Air Canada Pilots Association (appellant) v. Robert Neil Kelly, George Vilven, Canadian Human Rights Commission, and Air Canada (respondents) and Attorney General of Canada (respondent)
(as of right under section 57 of the Federal Courts Act)
(A-107-11; 2012 FCA 209)

Indexed As: Air Canada Pilots Association v. Kelly et al.

Federal Court of Appeal
Pelletier, Layden-Stevenson* and Gauthier, JJ.A.
July 17, 2012.

Summary:

Two Air Canada pilots filed discrimination complaints under the Canadian Human Rights Act (CHRA) when they were each forced to retire at age 60, in accordance with the mandatory retirement provisions of a collective agreement. The Canadian Human Rights Tribunal (CHRT), relying on the exception provision (s. 15(1)(c)) of the CHRT, dismissed the complaints finding that 60 was the "normal age of retirement" in the industry and, therefore, the mandatory retirement provisions were not discriminatory (See 2007 CHRT 36). The CHRT also found that s. 15(1)(c) did not violate the guarantee of equal treatment in s. 15(1) of the Charter. The pilots applied for judicial review.

The Federal Court, in a decision reported 344 F.T.R. 104, found that the CHRT erred in its analysis of the constitutionality of s. 15(1)(c) of the CHRA. The statutory provision violated s. 15(1) of the Charter (equality provision). Therefore, the court allowed the pilots' applications for judicial review, set aside the decision of the CHRT and remitted the matter to the tribunal to consider whether s. 15(1)(c) could be saved by s. 1 of the Charter.

The Canadian Human Rights Tribunal, in a decision with neutral citation 2009 CHRT 24, determined that s. 15(1)(c) was not saved by s. 1. Two judicial review applications were launched, one by Air Canada and the other by the Air Canada Pilots Association. Both applications raised an issue as to whether the CHRT erred in its s. 1 Charter analysis.

The Federal Court, in a decision reported 383 F.T.R. 198, found that the CHRT's decision on the Charter issue was correct (i.e., s. 15(1)(c) could not be saved by s. 1 of the Charter). The Air Canada Pilots Association appealed.

The Federal Court of Appeal allowed the appeal, set aside the decision of the Federal Court and returned the matter to the CHRT with a direction to dismiss the pilots' complaints on the ground that s. 15(1)(c) of the CHRA was constitutionally valid. The court held that both the CHRT and the Federal Court were bound by the doctrine of stare decisis to follow McKinney v. University of Guelph (SCC 1990) on the issue of mandatory retirement, and thus erred in concluding that s. 15(1)(c) of the CHRA was not saved by s. 1 of the Charter.

Aeronautics - Topic 4505

Pilots - General - Mandatory retirement - Two Air Canada pilots, forced to retire at age 60 under collective agreement provisions, filed discrimination complaints (Canadian

Human Rights Act (CHRA)) - The employer relied on s. 15(1)(c) of the CHRA which allowed termination of employment where an employee had reached the "normal age of retirement" for those working in similar positions - The Federal Court ruled that s. 15(1)(c) was contrary to s. 15(1) of the Charter (equality provision) - Subsequently, the Canadian Human Rights Tribunal (CHRT) determined that s. 15(1)(c) could not be saved by s. 1 of the Charter, and on judicial review, the Federal Court held that CHRT's decision was correct - On appeal, the Federal Court of Appeal held that both CHRT and the Federal Court erred in concluding that s. 15(1)(c) of the CHRA was not saved by s. 1 of the Charter, because both were bound by the doctrine of stare decisis to follow McKinney v. University of Guelph (SCC 1990) on the issue of mandatory retirement - See paragraphs 1 to 91.

Civil Rights - Topic 995

Discrimination - Employment - Age - Retirement - In McKinney v. University of Guelph (SCC 1990), the court held that a mandatory retirement provision in the Ontario Human Rights Code, breached the constitutional protection against age-based discrimination, but was saved by s. 1 of the Charter - The Federal Court of Appeal discussed what was decided by McKinney for purposes of stare decisis - See paragraphs 56 to 87.

Civil Rights - Topic 995

Discrimination - Employment - Age - Retirement - [See **Aeronautics - Topic 4505**].

Civil Rights - Topic 5658.1

Equality and protection of the law - Mandatory retirement - [See **Aeronautics - Topic 4505** and first **Civil Rights - Topic 995**].

Civil Rights - Topic 8348

Charter - Application - Exceptions - Reasonable limits prescribed by law - [See **Aeronautics - Topic 4505**].

Courts - Topic 5

Stare decisis - Authority of judicial decisions - General principles - Authority and use of precedents - General - [See **Courts - Topic 10**].

Courts - Topic 10

Stare decisis - Authority of judicial decisions - General principles - What constitutes obiter dictum - The Federal Court of Appeal stated that in Bedford v. Canada (Ont. C.A. 2012), the court had noted that the distinction between stare decisis and obiter dicta had evolved in the Canadian context so that there was a spectrum of authoritativeness on which the statements of appellate courts could be placed - The court in Bedford then referred to its own decision in R. v. Prokofiew (2010): "The question then becomes the following: how does one distinguish between binding obiter in a Supreme Court of Canada judgment and non-binding obiter? In Henry, [... 2005 SCC ...], Binnie J. explains that one must ask, "What does the case actually decide?" Some cases decide only a narrow point in a specific factual context. Other cases - including the vast majority of Supreme Court of Canada decisions - decide broader legal propositions and, in the course

of doing so, set out legal analyses that have application beyond the facts of the particular case" - See paragraph 55.

Courts - Topic 17.1

Stare decisis - Authority of judicial decisions - When precedent can be revisited - In a mandatory retirement case, the Federal Court declined to follow McKinney v. University of Guelph (SCC 1990), wherein the court held that a mandatory retirement provision in the Ontario Human Rights Code, breached the constitutional protection against age-based discrimination, but was saved by s. 1 of the Charter - The Federal Court reasoned that the Supreme Court itself did not consider its decision in McKinney to be the last word on the subject of mandatory retirement - On appeal, the Federal Court of Appeal held that the Federal Court was bound to follow McKinney on the basis of stare decisis - The court stated that the argument that the Supreme Court itself did not consider McKinney as the last word on mandatory retirement did not authorize a lower court to re-litigate the issues decided in McKinney - "To the extent that, in McKinney, the Supreme Court held the door open to revisit the issue of mandatory retirement at a later date, it was holding the door open for itself and not for others" - See paragraph 46.

Courts - Topic 17.1

Stare decisis - Authority of judicial decisions - When precedent can be revisited - [See first **Courts - Topic 19** and first **Courts - Topic 123**].

Courts - Topic 19

Stare decisis - Authority of judicial decisions - Constitutional issues - The Federal Court of Appeal adopted the following views expressed by the court in Bedford v. Canada (Ont. C.A. 2012): "In our view, the need for a robust application of stare decisis is particularly important in the context of Charter litigation. Given the nature of the s. 1 test, especially in controversial matters, the evidence and the legislative facts will continue to evolve, as will attitudes, values and perspectives. But this evolution alone is not sufficient to trigger reconsideration in the lower courts. If it were otherwise, every time a litigant came upon new evidence or a fresh perspective from which to view the problem, the lower courts would be forced to reconsider the case despite authoritative holdings from the Supreme Court on the very points at issue. This would undermine the legitimacy of Charter decisions and the rule of law generally. […] Such an approach to constitutional interpretation yields not a vibrant living tree but a garden of annuals to be regularly uprooted and replaced" - See paragraph 43.

Courts - Topic 19

Stare decisis - Authority of judicial decisions - Constitutional issues - [See **Aeronautics - Topic 4505** and first **Courts - Topic 123**].

Courts - Topic 123

Stare decisis - Authority of judicial decisions - Courts of superior jurisdiction - Decisions binding on Federal Court - In a mandatory retirement case, the Federal Court declined to follow McKinney v. University of Guelph (SCC 1990), wherein the court held that a mandatory retirement provision in the Ontario Human Rights Code, breached the

constitutional protection against age-based discrimination, but was saved by s. 1 of the Charter - The Federal Court reasoned that there were significant differences between the legislative provisions in issue, that there was a clear indication in McKinney that the Supreme Court did not intend that the decision be the final word on the subject of mandatory retirement for all time, there were differences in the evidentiary records that were before the Supreme Court and the situation here and there had been developments in public policy that had occurred since McKinney was decided - On appeal, the Federal Court of Appeal held that the reasons given by the Federal Court did not justify departing from the established jurisprudence - See paragraphs 4 to 88.

Courts - Topic 123

Stare decisis - Authority of judicial decisions - Courts of superior jurisdiction - Decisions binding on Federal Court - [See **Aeronautics - Topic 4505**].

Courts - Topic 124.1

Stare decisis - Authority of judicial decisions - Courts of superior jurisdiction - Decisions binding on boards or tribunals - [See **Aeronautics - Topic 4505**].

Courts - Topic 126.1

Stare decisis - Authority of judicial decisions - Courts of superior jurisdiction - Supreme Court of Canada - General - [See **Aeronautics - Topic 4505**, **Courts - Topic 10**, first **Courts - Topic 17.1**, and first **Courts - Topic 19** and first **Courts - Topic 123**].

Courts - Topic 129

Stare decisis - Authority of judicial decisions - Courts of superior jurisdiction - Supreme Court of Canada - Obiter dictum - [See **Courts - Topic 10]**.

Cases Noticed:

McKinney v. University of Guelph et al., [1990] 3 S.C.R. 229; 118 N.R. 1; 45 O.A.C. 1, folld. [para. 2].

R. v. Oakes, [1986] 1 S.C.R. 103; 65 N.R. 87; 14 O.A.C. 335, refd to. [para. 14].

CKY-TV v. Communications, Energy and Paperworkers Union of Canada, Local 816 (Kenny Grievance), [2008] C.L.A.D. No. 92; 2008 175 L.A.C. (4th) 29, refd to. [para. 20].

Association of Justices of the Peace of Ontario et al. v. Ontario (Attorney General), [2008] O.T.C. Uned. B04; 92 O.R.(3d) 16 (Sup. Ct.), refd to. [para. 21].

Greater Vancouver Regional District Employees' Union v. Greater Vancouver (Regional District) (2001), 158 B.C.A.C. 231; 258 W.A.C. 231; 206 D.L.R.(4th) 220; 2001 BCCA 435, refd to. [para. 21].

Housen v. Nikolaisen et al., [2002] 2 S.C.R. 235; 286 N.R. 1; 219 Sask.R. 1; 272 W.A.C. 1; 2002 SCC 33, refd to. [para. 41].

Dr. Q., Re, [2003] 1 S.C.R. 226; 302 N.R. 34; 179 B.C.A.C. 170; 295 W.A.C. 170; 2003 SCC 19, refd to. [para. 41].

Bedford et al. v. Canada (Attorney General) (2012), 290 O.A.C. 236; 109 O.R.(3d) 1; 2012 ONCA 186, refd to. [para. 41].

Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code, [1990] 1 S.C.R. 1123; 109

N.R. 81; 68 Man.R.(2d) 1, refd to. [para. 41].

New Brunswick (Board of Management) v. Dunsmuir, [2008] 1 S.C.R. 190; 372 N.R. 1; 329 N.B.R.(2d) 1; 844 A.P.R. 1; 2008 SCC 9, refd to. [para. 46].

R. v. Prokofiew (E.) (2010), 264 O.A.C. 174; 100 O.R.(3d) 401; 2010 ONCA 423, refd to. [para. 55].

Statutes Noticed:

Canadian Charter of Rights and Freedoms, 1982, sect. 1 [para. 1].

Canadian Human Rights Act, R.S.C. 1985, c. H-6, sect. 15(1)(c) [para. 6].

Human Rights Act (Can.) - see Canadian Human Rights Act.

Authors and Works Noticed:

Canadian Human Rights Act Review Panel, Report on Promoting Equality: A New Vision (2000), generally [para. 37].

Halsbury's Laws of Canada, Civil Procedure I (1st Ed. 2008), p. 282 [para. 54].

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Maryse Tremblay, for the respondent, Air Canada;

Anne M. Turley and Craig Collins-William, for the respondent, Attorney General of Canada pursuant to section 57 of the Federal Courts Act.

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Canadian Human Rights Commission, Ottawa, Ontario, for the respondent, Canadian Human Rights Commission;

Heenan Blaikie, Montreal, Quebec, for the respondent, Air Canada;

Myles J. Kirvan, Deputy Attorney General of Canada, Ottawa, Ontario, for the respondent, Attorney General of Canada pursuant to section 57 of the Federal Courts Act.

This appeal was heard in Ottawa, Ontario, on November 22, 2011, before Pelletier, Layden-Stevenson* and Gauthier, JJ.A., of the Federal Court of Appeal. The following decision was delivered for the court by Pelletier, J.A., on July 17, 2012. *Layden-Stevenson, J.A., was unable to participate in the court's deliberations and died on June 27, 2012. This judgment and reasons were issued under s. 45(3) of the Federal Courts Act, R.S.C. 1985, c. F-7.

Appeal allowed;
cross-appeal dismissed.

Editor: Elizabeth M.A. Turgeon

Civil Rights - Topic 995

Discrimination - Employment - Age - Retirement - Two Air Canada pilots, forced to retire at age 60 under collective agreement provisions, filed discrimination complaints (Canadian Human Rights Act (CHRA)) - The employer relied on s. 15(1)(c) of the CHRA which allowed termination of employment where an employee had reached the "normal age of retirement" for those working in similar positions - The Federal Court ruled that s. 15(1)(c) was contrary to s. 15(1) of the Charter (equality provision) - Subsequently, the Canadian Human Rights Tribunal (CHRT) determined that s. 15(1)(c) could not be saved by s. 1 of the Charter, and on judicial review, the Federal Court held that CHRT's decision was correct - On appeal, the Federal Court of Appeal held that both CHRT and the Federal Court erred in concluding that s. 15(1)(c) of the CHRA was not saved by s. 1 of the Charter, because both were bound by the doctrine of stare decisis to follow McKinney v. University of Guelph (SCC 1990) on the issue of mandatory retirement - See paragraphs 1 to 91.

Civil Rights - Topic 5658.1

Equality and protection of the law - Mandatory retirement - Two Air Canada pilots, forced to retire at age 60 under collective agreement provisions, filed discrimination complaints (Canadian Human Rights Act (CHRA)) - The employer relied on s. 15(1)(c) of the CHRA which allowed termination of employment where an employee had reached the "normal age of retirement" for those working in similar positions - The Federal Court ruled that s. 15(1)(c) was contrary to s. 15(1) of the Charter (equality provision) - Subsequently, the Canadian Human Rights Tribunal (CHRT) determined that s. 15(1)(c) could not be saved by s. 1 of the Charter, and on judicial review, the Federal Court held that CHRT's decision was correct - On appeal, the Federal Court of Appeal held that both CHRT and the Federal Court erred in concluding that s. 15(1)(c) of the CHRA was not saved by s. 1 of the Charter, because both were bound by the doctrine of stare decisis to follow McKinney v. University of Guelph (SCC 1990) on the issue of mandatory retirement - See paragraphs 1 to 91.

Civil Rights - Topic 5658.1

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Civil Rights - Topic 8348

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on s. 15(1)(c) of the CHRA which allowed termination of employment where an employee had reached the "normal age of retirement" for those working in similar positions - The Federal Court ruled that s. 15(1)(c) was contrary to s. 15(1) of the Charter (equality provision) - Subsequently, the Canadian Human Rights Tribunal (CHRT) determined that s. 15(1)(c) could not be saved by s. 1 of the Charter, and on judicial review, the Federal Court held that CHRT's decision was correct - On appeal, the Federal Court of Appeal held that both CHRT and the Federal Court erred in concluding that s. 15(1)(c) of the CHRA was not saved by s. 1 of the Charter, because both were bound by the doctrine of stare decisis to follow McKinney v. University of Guelph (SCC 1990) on the issue of mandatory retirement - See paragraphs 1 to 91.

Courts - Topic 5

Stare decisis - Authority of judicial decisions - General principles - Authority and use of precedents - General - The Federal Court of Appeal stated that in Bedford v. Canada (Ont. C.A. 2012), the court had noted that the distinction between stare decisis and obiter dicta had evolved in the Canadian context so that there was a spectrum of authoritativeness on which the statements of appellate courts could be placed - The court in Bedford then referred to its own decision in R. v. Prokofiew (2010): "The question then becomes the following: how does one distinguish between binding obiter in a Supreme Court of Canada judgment and non-binding obiter? In Henry, [... 2005 SCC ...], Binnie J. explains that one must ask, "What does the case actually decide?" Some cases decide only a narrow point in a specific factual context. Other cases - including the vast majority of Supreme Court of Canada decisions - decide broader legal propositions and, in the course of doing so, set out legal analyses that have application beyond the facts of the particular case" - See paragraph 55.

Courts - Topic 17.1

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Courts - Topic 17.1

Stare decisis - Authority of judicial decisions - When precedent can be revisited - In a mandatory retirement case, the Federal Court declined to follow McKinney v. University of Guelph (SCC 1990), wherein the court held that a mandatory retirement provision in the Ontario Human Rights Code, breached the constitutional protection against age-based

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Courts - Topic 19

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Courts - Topic 19

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Courts - Topic 123

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Courts - Topic 124.1

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Courts - Topic 126.1

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Courts - Topic 126.1

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Courts - Topic 126.1

Stare decisis - Authority of judicial decisions - Courts of superior jurisdiction - Supreme Court of Canada - General - In a mandatory retirement case, the Federal Court declined to follow McKinney v. University of Guelph (SCC 1990), wherein the court held that a mandatory retirement provision in the Ontario Human Rights Code, breached the constitutional protection against age-based discrimination, but was saved by s. 1 of the Charter - The Federal Court reasoned that the Supreme Court itself did not consider its decision in McKinney to be the last word on the subject of mandatory retirement - On appeal, the Federal Court of Appeal held that the Federal Court was bound to follow McKinney on the basis of stare decisis - The court stated that the argument that the Supreme Court itself did not consider McKinney as the last word on mandatory retirement did not authorize a lower court to re-litigate the issues decided in McKinney - "To the extent that, in McKinney, the Supreme Court held the door open to revisit the issue of mandatory retirement at a later date, it was holding the door open for itself and not for others" - See paragraph 46.

Courts - Topic 126.1

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Courts - Topic 126.1

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Courts - Topic 129

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