots.

[205] However, effective December 13, 2007, under the *Fair Treatment for Experienced Pilots Act*, the U.S. now allows commercial pilots on domestic flights to fly up to the age of 65. For international flights, the US adopted the over/under rule of the ICAO standard.

[206] Mr. Elfassy's experience when he was the point of contact with the FAA, if the ICAO rules were not followed, was that the principle operations inspector FAA would contact him and tell him that one of their inspectors audited an Air Canada airplane and identified certain problems which Air Canada would rectify. If there were repeated contraventions of the OPSPEC there could be financial penalties or the OPSPEC could be revoked so that Air Canada could no longer operate into the U. S.

[207] On the question of the application of the FAA regulations to Air Canada, Mr. Elfassy was referred to a December 11, 2006 letter from a Rebecca B. McPherson, the FAA Assistant Chief Counsel, Regulations Division. This letter was in response to a request by George Vilven, a retired Air Canada First Officer, for a legal interpretation of the "Age 60 Rule", specifically whether the FAA regulations permit Air Canada to fly over U.S.-space with a PIC over the age of 60 en route to foreign destinations.

[208] Ms. McPherson's response was that the U.S. applies the current ICAO standard to foreign air carriers operating within its airspace. Prior to November 23, 2006, the U.S. did not allow flights through its territory by foreign air carrier where the PIC was over age 60. This applied even where there was no landing in the U.S.

[209] According to Ms. McPherson, the ICAO standard also prevented a foreign air carrier from using a U.S. airport as a planned alternate airport except in the case of an emergency that required a landing in the U.S. The U.S. does not apply the ICAO standard to a second-in-command ("SIC"). Under the post-November 23, 2006 ICAO standard, the U. S. allows foreign air carriers to use a PIC or SIC age 60 or over if one of them is under the age of 60.

(iii) Arlo Speer

[210] Mr. Speer is the Chief of Flight Crew Licencing and Aircraft Registration with Transport Canada, the civil aviation authority for Canada. His responsibilities relate to flight crew licencing, the maintenance and establishment of the regulatory infrastructure for the licencing of flight crew in Canada, providing interpretations to the Canadian Aviation Regulations, in particular to Part 4 as it relates to flight crew licencing and to the periodic amendments and revisions to those requirements as necessary.

[211] Mr. Speer testified on behalf of the Complainants. He explained. from the perspective of the regulatory authority, the relationship between Canada and the Chicago Convention. As a Contracting State, Canada shares with its fellow states the obligation to develop and maintain a safety oversight and regulatory structure for aviation that's consistent with the requirements of the ICAO standards, inasmuch as those requirements are consistent with the laws of the individual states. Canada's obligation is to adhere to the standards that have been agreed upon internationally by ICAO to the extent that those standards are consistent with Canadian requirements.

[212] The ICAO standards produce an obligation on the ICAO contracting states that they will develop a regulatory structure that is consistent with the ICAO standards. There is an obligation on pilots and other operators within the aviation system to adhere to the regulatory structure that has been imposed either by the state that has provided its licenses or certificates or by the state in which the operation is conducted. So the regulatory framework comes from the state not from the standard itself.

[213] The ICAO standards have been implemented in Canada in Part 4 of the *Canadian Aviation Regulations* which provide the licencing requirements for flight crew. With a very small number of exceptions, the Canadian licencing standards are consistent with the ICAO standards and in many cases also with the ICAO recommended practices. The recommended practices are not required to be implemented by the member states. The expectation is that member states will implement the standards, but the recommended practices are recommendations and are not obligatory on the member states.

[214] Mr. Speer explained that if a member state does not want to incorporate an ICAO standard into its regulations, the expectation is it will file a difference with ICAO. The fact that a state does not adhere to a particular ICAO standard becomes a matter of public record for the other ICAO Contracting States. The differences that Canada has filed are set out in the licencing section of the Aeronautical Information published by Transport Canada.

[215] Canada has filed a difference with respect to Article 2.1.10 of ICAO Annex 1. The difference reads that Canada does not curtail privileges of pilots who have attained their 60th birthday. There are two reasons why this difference was filed. The primary reason being that the refusal to issue licenses or grant privileges purely on the basis of age was seen as contravening the *Charter of Rights and Freedoms*. The second reason was based on medical advice received from TC medical advisors that, from a licencing perspective, age alone is not a valid basis on which to predict the potential of sudden incapacitation.

[216] Each Contracting State issues its own licence and conducts its own medical certification. Canada's position is that if the licence is medically valid, Canada will accept a licence from any ICAO Contracting State regardless of the age of the holder. Canada imposes on foreign pilots the same expectations and obligations as imposed on Canadian pilots.

[217] Canada accepts pilots operating into Canada who are licenced by another State so long as they conform with the CARS regulations and they conform with the terms of the licence of their licencing authority.

[218] Canadian Aviation Regulations relate to Canadian licence holders and Canadian aircraft wherever they are. For flights coming into Canada it is Canadian regulations that apply. The regulations of the country that issued the pilot's licence would also apply.

[219] If a foreign pilot operating a foreign aircraft in Canada exceeds the privileges of the licence issued by the foreign state, that pilot would be potentially guilty of contravening *CAR*S and also potentially be guilty of an infraction against the foreign regulation.

[220] Typically what would happen is that Canadian enforcement authorities and those of the foreign state would work together so that the pilot would not be charged with the violation of two separate but effectively equivalent laws.

[221] Mr. Speer pointed out that the ICAO Convention recognizes the serenity of the individual Contracting States and leaves with those Contracting States the authority to generate whatever regulatory requirements they choose. There is an expectation through ICAO membership that Canada will match its regulatory requirements as much as possible to the ICAO standards.

[222] For example there are some pilot licenses for which Canada requires a greater degree of experience, knowledge or skill than specified by ICAO and so is more restrictive than the ICAO requirements. There are other examples such as the maximum age limit for pilots as discussed above, where Canada has chosen to be less restrictive and not impose the ICAO standard.

[223] Mr. Speer referred to Article 39(b) of the Convention. He said that this requires Canada to make an annotation on any document/licences it issues when the holder does not comply with the international standards. For example, TC issues a licence type rating for relief pilots on long range flights who have not been qualified for the take off and departure phase and for the approach and landing phase of the flight. They are rated for the cruise stage of a long range flight.

[224] Mr. Speer was asked about a scenario where a Part 121 flight (as defined under 14 CFR and which is the equivalent to Part 7 of the CARS) departs from Seattle and travels through Canadian air space enroute to Anchorage. He was asked how does Transport Canada view the operation of that flight while it's in US air space with respect to crew licencing.

[225] He said that the best answer that he can provide is to refer to Canada's difference which says Canada has no objections to pilots over 60 who hold a medically and otherwise valid licence issued by an ICAO contracting from flying foreign aircraft in Canada. So assuming that the operation is consistent with US law and the documents presented confirm that it would be, then Canada would have no objection to the operation of any aircraft, Part 121 or otherwise, in Canadian air space.

(iv) Harlan Clark

[226] In addition to giving evidence relating to s. 15(1)(c) of the *CHRA*, Mr. Clark also testified on the s. 15(1)(a) issue. He said that there are approximately 3,000 pilots currently employed at Air Canada and there has not been a lot of variance in the last ten years. For new hires Air Canada looks for is between 2,500 and 3,000 hours of flying time and they have to hold an Air transport pilot licence ("ATPL").

[227] The typical background of those who do get hired is the smaller airlines or the military. Because of the number of hours of fixed wing flying that Air Canada looks for, they do have to have a fair amount of experience flying before they come to Air Canada.

[228] New pilots hired at Air Canada enter the company through the Position Group which consists of EMJ170/190 first officer, B767 relief pilot, B787 relief pilot, A340 relief pilot, B777 relief pilot.

[229] Air Canada's fleet consists of the B777, A330 and B767, which are all wide-bodied aircraft; the A321/A320/A319 and the EMJ190/175. Pilot jobs are divided into 16 non-interchangeable positions, being captain, first officer and relief pilot on the wide-bodied aircraft and captain and first officer on the other aircraft. Each Air Canada pilot is trained and rated on one aircraft type at any point in time and are only able to fly that particular aircraft type.

[230] Pilots progress through their careers at Air Canada on the basis of seniority. Through the Crew Manning Steering Committee ("CMSC") review held at least twice per year (and can be up to four times), pilots submit their Standing Preferential Bid ("SPB") for their position which determines their status, equipment and their base.

[231] In addition to the SPB there is the monthly bid. On a monthly basis pilots bid their schedule. Depending on their seniority, they will be awarded a block i.e. the pairings or flights that they will be flying in that month. They can also use their seniority to bid the quality of their schedule such as days off, vacation time.

[232] Pilots who want to change aircraft type, status or base have the opportunity to do so through the SPB. If they have enough seniority to hold that position, it would be awarded through the CMSC bid process and they would eventually be trained for that position. But even though rated, when it comes time to bid the monthly work schedule, they may not have sufficient seniority to be a blockholder. In this case, they would go on the reserve.

[233] Reserve pilots are on call to backfill when required such as when the scheduled pilot calls in sick or for other reasons cannot make the flight. They have a monthly schedule that sets out the days they are on call and would fly the aircraft for which they are rated.

[234] It is important not to confuse reserve pilots with relief pilots. Relief pilot ("RP") is a position, whereas a reserve pilot is where they end up on the monthly schedule. So there is regularly scheduled relief pilots and on-call reserve pilots on any given aircraft type, on any given month.

[235] A relief pilot is a more junior pilot and is the third pilot in a three-pilot crew on a wide body aircraft. For international flights over a certain amount of duty time, a third pilot is required to ensure that the captain and first officer receive the prescribed rest time while operating the aircraft. But a relief pilot can be on the flight deck only for the cruise portion of the flight. They are not rated for all phases of flight such as takeoff and landing or flight 10,000 feet above ground level.

[236] If a pilot successfully bids for a new position through the CMSC bid process, they would receive transition training on the aircraft successfully bid on which may not be scheduled for another year. So pilots, after a CMSC review, will hold both their current qualified position and their CMSC awarded position until retrained.

[237] In addition to the initial training when a pilot joins Air Canada and transition training, there is captain upgrade training and annual recurrent training. Initial training involves ground school/pilot indoctrination course, then simulator training followed by a line check. Air Canada has pilots that are qualified by Transport Canada to be check pilots. They fly with pilots in

training on what's called a check ride. Once the pilot successfully concludes the check ride, they are rated on that aircraft.

[238] Training for a new hire takes about two months. The initial training is the longest, because the ground school is longer. For transition training there is some ground school, simulator and a check ride and may take eight to ten weeks.

[239] Captain upgrade training involves some ground school for leadership and operational control. Recurrent training is where pilots rated on a certain aircraft type attend regularly scheduled simulator sessions to maintain their rating on that aircraft. These are generally one-day sessions. Changing status, even on the same equipment type, requires training, some simulator time and a check ride but it would not be full transition training.

[240] Mr. Clark estimated that it would cost approximately $30,000-$40,000 to train a pilot from one position to another. A large part of the costs would be unproductive salary for pilots. There would be the backfilling when the pilot is off the line and it is necessary to cover using other pilots to fly those routes while they're in training and not productive. There is also the cost of instructor salaries and the cost of running the simulator.

[241] In addition to the pay formula, the collective agreement also provides for a minimum monthly guarantee (MMG) and that is linked to the designated monthly maximum (DMM). For a reserve pilot where the DMM is 70 hours, the MMG is 65 hours. This is the minimum number of hours that a reserve pilot is guaranteed to be paid whether or not they fly those hours. For a blockholder, the MMG is 60 hours and the DMM is 70 hours. The difference being a reserve pilot is on call and may or may not be required to fly those hours in the month.

[242] Seniority comes into play as a factor into how much a pilot earns, because seniority determines monthly schedule and the number of flying hours in the month. As pilots accrue seniority, they can bid on higher rated equipment types and if they have the seniority to hold it they attract the higher pay for the larger equipment type.

[243] Air Canada has permanent management pilots who hold management functions but remain on are on the seniority list. They do not bid on the CMSC review or on the monthly schedules. They are rated on certain aircraft and must fly on a regular basis to maintain their competency. Permanent management pilots can "return to the line", that is relinquish their management duties and go back to being a line pilot.

(v) Edward Tarapasky

[244] Mr. Tararpasky is the Manager of Crew Scheduling in charge of automation and process for flight operations. He has been in that position for four years and has been with Air Canada for 25 years.

[245] For this hearing, Mr. Tarapasky prepared a document entitled "Special Preferential Bidding Accommodation Experiments".

[246] The conclusion reached by these experiments was that if mandatory retirement no longer existed at Air Canada, at some point the PBS would not be able to produce a block/monthly flying schedule for its pilots and it could not fly this monthly schedule.

[247] The Preferred Bidding System is a computer program that analyzes data and produces schedules based on pre-set rules and pilot bid preferences and produces a block A block is a pilot's monthly flying schedule. To build a block, the computer takes into account current months flying, pre-planned absences such as training, vacations, check rides, next month's flying and regulatory and contractual constraints.

[248] The monthly block is broken down into pairings. A Pairing is a series of flights and can consist of one or more operating or deadhead flights. A deadhead flight is a start, middle or end of a pairing assignment where a pilot is not on the flight deck and is going to a destination in order to operate another flight.

[249] The Marketing department produces a marketing plan setting out the schedule of flights for the destinations for the next month and specifying the aircraft and the frequency of flights

which is sent by electronic transfer to the Crew Analysts who input this information into the PBS.

[250] In addition to this data, there are two groups of files that go into the PBS, Day of Flight information consisting of seven files and five Pairing files, one for each piece of equipment and bid preferences This is what each pilot uses to indicate the type of flying they prefer or wish to avoid. This data plus the pilots' bid preferences are used to build the blocks and pairings for the next month.

[251] The PBS has five categories of bid preferences and 74 individual bids and uses a weighted bid system. This system assigns a value of points (0-1000) indicating to PBS how desirable or avoidable a particular bid is for a pilot. PBS proceeds in order of seniority to calculate the best possible points score for each pilot. The more senior the pilot, the higher the point score. The higher point score usually indicates a pilot very high on the seniority list who would usually be awarded their preferences.

[252] Mr. Tarapasky explained that there are a number of constraints that go into the PBS to produce a block. Some arise out of the collective agreement such as the DSM and the open time per month rule. Other constraints come from CARs, for example, the rule which limits stick time to 40 hours within seven consecutive days, 120 hours within any 30-day period and a minimum rest time of three consecutive days off within any 17-24 day period. PBS will consider these rules when constructing the blocks for the next month.

[253] For the purposes of these experiments, Mr. Tarapasky added a further constraint, the ICAO "over/under rule" to determine how PBS could assign pairings to create blocks, that is, produce a "solution". The basic rules for the experiments were one captain ("CA") and one FO per flight and no two potentially restricted pilots, i.e. both pilots over the age of 60 on the same flight.

[254] The first accommodation experiment involved 10 CAs an 10 FOs for 10 flights and assumed that 40% of the captains and 40% of the FOs were potentially restricted. PBS always runs the CAs solutions first, the FOs second. In this example, there is no limiting factor for the

captain solutions and the most senior CA would have their choice of the ten flights. The next most senior CA would have the choice of nine flights down to the tenth CA who would have the last flight remaining, for a total of 55 choices.

[255] However in the case of the FOs, because 40% of the CAs were potentially restricted the most senior FO could only fly with captains five through ten which means they only has six choices of flights not the ten the FO would have normally have.

[256] The FO's choices fall to 39 rather than 55 in the absence of the over/under rule. Air Canada relied on this accommodation experiment to demonstrate how crew member satisfaction is impacted when additional restrictions such as the over/under restriction is introduced.

[257] The next experiment run by Mr. Tarapasky assumed that seven out of ten CAs, i.e. 70% and four out of ten FOs, 40%, are potentially restricted. His conclusion is that no solution can be produced and in order to operate the ten flights, Air Canada would have to add new pilots or reduce the number of flights

[258] As before, the CAs' solutions are run first. So there is no effect on the solutions and the choices for the captains. But when the FO solutions are run, the most senior FO will have only three choices of flights because no two potentially restricted pilots may fly together.

[259] FO number 2 has two choices; FO number 3 only has one choice available. When you get to FO number 4, the solution does not run because the solution must solve all ten pairings and there is no solution because there are no pairings that FO number 4 could fly with without breaking the over/under rule.

[260] The next experiments asked the question, what number of potentially restricted pilots can Air Canada accommodate. These experiments focussed on wide-body equipment, B-777, B-767 and A-330 at the Toronto, Vancouver and Montreal bases. The purpose of these experiments was to identify the number of pilots Air Canada could accommodate over age 60 in a given month and still meet its ICAO obligations if mandatory retirement was abolished.

[261] These experiments are not based on any particular number of pilots hypothetically employed past age 60. They were run using the actual flying operations of Air Canada and the actual bidding preferences of its pilots for the month of June 2009 with the added constraint of the ICAO over/under rule.

[262] The first experiment was for June 2009 Toronto 777 FO. There were 104 CAs and 136 FOs holding those positions on the B777 at that time. This experiment produced these results. Any combination of 10% to 40% of CAs and 10% to 50% of FOs would produce a solution, i. e. a monthly block and pairings.

[263] It was only when it reached the level of 50% CAs (52) and 50% FOs (68) all over the age of 60, that PBS was not able to find a solution. This means hypothetically that Air Canada could not operate this equipment from the Toronto base.

[264] The next experiment is a Score Analysis for June 2009, Toronto, B777 FO. The purpose here was to assess the impact on the solution of introducing another constraint into PBS, the over/under rule-potentially restricted pilots over age 60. What Mr. Tarapasky did here was to compare the actual original June 2009 block solution for a random number of Toronto B777 FOs against the solution that solved immediately before the No solution occurred and analyse the score differences between the two solutions.

[265] PBS uses a weighted bid points system (0-1000) indicating to PBS how desirable or avoidable a particular bid is for a pilot. PBS proceeds in order of seniority to calculate the best possible points score for each pilot. The higher point score usually indicates a pilot very high on the seniority list who would usually be awarded their preferences.

[266] The results of the score analysis were that, of the total number of Toronto FOs in June 2009, the restriction produced a negative impact on 57 FOs but for 47 FOs there was no change and for 43 FOs it had a positive impact. A negative impact means that the pilot received less points than were originally awarded in June 2009 than if there had not been any potentially restricted pilots in the PBS.

[267] No change means that pilots had a score equal to what they were awarded. Improved means that their score increased. This could occur when senior FOs do not get what they bid for, that flying gets forced to other parts of the solution so that junior pilots' score would increase and they would get a better award because PBS needs to find a FO under age 60.

[268] In this scenario, there would be no impact on the CAs because the PBS runs the solutions sequentially with no restrictions on the CAs. It is only the FOs who are affected. Every time a FO solution is looked at, PBS considers the captain solutions to ensure that the over/under rule is met before the FO is given an award.

[269] But Mr. Tarapasky said the pilots would not know whether they were improved or negatively impacted. They would just see their final score and would not know what they could have attained. This exercise is just to show the differences that would occur between the original block versus the restricted block and how pilot satisfaction could be affected.

[270] Mr. Tarapasky used the same methodology for the rest of the experiments. For June 2009 Vancouver B777 FOs, the actual number of pilots was 46 CAs and 73 FOs. In this experiment, a No solution was only reached at the level of 50% potentially restricted CAs and 30% potentially restricted FOs. Any combination of percentages below those levels would produce a solution. The score analysis was 23 negative, 17 no change and 23 improved.

[271] For June 2009 Vancouver A330 FO, this experiment showed a total of 30 CAs and 35 FOs. The PBS produced a solution for every percentage combination of CAs and FOs until the combination of 30% CAs and 50% FOs was reached. The score analysis was 8 negative, 14 no change and 4 improved.

[272] For the June 2009 767 Toronto FO there was a total of 136 CAs and 119 FOs. The PBS produced a solution for every percentage combination of CAs and FOs until the combination of 40% CAs and 50% FOs was reached. The score analysis for the FOs was 47 negative, 16 no change and 51 improved.

[273] The June 2009 Toronto A330 FO produced a solution for every percentage combination of CAs and FOs until 50% CAs and 50% FOs was reached. The June 2009 Montreal B777 FO, 13 CAs and 12 FOs, shows a PBS solution for every percentage combination of CAs and FOs until 50% CAs and 40% FOs was reached.

[274] The June 2009 Vancouver B767 FO, 89 CAs and 78 FOs, produced a solution for every percentage combination until 60% CAs and 50% FOs. For June 2009 Montreal B767 FO, the same was true until the 50% CAs and 50% FOs level was reached.

[275] Mr. Tarapasky was asked whether in any of the experiments he used augment pilots and relief pilots. He replied that augment pilots are part of the FO solution because they are fully qualified first officers.

(vi) Professor Johnathan Kesselman

[276] Professor Kesselman gave evidence for the Complainants. He obtained his Ph.D from the Department of Economics in 1972 from the Massachusetts of Technology. He is the author of numerous publications in economic and labour economics. He has been a professor in this academic field for more than 30 years and currently teaches the Masters graduate program in Public Policy at Simon Fraser University. He also holds a Canada Research Chair in public finance. He was qualified to give expert opinion in this matter.

[277] Professor Kesselman first testified on the question of how much longer Air Canada pilots would work if mandatory retirement was removed. Beginning with very broad empirical findings on the effects on retirement ages in jurisdictions that have ended mandatory retirement, there are statistical studies that have found typically a small positive effect and in some studies find the effect was statistically insignificant.

[278] These are traditionally jurisdictions where age 65 was the binding age. In fact not a large number of people in most occupations want to work longer than age 65 and the average retirement age in the Canadian labour force is well under 65, more on the order of 61 or 62.

[279] In the case of pilots there are no empirical studies about how much longer will pilots work if the constraint of age 60 is removed. When Professor Kesselman referred to studies of jurisdictions that have abolished mandatory retirement at age 65, that was for background and he is not using that evidence to predict what will occur with Air Canada pilots.

[280] However, because of the lifestyle, the enjoyment of flying, and the high pay he would expect there to be a larger inducement toward continued work for pilots than for the general population where there is almost no effect on average working years.

[281] He said that there is some evidence in this case from the Survey–Retirement Age of Pilots for Air Canada that, for the four and a half year period, 2005-mid-2009, 21% of Air Canada pilots retired before age 60. In some of these years, Air Canada offered early retirement packages as an inducement to early retirement with no pension reduction.

[282] The evidence that he used was that over that full period, 2005-2009, 21% of pilots, 107 out of 515 retired early, that is, prior to attaining age 60. For 2005 and 2009, he was aware that there was an early retirement incentive package but he did not have the details of the incentive package.

[283] But he pointed out that in the intervening years there were also early retirements and no early retirement incentives. His response was to eliminate the periods with early retirement incentives and focus on the years 2006, 2007 and 2008 to abstract the possible effects of early retirement incentives and consider behaviour without them. In the years 2006, 2007 and 2008, there were 40 out of a total of 328 Air Canada pilots, over 12%, who retired early.

[284] In terms of incentives for pilots to stay on past the age of 60, he agreed that for someone who has not maximized their years of service or their earnings under the pension plan, that could be an incentive to stay. As he already said that has to be offset against the other factors that he also described. He also agreed that even if someone has maxed out the years if they have an opportunity to increase their earnings for the purpose of calculating their best five years, that’s another incentive to stay.

[285] Beyond that it does not pay to lose those years of pension benefits which might be 60% of full time earnings to work for 40% of those accustomed earnings. And that does not seem so attractive relative to leisure, working elsewhere or whatever the individual might choose.

[286] He agreed that his view would be somewhat tempered when considering a typical senior pilot's monthly schedule that requires the pilot to work only eight days per month with all weekends off. In addition, a 25-year pilot receives generous vacation time and four days off in lieu of statutory holidays. This type of schedule could be an incentive for a pilot to stay on.

[287] Professor Kesselman estimated that promotions would be delayed for younger pilots by about nine months. So pilots would give up nine months in delay of their promotion, the normal seniority and the type and size of aircraft and greater earnings. But they could make this up at age 60 by working another nine months. Or they can work another year or two years, three years, five years. So it gives them a very valuable option.

[288] In the end, Professor Kesselman concluded that he could not find any empirical study that would give a number, or even give a ballpark number of how many pilots would choose to work beyond age 60 at Air Canada and the numbers of years they will actually work.

[289] His position was that any evidence brought by anyone to this proceeding on the likely number of pilots who actually decide to work beyond age 60 would be only guesstimates and at best based upon indirect evidence. He does not claim any precision and does not believe that anyone else coming to this can claim any more precision or any certainty.

[290] Professor Kesselman then focussed on the question of the likely impact of removing mandatory retirement for pilots at age 60 on Air Canada's ability to schedule flight crew while respecting the preferential bidding. In this respect he commented on the evidence of the accommodation experiments done by Mr. Tarapasky.

[291] Professor Kesselman referred to the evidence of invitations to attend retirement dinners for Air Canada pilots sponsored by ACPA and Air Canada held in Toronto, Winnipeg and

Vancouver 2008 and 2009. These invitations list the names and status of the retirees who are retiring at age 60.

[292] He calculated that less than 10% of those forced to retire at age 60 were FOs. That indicates that most pilots attain the rank of captain by the mandatory retirement age. In his opinion, to assume, as did Mr. Tarapasky, that 30, 40 or 50 % of FOs would be over age 60 is not realistic.

[293] Even in the absence of this evidence, Professor Kesselman challenged Mr. Tarapasky's assumptions that FOs today will remain first officers indefinitely and not get promoted to captain. First officers, whether they're 59 or 55 or 45, by and large will become captains before they retire.

[294] If there is a relaxation of the age 60 barrier, those who were forced to retire at age 60 as first officers, if they wanted to stay on, would do so to get more years and to increase their pay. So they would likely attain the rank of captain before they did retire, whether it was age 62 or 66 or whatever.

[295] In his opinion, Mr. Tarapasky's assumptions in his model that first officers would remain first officers and a high proportion of first officers would be over the age of 60 are not necessarily valid, given the variant ages at hiring and other factors affecting promotions.

[296] Professor Kesselman said that the pilots at the top of the seniority in each classification are not necessarily the ones that will be over 60. Seniority is by years of service at Air Canada. Pilots may be hired at different ages and there could be some individuals with higher seniority but lesser age and vice versa. More first officers will tend to be younger and over time without mandatory retirement, it would be easier to satisfy the over/under rule.

[297] Mr. Tarapasky's model requires much higher percentages of FOs being over age 60, in most cases 30%, 40% or even 50% before it runs into this gridlock, where it can't do the matching, can't satisfy the over/under rule.

[298] Professor Kesselman had another concern and that related the sequential manner used in Mr. Tarapasky's model as it tried to mimic the bidding system while trying to fulfill the ICAO requirement. Professor Kesselman pointed out that first there was sequential bidding by captains in the sequence of their seniority, then bidding by first officers in their seniority sequence.

[299] If the PIC on a flight is over age 60, the operating first officer must be under age 60. Pairings that do not satisfy that constraint are ruled out. But long haul flights require an augment pilot who would be under age 60 under ICAO where both the PIC and the operating FO were over age 60.

[300] Professor Kesselman concluded that the logic of Mr. Tarapasky's model has fundamental deficiencies. If the logic of the model was sequential reasoning, Mr. Tarapasky should have included another sequence, namely, consideration of the augment pilot on long haul international flights.

[301] It is true that with respect to his comments on augment pilots, he did not know that in 2009, of the total flying hours of Air Canada, only two percent had augment pilots on the flights. Further, Mr. Tarapasky had indicated that augment pilots were taken into account in his experiments as they are generally first officers.

(vii) Captain Steven Duke

[302] Captain Duke, is the General Manager of Crew Resources at Air Canada. Crew Resources is responsible for running the equipment bids, the allocation of the flying every month between bases and the setting of the DMMs to determine how much the pilots, each pilot is flying that month.

[303] Captain Duke testified with respect to a study that he prepared, "Air Canada and Pilot Retirement, October 2009." There are two general sections. First, background on the Air Canada pilots which deals with the structure of Air Canada's pilot group and the Crew Manning Steering Committee review and position bidding process.

[304] The second section relates to Undue Hardship on Air Canada and deals with the inability to have captains over 65 fly internationally and domestically; the very limited ability of Air Canada to accommodate captains or first officers who are over age 60; and then the fact that retirement at age 60 has been predictable and stable.

[305] Captain Duke described the pilot jobs at Air Canada as being divided into 16 groups geographically separated into 44 positions. These groups are B777, captain, first officer and relief pilot; A330 captain, first officer and relief pilot; B767, captain, first officer and relief pilot; A319/320/321 captain and first officer; EMJ captain and first officer.

[306] Pilot status is not interchangeable. Captains cannot act a first officers. First officers cannot act as captains. And relief pilots cannot act as either captains or as first officers. However both captains and first officers can act as relief pilots. Captains and first officers are trained to operate all phases of flight. A relief pilot can operate only the cruise phase of a flight.

[307] Seniority is of fundamental importance for pilots at Air Canada. It is correlated with position and determines status, equipment and base. Different salaries are associated with each equipment status. It can go from a low of an Embraer first officer at $85,000/year to a high of a B777 captain of $244,000/year.

[308] Further, higher seniority brings with it more favourable monthly and vacation schedules. A typical B777 captain's monthly schedule consists of eight days per month of flying and weekends off. A mid-seniority pilot's schedule would have twelve days per month and working weekends. The less seniority, the less favourable the monthly schedule.

[309] In the second part of Captain Duke's evidence, he raised four issues. The first issue deals with the inability of Air Canada to have captains over age 65 fly internationally.

[310] As explained by Mr. Elfassy and Mr. Speer, prior to November 23, 2006, the ICAO Annex 1 standard restricted Air Canada PICs past age 60 from operating in foreign airspace. After November 23, 2006, ICAO restricts Air Canada from PICs that are over 65 from operating in foreign airspace.

[311] This divides Air Canada pilots into different sub-positions, PICs who are age 65 and older that are restricted; PICs 60-65 who are potentially restricted; and PICs under age 60 who are unrestricted. FOs over 60 who are potentially; FOs under 60 who are unrestricted; and RPs who are unrestricted.

[312] For the B777 93% of the flying is international. For the A-330, 90% is international flying. The B767 is 80% international flying. The A320 is 48% international flying and the EMJ is 46%. Captain Duke said flights on the three wide-bodied aircraft cannot be operated by PICs over age 65.

[313] Issue No. 2 is the inability to have Air Canada PICs over 65 fly domestically. Captain Duke defined domestic flying as a flight that leaves a Canadian airport and lands at a Canadian airport. International flying is anything else. He said that if he was to consider anything at all, it would to be the A320 and EMJ aircraft.

[314] The problem that Captain Duke identified here is that 88% of Air Canada's domestic flying hours involves overflying US airspace. For example, Toronto-Montreal flights overfly New York State. Toronto to Halifax flights overfly New York, Vermont, New Hampshire and Maine. Toronto to Vancouver flights overfly Michigan, Wisconsin, Minnesota, North Dakota and Montana.

[315] Of the remaining 12% percent, Air Canada flights may hold an alternate airport in the US. Alternate airports and the selection of alternate airports are necessary because of adverse weather at the destination. For example, flights into Toronto hold Niagara Falls, New York or Buffalo as alternate airports. Flights into Vancouver hold Seattle as an alternate.

[316] Not all flights hold alternate airports. It is weather dependent. The selection of alternate airports has to do with adverse weather at the destination. Captain Duke could not answer with certainty how many of the 12% holds alternates. It is dependent upon the weather on the day of the flight. But if Air Canada does not have the option of U.S. alternates the result may be cancelling the flight or going hundreds of miles out of the way north around the weather.

[317] As to the possibility of rerouting domestic flights that overfly the U.S. to keep them solely within Canadian airspace, Captain Duke's evidence is that increases the flight time, increases costs and it will make subsequent flights late. For example, he compared the time taken and the fuel burned using the most optimal route from Toronto to Halifax versus a route that stays solely in Canadian airspace.

[318] Captain Duke estimated that to reroute the 117 A320 and EMJ flights per week from Toronto to Halifax and Halifax to Toronto would cost an additional $5.7m per year.

[319] Air Canada operates 1600 domestic flights per week which overfly the U.S. Captain Duke estimated that, to fly the same schedule for A320 flights that do not overfly the U.S. would involve 1,720 additional flying hours, 21 additional flight crews and accounting for reserve coverage and vacation, the increased costs to Air Canada would be $7.7m per year. He also estimated that the additional costs for the Embraer fleet isolating flights that do not overfly the US would amount to $6.6m per year.

[320] Captain Duke then addressed Issue No. 3, the limited ability of Air Canada to manage both captains and first officers who are over age 60. His point here is Air Canada can only accommodate a very limited number of potentially restricted pilots before pilot scheduling becomes unworkable without increasing costs. He produced a number of graphs and tables which provide a snapshot of Air Canada's pilot demographics as at September 2009.

[321] They show the numbers and percentages of captains and first officers by base and equipment. For example, 53/58=91% of B777 Vancouver captains are age 55 or older. For Toronto, it is 101/115=88% of captains who are 55 or older. What is particularly interesting is the contrast between the captains and first officers. Only 21/82=26% of Vancouver first officers are age 55 or older.

[322] Captain Duke then prepared a bar chart in which he projected what the demographics for captains and first officers would be in 2014 and 2019. His projection assumed that there would be no retirements, i.e.100% of pilots would stay on. He said these projections represent the worst case scenario and simply point out Air Canada's maximum liability.

[323] It is not clear as to the purpose of this information. When questioned Captain Duke said, "You know what? To be honest, I wish I'd left all the demographic stuff out. I don't think it adds a whole lot…. I don't think that they add very much value because they do not necessarily predict what is actually going to happen, nor do they predict what Air Canada's demographics are going to be 10 years from now." He concluded that Mr. Tarapasky's experiments were much more instructive than his demographic evidence.

[324] Captain Duke said that his understanding of Mr. Tarapasky's model was that it is completely independent of the demographics of Air Canada's pilot population now, in 10 years or 20 years or 30 years This model just sets up possible numbers that may occur at any time in the future and what would happen to the PBS and the monthly process if certain of potentially restricted pilots were to occupy these positions.

[325] Captain Duke commented on the potential costs to Air Canada in the case where 80% CAs and 20% FOs are potentially restricted, a situation in Mr. Tarapasky's model which would not generate a solution. Captain Duke said that to operate that flight, one of the age 60 pilots would have to be taken out of the pairing and replaced by another pilot under age 60. If there is not enough flying time for the ineligible pilot, they would be paid the MMG but not flying. Should Air Canada have to promote one pilot that would cause one training course to stay on the workable feasible-infeasible side of the boundary.

[326] There would have to be backfilling and eventually causing Air Canada to hire a new pilot. Captain Duke estimated that this could involve a total of seven training courses including the new hire. The average cost of a training course is $43,000 so the full training costs would be around $300,000. There is the further cost of paying the full salary of the pilot while on training.

[327] He agreed that there would be reserve pilots qualified on the equipment who could replace the ineligible pilot. But that would reduce the reserve coverage and they would have to be replaced because otherwise you are increasing the operational risk by reducing the number of pilots on reserve.

[328] Captain Duke also spoke to the subject of augment crews. Augment pilots are almost exclusively first officers. Generally a flight time over fourteen hours requires a crew of four, adding an augment pilot. Only the B777 has augment pilots and approximately 14% of all B777 flying has augment pilots. For all Air Canada's operations, augment pilots are on only 2.5% of the flights. About 22% of all B777 flying is done with relief pilots. And 7% of all of Air Canada's flying is with relief pilots.

[329] Issue No. 4 as defined by Captain Duke, is that at Air Canada's retirement age of 60 has been stable and predictable. From May 25,1992 to June 2009, over 90% of Air Canada pilots retire at age 60. So there is a great deal of certainty as to when these pilots retire. This data includes early retirements and people who leave the airline for whatever reason. It also includes pilots who took early retirement incentive programs.

[330] Captain Duke explained that each unexpected retirement (without notice) detrimentally affects Air Canada's operations and results in additional costs. To replace this person can take a full training period, a minimum of two months. And it may require the full CMSC review process to get an individual assigned to the new position. This may jeopardize Air Canada's ability to conduct a full operation.

[331] His evidence was that any more than six unexpected retirements over three months in the Vancouver B777 captain cohort could cause flight cancellations and cost approximately $2.5m in revenue. This would not be an issue if the Tribunal were to order that pilots must give notice of retirement within a specified time period. Captain Duke acknowledged that economic incentives could be used to encourage this.

D. Sections 15(1)(a) and 15(2) of the *CHRA* and *Meiorin*

[332] Section 15(1)(a) of the *CHRA* provides a defence to a claim of discrimination if the employer establishes that "any refusal, exclusion, expulsion suspension, limitation, specification or preference is based on a bone fide occupational requirement"("BFOR").

[333] The test to be applied for determining whether the employer has established a BFOR, is that set out by the Supreme Court of Canada in *British Columbia (P.S. Empl. Rel. Comm.) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3 ("*Meiorin*").

[334] An employer must establish on a balance of probabilities that:

1) the employer adopted the standard for a purpose rationally connected to the performance of the job. The focus here is not on the validity of the standard but on the validity of its purpose;

2) the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that work-related purpose; and

3) the standard is reasonably necessary to the accomplishment of that work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the same characteristics of the claimant without imposing undue hardship on the employer.

[335] The Supreme Court softened the "impossibility" aspect of the third step in *Hydro-Quebec v. S.E.T.P*. [2008] 2 S.C.R. 561, saying that the test is not whether it was impossible for the employer to accommodate an employee who does not meet the standard, but requires proof of undue hardship, which can take as many forms as there are circumstances.

E. Sections 15(1)(a) and 15(2) and ACPA

[336] The Complainants argue that, on the wording of s. 15(1)(a) and the principle of *expression unius est exclusio alterius*, the BFOR defence is only available to an employer and not to an employee organization such as ACPA. A union may provide evidence to support an employer's BFOR defence but cannot do so for itself. The reference only to "employer" in the *Meiorin* test gives weight to this argument. Further support for this position is found in

s. 15(1)(f) of the *CHRA* where the BFOR defence is available to an employee organization as well as to an employer.

[337] Although tempting, ultimately I do not accept this argument for two reasons. These complaints reference both s. 7 and s. 10 of the *CHRA*. If a discriminatory practise can be committed under s. 10, by an employer, an employee organization or an employer organization, how can it be, that of these three, only an employer can raise a BFOR defence. It doesn't make sense either in terms of policy or logic.

[338] Second, I rely on the Supreme Court decision in *Central Okanagan School District No.23 and CUPE v. Renaud*, [1992] 2 S.C.R. 970 ("*Renaud*") where a complaint was brought against both the employer and the union. The union refused to agree to the accommodation offered by the employer because of its impact on other employees.

[339] The Court noted that a union may become a party to discrimination by participating in the formulation of a work rule that has a discriminatory effect on the complainant, e.g. if the rule forms part of the collective agreement.

[340] The Court went on to say that in such case the union incurs liability (under the *B.C. Human Rights Act* which also provided for a BFOR) and must have the same right as an employer to justify the discrimination. In order to do so, it must discharge its duty to accommodate.

[341] But the Complainants argue, even if ACPA can offer a BFOR defence apart from Air Canada, it has failed to satisfy the *Meiorin* test.

[342] ACPA's explanation as to the purpose of the age 60 rule is that it negotiated a collective agreement which provided its members with security of employment, certainty of advancement, increase in salaries and significant pension income. All of these benefits are tied to a system of seniority. The mechanism that ACPA chose to distribute these benefits of seniority in a fair manner for all pilots was to include a requirement for mandatory retirement.

[343] If the essence of what Air Canada pilots do is flying aircraft of varying sizes and types, transporting passengers to both domestic and international destinations, it is difficult to see how the age of the pilot bears any relationship to the performance of the job.

[344] It is very telling that Transport Canada, the federal regulatory agency responsible for licencing commercial pilots, does not impose any maximum age restriction. In fact, in its submission to ICAO on the question of raising the maximum age of PICs for international flights, Canada's position was that there should not be any age restriction. Canada has no objections to pilots who are 60 years of age or older holding a medically valid licence from flying within Canadian airspace.

[345] As to the second step of *Meiorin*, I do not question that the age 60 rule was adopted with an honest and good faith belief. But if it was not adopted for a purpose connected to the performance of the job, it cannot be necessary for the fulfillment of that work-related purpose.

[346] For these reasons, I have concluded that ACPA has failed to satisfy steps one and two of the *Meiorin* test. The result is that ACPA cannot rely on the BFOR defence provided by s. 15(1)(a) of the *CHRA.*

[347] Although, in the case of ACPA, it is not necessary to proceed to step three of *Meiorin*, it is nonetheless prudent for me to deal with the evidence that ACPA produced to support its position that the elimination of the age 60 rule would result in undue hardship to a significant number of its members.

[348] Before doing so, I want to deal with the question of the factors the Tribunal can consider when assessing the whether a BFOR has been established. In *Central Alberta Dairy Pool v. Alberta (HRC)* [1990] 2 S.C.R., the Supreme Court listed the factors that could be relevant to undue hardship as including financial cost, disruption of a collective agreement, problems of morale of other employees and interchangeability of work force and facilities. The Court went on to explain that this list was not meant to be exhaustive. (see: also *McGill University Health Centre v, S.E.H.G.M.* 2007 SCC 4).

[349] In 1998 the *CHRA* was amended to add s. 15(2) which specified that the factors to be considered are health, safety and cost. In *Meiorin*, the Supreme Court pointed out that the relevant factors are not entrenched unless they are expressly included or expressly excluded by statute.

[350] With s. 15(2) Parliament has expressly included the relevant factors to be considered in the determination of undue hardship. Apply again the *expression unius est exclusio alterius* principle and the principle that defences limiting the exercise of human rights conferred under human rights legislation are to be construed narrowly. The conclusion must be that the factors to be considered in the undue hardship analysis are limited to health, safety and cost.

[351] ACPA's position is that there is no other way to accommodate the Complainants but to eliminate the age 60 retirement rule. To do so would impose an undue hardship on ACPA.

(i) Rikk Salamat

[352] ACPA tendered Rikk Salamat as an expert in collective agreement analysis and specifically in this case to give evidence regarding the potential career earnings of airline pilots if the age 60 rule is eliminated. He produced a report dated October 2009 setting out his analytical methodology and his general conclusions.

[353] Mr. Salamat's general conclusions were that, for 14% of the active Air Canada pilots, the elimination of mandatory retirement offers a clear financial benefit. The remaining 86% of pilots will have to work past age 60 to maintain the same potential earnings they would have if the age 60 rule remained. For some in this latter group the decrease in career earnings is relatively small compared to the financial benefits of being able to work beyond age 60.

[354] For those 29% of the 86% of pilots, working beyond age 60 would provide little additional earnings. And for 1% of the pilots they would receive no benefit from working any additional years. This is illustrated in the data below where Mr. Salamat grouped the active pilots into four categories which reflect his conclusions.

- Group 1: 14% of active pilots-“No Risk”. These pilots will suffer no loss in career earnings whether or not they work past age 60.

- Group 2: 57% of active pilots-“Moderate Risk”. This group will suffer from delays in career advancement. The financial impact of these delays can be offset by working past age 60. But the magnitude of the earnings loss they would suffer if they retired at age 60 is *less* than the benefits they would receive if they work to the same average as other pilots.

- Group 3: 28% of active pilots-“Significant Risk”. As with group 2, these pilots will suffer from delays in career advancement that can be offset by working beyond age 60. However, the magnitude of the damages they would suffer if they retired at age 60 is *greater* than the benefits they would receive if they work to the same average age as other pilots.

- Group 4: 1% of active pilots-“No Benefit”. This group of pilots will suffer a decrease in their career earnings even if they work as many years past age 60 as other pilots. The reason is that the near term losses these pilots will experience from lost advancement opportunities are large enough and their extra years of income so far into the future, that the latter cannot fully offset the former.

[355] For his analytical model, Mr. Salamat started with all of the pilots on the January 2009 Air Canada pilot seniority list and projected one year into the future. He removed all the pilots who would have turned 60 by December 31, 2009 and assigned their positions by seniority order to pilots with lower seniority. This process was repeated for the next 35 years until all of the Air Canada pilots who are on the current seniority list have retired.

[356] To calculate the financial impact, the model assumed the July 2008 pay scale and 80 hours worked per month and applied a three percent discount rate on future earnings to estimate the net present value of the total career earnings. (“npv”).

[357] The model then ran five alternative scenarios based on assumed average retirement ages of 61 to 65 instead of age 60. Rather than producing a data for all five scenarios, Mr. Salamat chose age 63 as the assumed average age of retirement. As to why he focussed on age 63, Mr. Salamat said that he works with pilots from a number of US airlines and the data suggests that pilots who stay on past age 60 generally work until age 63. He said that this is based on retirement patterns to date, some actuarial studies and expressed the interest that pilots have indicated in various surveys.

[358] He did not produce any such patterns, studies or surveys. Nor is there any factual evidence to support this because there are no pilots yet in the US who have stayed on to age 63. The US law increasing pilot age to 65 only changed in December 2007. But on an aggregate level, it does not matter the age as long as everyone goes at the same age.

[359] Mr. Salamat did not claim to know or have a definitive answer as to what age Air Canada pilots would retire at beyond age 60 if no mandatory retirement. Nor did he claim that the model could predict what choices pilots would make with respect working past that age.

[360] Scenario No. 1, shows, by year and age in 2010, the cumulative impact, by year and age in 2010, on npv of career earnings with the average age at retirement increasing from 60 to 63. For pilots in the age 55 to 59 age group, in the year 2018, the cumulative impact is a positive $470,000. There is no negative impact for retiring at age 60.

[361] Pilots aged 50-54, in year 2013, would have a negative npv of $70.000 at retirement age 60, but positive npv earnings of $328,000 at retirement age 63. For age group 45-49, the positive npv earnings would be $231,000 age 63 compared to $116,000 negative npv at age 60. In terms of the positive/negative comparison, this holds true for the 45-49 and 40-44 age groups except that the magnitude of the difference diminishes with each lower age group.

[362] It is only with the most junior pilots, those in the age groups, 35-39, 30-34 and 25-29 that the magnitude of the negative impact on npv earnings at retirement age 60 is more than the positive npv earnings at age 63. The reason for this latter effect is because up to this point in time

the only impact that they have experienced are the delays. With each progressive year they are a little further and further behind.

[363] Scenario No. 2 considered the average potential impact, by age in 2010, on npv of total career earnings of average age at retirement rising from age 60 to age 61-65. This graph shows that, for a pilot age 60 in the year 2010, the average potential impact on npv of total career earnings, if he worked to age to 63 is $560,000. This person would not suffer any negative impact on earnings loss if retired at age 60.

[364] A 55 year old pilot would stand to gain npv of about $425,000 at age 63 and would suffer a negative npv of about $100,000. It is the youngest and least senior pilots where the magnitude of the negative impact on the npv earnings is far greater than the positive impact. A pilot age 27 would suffer a $227,000 loss at retirement age 60 and a $10,000 gain at retirement age 63.

[365] The next Scenario, No. 3, considers the npv, by seniority number, of each additional year worked with average age at retirement rising from 60 to age 61-65. This reflects that there is a strong correlation between age and seniority. But Mr. Salamat said that this does not always hold true. You can be old and be at the top of the seniority list and you can be old and be at the bottom of the seniority list. You just can’t be young and senior.

[366] For a pilot who is number one on the seniority list, the value of working one more year to age 63 is $200,000 with no negative npv earnings at retirement age 60. A pilot, seniority number 1,500, would have a positive npv of about $100,000 at retirement age 63 and a negative npv of about $45,000 to retirement age 60.

[367] The value of working to retirement age 63 for a junior pilot with the low seniority number of 3,500, is $15,000 and if this pilot retired at age 60 the npv would be a negative $71,000.

[368] Scenario No. 4, shows the potential impact, by seniority number, on npv of total career earnings of average age at retirement going from 60 to age 63. For the most senior pilot, number

1 on the seniority list, if the average retirement age goes to 63, the additional total npv would be $597,000 with no downside at retirement age 60.

[369] Seniority number 1,000 would realize a total npv of about $395,000 at retirement age 63 and negative npv of $100,000 at retirement age 60. The impact on the junior pilot, seniority number 3,000, retiring at age 60 would be a negative $215,000 and only rising to a negative $2,000 working to age 63.

[370] Scenario No. 5 analyses the potential impact, by pilot position, on npv of total career earnings of average at retirement rising from 60 to age 61 to 65. For this analysis, the pilots were grouped according to the position that they held in September 2009. The positions were arranged from most senior to most junior.

[371] Starting with the Embraer 190 first officers, with the lowest pay rate, this scenario shows the benefit to be $51,000 if they worked until age 63. For the B777 captain, the npv value of benefits of working to age 63 is $586,000.

[372] For the Embraer first officer the cost of retiring at age 60 would be a negative $222,000 npv and for the B777 captain there will be no cost. The Embraer captain would gain about $230,000 at retirement age 63 and a loss of $18,000 at retirement age 60.

[373] Scenario No. 6 is a scatter graph showing the impact on npv of career earnings average age at retirement rising from 60 to 63. It is a graphic illustration of the four pilot groups referred to earlier.

[374] Mr. Salamat next produced a Table showing the impact on the average income for the last five years of employment by retirement at age 60. He assumed that the pension was based on the average of the last five years of earnings. (Air Canada’s pension is based on the best 60 consecutive months).

[375] Mr. Salamat explained that, whereas the previous scenarios illustrated what happens during the employment phase, this Table is intended to show the impact on pensionable earnings if pilot choose to retire at age 60 when the retirement age rises to age 61-65.

[376] What the Table ultimately concludes is that the average impact on a pilot's earnings for pension purposes is $3,762 or 3% less if they retire at age 60 when the average retirement rises to age 61. If the average retirement age goes to 63 and the average pilot retires at 60 when the average age rises to 63, the negative impact will be $13,900, or eight percent less for pension purposes. And so on for the years, 62, 64 and 65.

[377] Finally, Mr. Salamat presented a Table called Equipment Bid 09-01 at Bid Close. What this Table shows is the number of Air Canada pilots and their minimum, median, average and maximum ages by position as at January 2009. I have referenced only some of the position data, more particularly, those positions referred by Mr. Tarapasky and by Captain Duke in their pairings evidence.

[378] According to this Table, there were 109 B777 Toronto captains in January 2009. The maximum age was 59 and the minimum age was 51.6 years. The median age was 58 and the average age 57 years.

[379] There were 126 B777 Toronto first officers, the maximum age being 58.8 and the minimum age 40.8 years. The average age and median age of these first officers was about 51 years.

[380] The B777 Vancouver position had 52 captains with a maximum age of 59 and a minimum age of 52.3 years. The median age was 57.5 and the average was 57 years. There were 76 Vancouver first officers, whose maximum age was 58.7 and a minimum age of 41.8 years. They had a median age of 52 and an average age of 54 years.

[381] The data for B777 Montreal captains shows even lower ages. For the 15 captains, the maximum age was 57.3 and the minimum age was 51.4 years. The average age was 49 and there was no median age shown. For the 13 B777 Montreal first officers, the maximum age was 56.3

and the minimum age was 43.1 years. The median age was about 48 years and the average was about 47 years.

[382] There were 50 Toronto A340 captains with a maximum age of 59 and a minimum age of 50.6 years. The median and average ages were about 55 years. For 44 first officers on the Toronto A340, the maximum age was 58.9 and the minimum age was 40.3 years. The median age was about 46 and the average was about 47.5 years.

[383] Toronto had 162 B767 captains with a maximum age of 59 and a minimum age of 45.3 years. The median age was 54 and the average was 55 years. For the 130 Toronto B767 first officers the maximum age was 58.2. and the minimum was 35.8 years. The median and average ages were about 46 years.

[384] There were 87 B767 Vancouver captains with a maximum age of 59 and a minimum of 50.8 years. The median was 54 and the average was 55 years. Of the 75 Vancouver B767 first officers, the maximum age was 57.6 and the minimum was 38.1 years. The median and average ages were 47 years.

[385] Montreal B767 captains had a maximum age of 58.4 and a minimum age of 41 years. The median age was about 47 and the average age was 46 years.

[386] There were 13 Montreal B767 captains with a maximum age of 58.4, a minimum of 41 years, a median age of 46 and an average age of 47 years.

[387] According to Mr. Salamat's Table, there were 363 Toronto A320 captains in January 2009. Their maximum age was 58.9 and minimum age was 36.8 and an average of 48 years. The 341 Toronto A320 first officers had a maximum age of 56 and a minimum age of 25.8 years. The median and average ages for the first officers was 40 years.

[388] The maximum age for the 39 Vancouver A320 captains was 58.9 and the minimum age was 46 years. The median and average ages were about 52 and 53 years. For the 37 Vancouver

first officers, the maximum age was 52.4 and the minimum age was 28.1 years. The median and average age was just over 40 years.

[389] Montreal had 80 captains at a maximum age of 58.3 and a minimum age of 36.9 years. The median age was 48 and the average was 47 years. The 78 Montreal first officers' maximum age was 58 and the minimum age was 32.2 years. The median age was 42 and the average age was 43 years.

[390] The 31 Winnipeg A320 captains had an average age of 58.6 and a minimum age of 36.9 years. The maximum age of the Winnipeg first officers was 54.2 and the minimum age was 37.6 years. The median age was 46 and the average age was 45 years.

[391] The maximum age for the EMJ captains for these bases ranged from 54.4 to 57.9. The range for the minimum age was 30 to 34.2 years. The EMJ first officers had a maximum range of 50.6 to 51.2 years. The minimum age ranged from 25.9 to 28 years.

[392] Clearly the pattern that emerges from these scenarios is that the impact of eliminating the age 60 rule follows the age and more so the seniority of the pilots. If the age 60 retirement rule is eliminated, those pilots in Groups 1, 2 and 3 can choose to retire at age 60. The Group 1 pilots, who constitute 14% of the active pilots, will not suffer any earnings loss and they will receive significant earnings benefit to work to age 63.

[393] The Group 2 pilots, 57% of active pilots, because of the delay in career advancement, will suffer an earnings loss. But if they work to age 63, they will receive positive earnings benefits which will be greater than their earnings loss.

[394] The Group 3 pilots, 28% of the active pilots, because of the delay in career advancement will also suffer an earnings loss. But if they work to retirement age 63, they will receive positive earnings which will be less than the earnings loss.

[395] It is Group 4, the most junior pilots, for whom the consequences are the most negative if retirement age 60 is eliminated. They make up 1% of the active pilots. They will suffer a

significant loss if they choose to retire at age 60 and will continue to have a very small loss which may be greatly reduced to the point of being neutral, if they work to age 63.

F. Conclusion on s. 15(1)(a) of the *CHRA* for ACPA

[396] It is true that terminating the age 60 retirement rule would have a disproportionate impact on the younger pilots. There is also no question that the Complainants during their careers at Air Canada accepted and took the benefits of the very rule that they now seek to overturn. But acquiescence to the rule should not disentitle the Complainants from asserting their rights under the *CHRA* to be free from discrimination. The clean hands principle is not a mitigating factor at least for the issue of liability.

[397] In *Renaud*, the Supreme Court said that "the use of the term "undue" implies that some hardship is acceptable. The extent to which the discriminator must go to accommodate is limited by the words 'reasonable" and "short of undue hardship". These are not independent criteria but are alternate ways of expressing the same concept".

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

[399] The most significant impact would be on the most junior pilots. They would suffer a significant loss of earnings at retirement age 60 and at best would be in a no benefit position even if they work to retirement age 63.

[400] If some degree of hardship is acceptable should it be the pilots whose ability to continue working at Air Canada was cut off at age 60 for no reason other that they attained age 60. Or should it be majority of the pilots for whom their ability to choose to retire at age 60 would now be more constrained but who would still be in a positive earnings position if they worked to

age 63. This is not to underestimate the more serious impact on the younger pilots with the least seniority. But this group of pilots constitutes only 1% of the total Air Canada pilot cohort.

[401] The choice is difficult. But in my opinion, the impact of eliminating the age 60 retirement rule does not reach the threshold of "undue" hardship. I have concluded therefore that ACPA has not satisfied the third step of the *Meiorin* test.

G. Section 15(1)(a) and Air Canada

[402] The first two steps of the *Meiorin* test require an assessment of the legitimacy of the standard's purpose and the bone fides of the employer in adopting the standard. This is not so much in dispute between the parties as is their disagreement on step 3, the accommodation obligation.

[403] Air Canada's evidence is that 86% of its flights are international including those that overfly US air space enroute to Canadian destinations. Of the remaining 14%, between 20-25% of the flights may hold alternate US airports. Being able to fly lawfully within foreign airspace is integral to the job of Air Canada's pilots. Because of the ICAO standards imposing restrictions on pilot age for international flights, Air Canada asserts that it cannot accommodate pilots over age 60 without undue hardship.

[404] The onus is on Air Canada to demonstrate that, if there was no mandatory age of retirement for its pilots, it would impose an undue hardship in terms of the costs to operate the airline business. The Complainants do not ask that Air Canada accommodate pilots as PICs over age 65. They argue that Air Canada has not demonstrated that it cannot accommodate pilots age 60-65.

[405] The retirement dates of the Complainants run over the period 2005-2009. The amendments to the ICAO standards were amended effective November 23, 2006 in the period of the Complainants' retirements. Thus the issue of accommodation needs to be assessed both pre-November 23, 2006 to account for those pilots who retired prior to that date. There must also be

a post-November 2006 for those pilots who retired after that date and because the Complainants are seeking to invalidate the mandatory rule for all Air Canada pilots.

[406] In *Meiorin*, the Supreme Court felt that it would be useful to consider the procedure, if any, which was adopted to assess the issue of accommodation and the substantive content of a more accommodating standard which was offered or the employer's reasons for not offering such a standard.

[407] In this regard, it may be asked did the employer investigate alternative approaches that did not have a discriminatory effect. Or is there a way to do the job that is less discriminatory and still accomplish the employer's legitimate purpose.

[408] The Complainants had no need for accommodation until they reached age 60 when they were forced to retire. The evidence of both Mr. Tarapasky and Captain Duke related primarily to the difficulties Air Canada would experience in the absence of the age 60 rule after the ICAO amendments.

[409] But Air Canada did not offer any concrete evidence as to why it could not accommodate all over age 60 first officers before November 2006. There was nothing in the ICAO standard that prevented them from flying international flights so long as they satisfied Transport Canada licencing requirements.

[410] As to Air Canada captains flying international routes as PICs before November 2006, there was no licencing restriction and no operational restrictions offered by Air Canada that would have precluded them from bidding into other pilot positions such as first officer.

[411] Air Canada did not offer any accommodation nor even engage in any procedure to investigate alternate approaches that may have had a less discriminatory consequence. For these reasons, I find that Air Canada did not meet its obligation of accommodation at least in the pre-November 2006 era.

[412] The next question is whether the evidence of Air Canada supports its contention that after November 2006, undue hardship will result if there is no age 60 retirement rule.

[413] As I see it, the core of Air Canada's case are the conclusions of Mr. Tarapasky's experiments and the cost consequences that follow as interpreted by Captain Duke. There is no way to question the mathematical output of the experiments. But the input, the assumptions used by Mr. Tarapasky can be questioned.

[414] The evidence is that certain combinations of potentially restricted captains and first officers reach a threshold whereby PBS cannot produce a block solution. This is with respect to Air Canada's wide-bodied aircraft. Mr. Tarapasky's assumption was that the pilots on these on these flights would be the most senior and the oldest of the Air Canada pilot groups.

[415] Professor Kesselman challenged the validity of this assumption on the basis that in the absence of mandatory retirement, first officers would not remain such and would progress to captain status. Further, in his opinion, Mr. Tarapasky's assumptions in his model that that first officers would remain first officers and a high proportion of first officers would be over the age of 60 are not necessarily valid, given the variant ages at hiring and other factors affecting promotions.

[416] Professor Kesselman said that the pilots at the top of the seniority in each classification are not necessarily the ones that will be over 60. Seniority is by years of service at Air Canada; pilots may be hired at different ages and therefore there could be some individuals with higher seniority but lesser age and vice versa. Rather, said Professor Kesselman, more first officers will tend to be younger and over time without mandatory retirement, it would be easier to satisfy the over/under rule.

[417] Mr. Tarapasky's model requires much higher percentages of FOs being over age 60, in most cases 30%, 40% or even 50% before it runs into this gridlock, where it can't do the matching, can't satisfy the over/under rule.

[418] Mr. Salamat pointed out in his evidence that there is a strong correlation between age and seniority. But Mr. Salamat said, that this does not always hold true. You can be old and be at the top of the seniority list and you can be old and be at the middle or bottom of the seniority list. You just can't be young and senior. Consider the example of FO George Vilven who retired from Air Canada at age 60 with only 22 years of service and seniority number 1,404 putting him in the middle of the seniority list.

[419] Captain Duke identified one weakness with Mr. Tarapasky's model. He said that it is only one month's data. If it was a year's worth of data, it might be that PBS could produce a solution on the B777 with 80% captains and 30% first officers. I agree that this evidence is reflective of only one month's operations and may not be representative of a whole year or any future period.

[420] Finally, there is the evidence of the age distribution and the level of seniority of Air Canada pilots in 2009 contained in the reports of Mr. Salamat and Captain Duke. For example, as set out in great detail earlier in this decision, Mr. Salamat's, Equipment Bid 09-01 Age at Bid Close, shows that the age range for Vancouver B777 FO is between age 41.8 and age 58.7. Of the 76 pilots in this position in 2009, the average age and median age was about 54 and 52 years.

[421] Captain Duke's chart (p. 60) shows that of the current Vancouver B777 FOs, only 26% are age 55 or older. Another of his charts (p.10/12) indicates that the highest number of Toronto B777 FOs are concentrated at the 1,000-1,400 seniority level which is in middle of the seniority pack. And by far only a very few FOs on this equipment are at the highest seniority level. For the Toronto A330 FOs, the highest concentration in numbers is at the 1,600-1,800 seniority level.

[422] Mr. Tarapasky's conclusions may be valid in its own terms. But it is a snapshot only for one month and depends on the assumption that the wide-bodied FOs are the most senior and the oldest and that for each combination percentage of CAs and FOs combination they are all potentially restricted, i.e. over age 60.

[423] The demographic evidence is otherwise. These FOs are not the most senior and are not the oldest pilots on the wide-bodied aircraft. Maybe in the future this could be the situation. But that is only speculation.

[424] Captain Duke's evidence on cost impact depends on Mr. Tarapasky's conclusions that PBS could not produce a solution for the actual blocks run if mandatory retirement is ended. To this extent his conclusions on the additional cost to Air Canada cannot be accepted.

[425] At the end of it all, my opinion is that Air Canada has not met the burden of proving that it will suffer undue hardship with the elimination of the age 60 retirement rule. Accordingly, it cannot rely on the BFOR defence under s. 15(1)(a) of the *CHRA*.

II. Final Conclusion

[426] I have concluded that the Respondents can rely on s. 15(1)(c) of the *CHRA* so that the mandatory retirement policy at age 60 does not amount to a discriminatory practice. Accordingly, the complaints are dismissed.

Signed by

J. Grant Sinclair
Tribunal Member

OTTAWA, Ontario
August 10, 2011

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1196/0807, T1197/0907, T1246/5807, T1247/5907, T1263/7507, T1279/0908, T1280/1008, T1336/6608, T1337/6708, T1380/0609, T1390/1609, T1402/2809 & T1418/4409

Style of Cause: Thwaites et al. v. Air Canada and Air Canada Pilots Association
Boyes et al. & Adamson et al. v. Air Canada and Air Canada Pilots Association
Bakker et al. v. Air Canada and Air Canada Pilots Association
Delf et al. v. Air Canada and Air Canada Pilots Association
William Burrows et al. v. Air Canada and Air Canada Pilots Association
George Herman et al. v. Air Canada and Air Canada Pilots Association
Jonathan Michael Hardwicke-Brown et al. v. Air Canada and Air Canada Pilots Association
Robert Peter Ford v. Air Canada and Air Canada Pilots Association
Kenneth Charles Buchholz v. Air Canada and Air Canada Pilots Association

Decision of the Tribunal Dated: August 10, 2011

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January 18 to 21, 2010

Ottawa, Ontario

Appearances:

Raymond Hall and David Baker, for the Complainant (except Donald Paxton)

Donald Paxton, for himself

Daniel Poulin, for the Canadian Human Rights Commission

Maryse Tremblay and Fred Headon, for Air Canada

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