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Chair

Ms. Candice Hoeppner

Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities

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● (1105)

[*English*]

The Chair (Ms. Candice Hoeppner (Portage—Lisgar, CPC)): Good morning, everyone.

I would like to call our meeting to order.

We are beginning meeting number 43 of the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities.

Our orders of the day are pursuant to the order of reference of Monday, December 6, 2010. We are studying Bill C-481, An Act to amend the Canadian Human Rights Act and the Canada Labour Code (mandatory retirement age).

We are very pleased to have three witnesses with us today, two of whom are in the committee room with us. One witness is via video conference from Vancouver, B.C.

Today we are welcoming Mr. Robert Neil Kelly, who is part of Fly Past 60 Coalition, and George Vilven, who is also with the same organization.

Welcome, gentlemen.

We also welcome Jonathan Kesselman, a professor with the School of Public Policy at Simon Fraser University.

Thank you for being here as well, Professor.

Each one of you will have approximately seven minutes for a presentation. After all of your presentations are complete, we will then go to questions from the committee members.

We will begin today with Mr. Kelly. If you will begin, we'd love to hear from you.

Mr. Robert Kelly (Fly Past 60 Coalition, As an Individual): Madam Chair, good morning.

I'm here to speak on behalf of the Fly Past 60 Coalition at the request Mr. Hall, who is unable to attend today.

The Fly Past 60 Coalition is a group that was formed by a segment of Air Canada pilots who oppose mandatory retirement. We're a group of 200 Air Canada pilots, past and present, who have joined together to pursue our mandatory retirement complaints.

We've achieved reinstatement of my employment by Air Canada by reason of an order of a tribunal issued November 8, 2010.

I was also directly involved in our second hearing, known as the Thwaites hearing, before the tribunal. That hearing involved 70 additional Air Canada pilot complainants and was held in October 2009 through January 2010. That decision is still pending.

That hearing dealt almost exclusively with the interpretation of the words in paragraph 15(1)(c) of the Canadian Human Rights Act, namely, “normal age of retirement for employees working in positions similar to the position of that individual”. I would like to offer the committee some candid observations on the current application of that paragraph, as expressed by the tribunal and by the Federal Court, with a view to putting the paragraph in context.

Our analytical starting point with respect to the statutory paragraph is, appropriately, the 1977 Standing Committee on Justice and Legal Affairs, which deliberated the insertion of paragraph 14 (c), now paragraph 15(1)(c), into the act. Two pages from the parliamentary transcript of 1977 are appended to this submission.

The issue raised in that committee was whether what is now paragraph 15(1)(c) essentially condoned systemic discrimination. The issue was raised by Member Fairweather to the then deputy minister of justice, Mr. Barry Strayer, page 6:21 of the transcript, second page, at the bottom.

His answer was that permitting termination on the basis of age would not be a discriminatory practice as long as everyone else in that kind of employment was terminated at the same age. I make particular reference to his words “everyone else”, for these words appear to have been the key factor in reducing any opposition to the enactment of that potentially problematic provision.

Unfortunately, that qualification, “everyone else”, appears to have been totally forgotten. It never came before either the tribunal or the courts in any subsequent proceeding where the paragraph came into question until we raised the issue in the Thwaites hearing. Instead, both the tribunal and the superior courts, in a number of cases, independently deemed that the provision was intended to be interpreted instead by a statistical count of individuals doing similar work. In other words, the normal age of retirement was determined by not everyone else, or 100%, but by a simple majority of employees doing similar work.

In the judicial review of my 2007 tribunal hearing, the Federal Court denied that a violation of that paragraph had occurred because it found that Air Canada's pilots constituted approximately 54% of the total Canadian airline pilot population.

The Federal Court did express significant concerns with the wording of the paragraph, however, including the following.

One, the wording “individuals doing similar work” is uncertain, and, as a result, few employees are able to know in advance of their termination of employment who is included and who is not included in the classification. As a result, there is little certainty as to the normal age of retirement prior to an employee having his or her employment terminated.

Two, it is almost impossible for employees to determine the numbers doing similar work because individuals do not have access whatsoever to employment statistics of competing organizations. In the Thwaites proceeding, we actually had to issue subpoenas to over 30 different Canadian airlines to obtain their pilot employment statistics.

Three, dominant employers, such as Air Canada, are effectively able to set the norm and thus unilaterally determine the normal age of retirement by fiat, thereby usurping the role of Parliament.

Four, the Federal Court had difficulty accepting the concept that discrimination on the basis of age should be tolerated provided that the discrimination is applied against the majority of the employees. This proposition clearly offends the intent of the Canadian Human Rights Act and was not, in the opinion of the Federal Court, consistent with contemporary Canadian values.

● (1110)

The court suggested in its 2009 decision that the solution to this lay in the application of the charter and in the decision rendered by the same judge last week. That provision was found to offend the charter.

Five, in that decision the court identified one additional problem with the statutory provision, namely, that although the normal age of retirement may be determined by a free and collective bargaining between a dominant employer and its union, that normal age of retirement would then become applicable to employees of other companies who did not negotiate their age of retirement, including those employees in non-unionized companies.

As well, it is one thing to be accorded rights under the Canadian Human Rights Act; it's entirely another thing to actually realize them.

Despite the good intentions of Parliament in 1977 in allowing a limited exemption to the general prohibition against age discrimination for mandatory retirement, the reality is that it's almost impossible for the average Canadian to realize those rights when they're breached by powerful, litigious employers and unions.

It took over five years from the date when my employment was terminated for me to follow the due legal process to have my employment reinstated, and indeed, that legal battle is not yet ended, with Air Canada continuing to appeal the decisions of the tribunal and the court. Justice delayed is indeed justice denied, and the uncertain and inappropriate wording and restrictions of paragraph 15 (1)(c) of the Canadian Human Rights Act, in our view, should be repealed so as to prevent denying other Canadians the ability to be free from age discrimination in their employment.

I would be more than happy to entertain your questions regarding my submissions.

Many thanks.

The Chair: Thank you very much, sir.

We will now go to Mr. Vilven, please.

Mr. George Vilven (Fly Past 60 Coalition, As an Individual): Good morning, Madam Chair and fellow committee members.

My name is George Vilven. I would like to thank you for allowing me to appear here to put a human face on what this bill is all about. Because of the time constraints, I will cover some of the major points but would encourage you to read my submission. I believe you will find it interesting how Air Canada and its pilots' union treat their employees and their fellow pilots.

When I started my complaint in the year 2003, I was told by the Canadian Human Rights Commission that it would take approximately a year and a half from start to finish. We are now going into the eighth year.

The union is telling its membership that this is far from over. It plans to appeal it to the Federal Court, to the Federal Court of Appeal, and on to the Supreme Court. Once again, the union is telling its members that this is far from over.

A large part of the Canadian population believes that mandatory retirement is no longer in existence. Yet it is alive and well in the federal labour code.

Here are some interesting facts. Air Canada is the only airline in Canada that does not allow its pilots to fly past the age of 60. WestJet, Air Transat, and Skyservice all allow their pilots to fly past the age of 60, and some allow it beyond the age of 65. All 45,000 American airline pilots.... United, Continental, and American Airlines also allow their pilots to fly up to the age of 65.

In 2006, ICAO changed the rules that allow captains to fly overseas up to the age of 65. British Airways, Qantas, Air New Zealand, and El Al, to name but a few, are all flying up to the age of 65, and some beyond.

Yet Air Canada, in a letter, stated to its employees who wanted to continue the option of flying that it will not stop until ordered to do so.

I have paid a huge personal price to pursue this complaint. I have been harassed. I have been threatened. I have lost family friends—I guess they weren't friends. My wife refers to this as the gift that keeps on taking.

I have detailed what happened to me at a retirement party in Winnipeg in the year 2006. I have included this in my submission. I believe you might find it interesting and sad what happened to me at this retirement party.

I can say unequivocally that I was a much better pilot when I was forced to leave the company than when I arrived. And why is that? Experience does count. Training and the mentoring of fellow pilots adds up to the fact that over the 20 years a lot of things were learned.

In closing, I would like to say that for the majority of the pilots at Air Canada, other employees at Air Canada, and the remaining 800,000 employees covered by the federal labour code, this request is now almost exclusively in your hands.

I would be more than happy to answer your questions, if you have any.

Thank you, Madam Chair.

● (1115)

The Chair: Thank you, Mr. Vilven.

We will now continue with Professor Kesselman. Are you able to hear us all right, sir?

Professor Jonathan Kesselman (School of Public Policy, Simon Fraser University, As an Individual): Yes, I am. Thank you.

The Chair: All right. Go ahead. You have seven minutes.

Prof. Jonathan Kesselman: This morning I'd like to present key points on mandatory retirement from an economic rather than a human rights perspective. Fortunately, the economic perspective concludes in a way that is fully consistent with the human rights perspective. I'll approach this matter by describing major fallacies about mandatory retirement, which I'll abbreviate as MR, and I'll go over the relevant facts.

MR practices are often described as voluntary agreements between an employer and its employees. In fact, MR and the associated pension plans are not an agreement between an individual employee and the employer. These agreements are typically mediated by a union, and if they involve a vote, it is majority-rule imposed on all the employees. In a company applying MR, all employees are subject to it regardless of their individual wishes.

Some have argued that a worker should take a job elsewhere if he or she does not like MR at the current employer, but that option is costly to the individual, who loses wages and seniority. It also involves high mobility costs for the worker situated in a smaller city or working in a union-dominated industry. Moreover, some workers, such as women and recent immigrants, may have a stronger need to work until higher ages because of a shorter work history and inadequate retirement savings, either individually or through a company pension plan.

A common argument is that eliminating MR would act as a barrier to the promotion prospects of younger workers. This point may have been true in the 1960s or even as recently as the 1990s, but it is no longer valid, given the evolving demographics of Canada. We are witnessing an accelerating retirement of baby boomers from the workforce and an emerging smaller cohort of younger workers.

Canada is entering an era of worker scarcity and skill shortages in many occupations and industries that will be seeing faster promotions for younger workers. Some argue that Canada will need to sharply increase immigration of younger workers to satisfy the needs of the economy. But to forego the skills and experience of older workers who wish to continue working, which MR does, is a shortsighted and economically wasteful policy. It also assumes that the economy has a fixed number of jobs available, which is demonstrably false, as the supply of workers and skills is a key constraint on the size of the productive economy.

MR has also been described as necessary for employers to easily get rid of older workers who have lagged in their on-job performance. This argument assumes that employers do not have effective systems to evaluate the performance of workers of all ages and to dismiss poor-performing workers regardless of age. Only a badly managed firm would rely on MR at age 65 to get rid of a younger worker, such as a 40-year-old, who was not performing up to standard.

Similarly, MR has been supported as a means for firms to retire older workers who are overpaid relative to their productivity. Again, this assumes that employers do not have adequate systems for worker assessment and appropriate flexibility in compensating employees in line with their individual performance.

MR has been described as solely a private matter between workers and their employers and not an issue of concern for the general public or public policy. This position is incorrect, since the practice has implications for governments and the taxpaying public. Workers who are forced to retire by virtue of their age and before they wish to stop working impose various costs on the public treasury. They contribute less in taxes when their earnings cease or decline; they draw more in public pensions that are conditioned on incomes; and with the generally worsening health associated with retirement, especially forced retirement, they impose more burdens on our publicly financed health care system.

Prohibiting MR practices in industries subject to the Canadian Human Rights Act by amending the act would only bring the federal government into line with reforms already implemented in all the provincial human rights acts, and very belatedly at that.

● (1120)

Twenty-five years ago, in 1986, the Canadian government stopped the practice of MR with respect to the federal public service. Also in 1986, the U.S. prohibited MR practices nationally in that country. Many other advanced economies have done likewise in the years since then. Nowhere have any of the adverse consequences predicted by supporters of MR emerged as significant issues.

From an economic perspective, then, mandatory retirement has outlived any usefulness that it might have once offered. The interests of both the economy and older workers would be best served by prohibiting the practice under the Canadian Human Rights Act.

Thank you. I will welcome questions.

The Chair: Thank you very much.

We will begin our first round of questions. It will be a seven-minute round. Just so the witnesses are aware, that would include the questions and answers. I'll let you know if we're getting close to the seven minutes.

We'll begin with the Liberals, with Madam Folco.

Ms. Raymonde Folco (Laval—Les Îles, Lib.): Thank you, Madam Chair.

I wish to once again welcome Mr. Vilven, Mr. Kelly, and Professor Kesselman.

This is my first meeting with you. As you know, I'm the person responsible for bringing this bill to Parliament, so welcome.

Somebody asked me why we are working on this bill, why I thought of bringing this bill to Parliament. In fact, we were actually, as we say in French, *interpellé*, that is to say, when Mr. Justice La Forest gave his decision from the courts, what he said was it was a complex matter and one that should be resolved by the legislatures. This is what Mr. Justice La Forest said.

We thought it would be not only useful, but important for the legislature in Canada to follow up on this, since really the ball was in our court. This is the reason we're all meeting to discuss this.

I do have several questions. I'd like to ask a question of the former airline pilots, if I may, to begin with.

How many people in your group—I don't know whether I can call it an association, but the group you have formed—do you represent? And how many people, what percentage, does your membership represent of the number of airline pilots who have either reached the age of 60 or are likely to reach the age of 60 within the next five years?

I'm asking the question of one of you two, and possibly Professor Kesselman, eventually.

Mr. Kelly.

● (1125)

Mr. Robert Kelly: Yes, I'll answer that, if I may.

We represent approximately 200 pilots, past and present, some retired, some still at the airline facing retirement. I would rather suspect there's a considerably larger percentage of the airline that's anxiously watching our progress and they don't feel inclined to put their head over the parapet and have it shot off when it will be settled long before they get to that position.

I am actually back to work now. Because of the delay in my reinstatement, I'm flying as a first officer because I'm now over the age of 65. I was a captain for 23 years prior to that.

I've run into very little adverse reaction from the crews I've been flying with, and it's been almost 100% positive, with a great many showing support who aren't on our list. It's interesting to see there's probably a considerably larger percentage than we represent on paper that support us.

There are approximately 3,000 pilots at Air Canada. As you are probably aware, complaints through the Canadian Human Rights Commission cannot be filed until the alleged discrimination has occurred, so it's impossible to file a complaint prior to retirement. At that point, you're no longer a member of the pilots association, so you're not represented by them. We are in fact actively opposed by them, which made the whole process extremely difficult.

Worldwide, the pilot profession is well over 65 now in mandatory retirement ages. Many have done away with it altogether. Australia and New Zealand were probably some of the first. Canada has had no age limits on airline pilots for almost 26 years. The position of Transport Canada is that it's far better served by individual assessments rather than blanket age restrictions, and they refuse to apply these age restrictions from the international body within Canada.

Ms. Raymonde Folco: Excuse me for interrupting. I only have seven minutes.

I wanted to bring up a fact that I think is important and that has not been mentioned. When I first started looking into the possibility of bringing this bill to Parliament, I looked at what was happening at the level of the provinces, in the provincial legislatures, because this bill does not touch Air Canada pilots only. In fact, it is aimed at all employees of crown corporations in Canada.

I looked at the employees of the equivalent of crown corporations at the provincial level, and what I found was that all provinces and territories, with no exceptions, actually had abolished mandatory retirement. New Brunswick, on the other hand, brought in a more flexible system, but it did abolish it as well.

I wanted to bring that bit of information. I think it's important.

My question is to Professor Kesselman. Professor, you have, I think, a wider view. I've read so much of what you've written, obviously. Would you tell us how other institutions reacted institutionally when the mandatory retirement element was withdrawn from their institutions? How did it work? Did it work out reasonably well? What sort of model can they offer to Air Canada and other crown corporations?

Prof. Jonathan Kesselman: Briefly, this would depend very much on the type of industry. The most studied industry in the U.S. is higher education and professors, who, because of the enjoyment of the work and the great working conditions, and so on, often will work into their late 60s and into their 70s.

More generally, I think the adaptation needed is, in some firms, a tightening up of the method of evaluating performance. At least, that is perceived as an issue. And of course, giving better performance evaluations can be beneficial to the employer and employees, not only when people are approaching 65 but when they're 40 or 25. They can work to the benefit of both parties in improving individuals who are having issues and in properly rewarding people for their performance.

One other area that has come up more recently, particularly in Canada, is the issue of job-related benefits, such as life insurance and extended health insurance. In this area, because certainly our mortality rates, our risk of dying in any given year, are higher when we're 67 than when we're 57 or 27, life insurance becomes more costly. Extended health insurance becomes more costly, and disability insurance particularly does. If I understand it, at least in most jurisdictions, the courts have allowed differential treatment of individuals over age 65 under life insurance and disability insurance coverage paid for by the employer. That, to me, seems reasonable. Yes, it is a form of discrimination, but it is one whereby we don't want the cost of employing an older worker to become so high that the employer really wants to get rid of that person.

By and large, the adaptation has been fairly straightforward. It is nothing really insurmountable. It is not all that difficult. It's really, in essence, something that can be handled. It's not an issue that should make anyone shrink from pursuing the proposal you have on the table.

● (1130)

The Chair: Thank you very much. We will now go to Madame Beaudin, please.

[*Translation*]

Mrs. Josée Beaudin (Saint-Lambert, BQ): Thank you very much, Madam Chair. Gentlemen, welcome and thank you very much for being here.

You will need your earpiece, since I will ask my question in French.

[*English*]

The Chair: Let me double-check.

Mr. Kesselman, do you have translation? Mr. Kesselman, can you hear us?

He doesn't appear to be hearing us. Stop the time.

Can you hear us Mr. Kesselman?

Prof. Jonathan Kesselman: I can hear you. I'm going into translation. Is that correct?

The Chair: Yes. We were hoping you could hear translation, but we weren't certain that you could.

Are you telling us that you could not hear any translation?

Prof. Jonathan Kesselman: I can hear only your voice.

The Chair: All right. What we'll now do is have the translator speak to see if you can hear the translator.

Prof. Jonathan Kesselman: Yes, indeed, I can now hear, thank you.

[*Translation*]

Mrs. Josée Beaudin: Can everyone understand me clearly? Can everyone hear the interpretation?

I have one question on my mind that I would like you to think about and answer. I listened to your comments, I read Ms. Folco's bill and I went over the documents. You are airplane pilots. I assume that there are physical fitness requirements involved in hiring airplane pilots and that you must undergo tests on a yearly basis. I assume that your health is evaluated annually, so that you can continue to fly aircraft. I think that, instead of using age as a criterion for deciding when someone should retire, we may just as well say that all those with blond hair can no longer be pilots.

Who do you think should determine the retirement age? How should this be done? Should employers and unions make the decision together? Could it be done following an annual medical? Who should determine the retirement age in your line of work and in similar fields?

[*English*]

Mr. Robert Kelly: Unfortunately, I'm not getting simultaneous translation. I'm getting French only, *français seulement.*

The Chair: It's on your panel there.

We'll start again, Madam Beaudin.

Mr. Robert Kelly: *Pardon, madame.*

[*Translation*]

Mrs. Josée Beaudin: I have another question.

[*English*]

The Chair: I would like to ensure that everybody has translation.

Mr. Kelly, can you hear the interpreter?

Mr. Robert Kelly: Very quietly.

● (1135)

The Chair: If the red light on your microphone is on, it's going to mute the sound. So turn that off, then the sound will be louder.

Mr. Vilven, can you hear the interpreter as well?

Mr. George Vilven: Yes, I can.

The Chair: All right.

Mr. Kesselman, you're still all right with hearing everything?

Prof. Jonathan Kesselman: Yes, thanks.

The Chair: Good.

We'll begin again and have you ask that question again, Madam.

[*Translation*]

Mrs. Josée Beaudin: Welcome and thank you very much for being here.

I mainly wanted to ask you who should determine the retirement age in your line of work and in similar fields. For instance, a 45-year-old individual could lose his eyesight. His health could deteriorate. A 45-year-old pilot could be forced to quit his job if the results of his annual medical are poor. In contrast, a 68-year-old pilot could be in perfect health and continue flying. Under those circumstances, who do you think should set the retirement age and how should that age be determined?

[*English*]

Mr. Robert Kelly: The licensing body within Canada is Transport Canada. About 26 years ago, they did away with the blanket age restriction on licences. It was previously 60 years of age. The reason for this change was that they felt a personal evaluation made far more sense than a blanket age restriction. Exactly as you say, Madame, people do age at different stages of their life. Some people may be perfectly fit to fly an aircraft at 70; some may not be fit to fly at 35.

All pilots over the age of 40 within Canada are required to complete a category 1 aviation medical with a Transport Canada approved aviation doctor every six months. In addition, we're required to complete competency tests either on the aircraft or within a simulator every six-month period twice a year, and we're subject to route checks at least annually and any time Transport Canada or a company representative wishes to ride on the operation to observe our performance. This is something we've lived with all our lives. We don't expect anything different. We fully expect that safety is the first issue and that this must take precedence, and we're quite prepared to continue to accept it.

Safety was never brought up as an issue in this question by anybody, not Transport Canada, not Air Canada, not the union, and certainly not by us. I've recently requalified after a five-year absence from the flight deck of a transport aircraft and over six years from Air Canada's aircraft. I was able to requalify on the Boeing 777, the largest, most sophisticated aircraft in Air Canada's fleet. I've renewed my category 1 aviation medical by completing a new-hire medical with Air Canada. It's the same medical they give to 20-year-olds, including all the tests. I passed them, and I'm currently back flying, just completing a line indoctrination with the supervisor on regular passenger flights on the Boeing 777.

We don't think for one minute that we've become immortal. We're quite prepared to hang them up whenever we feel the time is approaching or whenever our medical or physical capabilities do deteriorate to the point.... We're very well monitored. We fully expect that to continue.

I hope that answers your question.

[*Translation*]

Mrs. Josée Beaudin: Absolutely, thank you very much. You will need the earpiece again.

I think what matters to plane passengers is the pilot's proficiency. They don't care whether the pilot is 30 or 60 years old.

Mr. Vilven, you were let go at the age of 60, correct?

[*English*]

Mr. George Vilven: Did you say fired at 60?

● (1140)

[*Translation*]

Mrs. Josée Beaudin: You were dismissed at the age of 60, right?

[*English*]

Mr. George Vilven: That's right.

[*Translation*]

Mrs. Josée Beaudin: How much time did you invest into trying to resolve the dispute?

[*English*]

Mr. George Vilven: I have tried to settle this issue for the last eight years. We have been before the courts, before the tribunal. Unfortunately, having a deep-pocket corporation that is willing to appeal all decisions from the courts and a union that will not represent the older pilots, it has been very difficult. Without the help of the coalition, with the amount of money we raised, it would not be possible for a small group of individuals like ourselves.

[*Translation*]

Mrs. Josée Beaudin: At age 60, when you were fired, did you meet the physical requirements and other requirements pilots must meet?

[*English*]

Mr. George Vilven: That is correct. On the day I was terminated, September 1, 2003, all my licences and my medicals were still valid. What we call PPC, your pilot proficiency check, which is signed by a representative of Transport Canada, was valid. All my licences were valid. The only reason I could not fly was because I was now 60. My age was the only difference between me and the other 3,000 Air Canada pilots.

[*Translation*]

Mrs. Josée Beaudin: Thank you very much.

[*English*]

The Chair: Thank you very much.

We'll go to Mr. Martin, please.

Mr. Tony Martin (Sault Ste. Marie, NDP): Thank you for being here today.

I'm wondering where all this is coming from. Most people I speak to are looking forward to retirement and all that it brings in opportunity and freedom. But you represent a fairly large group of people who don't want to be told when to retire.

Is it a financial issue? Is the pension scheme not rich enough? If that was improved, would it make it more palatable to retire? Or is it something else, that you just like flying and want to continue to fly?

Mr. Robert Kelly: I would say it's a combination of all. The pension is good, albeit a little shaky the last few years. The main aspect is not financial; it is that pilots just love to fly. They tend to be a somewhat alpha group of individuals who worked long and hard to get where they got. They enjoy their work and would like to continue to fly.

In my own case, I would have preferred to fly a few more years with a retirement date of my choosing and then continue to fly my own aircraft, which I still do.

The legislation in human rights states that the choice should be up to the individual and should not be imposed by any other persons. This includes the tyranny of the majority. A large proportion of younger pilots would obviously prefer that the older ones retire immediately to increase their own advancement. But they may well feel different as they approach retirement age themselves.

Mr. Tony Martin: That's a fair statement to make.

I'm also trying to find out why the union has taken such a strong stand. I think I know why the company is taking the stand, or I think I do. With the union and the union movement, there are some underlying principles and values. When you go in to negotiate a collective agreement, if everybody's on board and there's solidarity, the chances of getting a good agreement are heightened. So we all buy into that piece of it.

One of the criticisms of unions is that they go to bat for workers who really shouldn't be gone to bat for, because they want to protect the rights of that individual to due process and protection. But on this issue, there's obviously some disagreement with some of the members of the union. Maybe you could share your views of why the union is taking such a strong position.

● (1145)

Mr. George Vilven: I'd like to cover a misconception. Air Canada's pilots union is against our continuing to fly past 60. But this is not the case with the vast majority of unions in Canada, for example, WestJet.

WestJet wanted their pilots to have the opportunity to continue flying past the age of 60. Air Canada Jazz, which at one time was part of the Air Canada family, also wanted to have their pilots fly past the age of 60, and they approached the company. So Air Canada's pilots union is in a minority. Most of the unions want to give their older pilots the opportunity to fly if they're competent and medically fit. We are not in a minority by asking for this privilege.

Mr. Tony Martin: I was under the impression that WestJet didn't have a union.

Mr. George Vilven: They have what they call an association.

Mr. Tony Martin: Yes, but it's not a union.

Mr. George Vilven: Well, Air Canada's Pilots Association call themselves an association. In fact, they sometimes take umbrage at being called a union. But it's an association of a group of pilots that band together to represent themselves. WestJet and the Air Canada Jazz pilots have a union, and they approached the company wanting their older pilots to be allowed the option of flying.

Mr. Tony Martin: I hear from young people in my constituency who are trying to get into the workplace that there are a lot of people at the top end who could retire with decent pensions who won't retire. We also have the situation where people retire and then are hired back on, on contract, which at the end of the day sometimes costs the company more anyway. The young people, and their parents, who want them to get into the workplace, are very concerned.

In many senses, because of technological advances, the workplace is shrinking in terms of employment opportunities, particularly good employment opportunities. Certainly, in the airline pilot sector, it's good work. We have a pilot training program in Sault Ste. Marie, at Sault College, and all of those young people are looking for jobs. What do you have to say to them?

Mr. Robert Kelly: First, I'd like to say that Sault College has indeed an excellent program. My youngest daughter is planning on attending the pilot course next year. My oldest son is also a pilot. He's flying for Cathay Pacific in Hong Kong. There are tremendous opportunities throughout the world. There is a major shortage looming, with the number of aircraft on order and the number of pilots in the pipeline.

Having said that, the main impetus for the upward movement of younger pilots is not older pilots retiring; it's the airline being healthy and expanding. To that aim, it makes little sense to squeeze out experienced pilots who could mentor these younger pilots. There is also, of course, this question: why discriminate against one age group for the benefit of the other? Surely, it should be a balance.

I know in my earlier years it was at least 13 years before a pilot could possibly hold a captain's position with Air Canada. We have pilots with Air Canada now who were direct-entry captains, on the smaller aircraft, albeit. So times do change.

The Chair: Thank you very much. That's your seven minutes.

We'll go to Mr. Komarnicki, please.

Mr. Ed Komarnicki (Souris—Moose Mountain, CPC): Thank you, Madam Chair.

Certainly, I'm sympathetic to a lot of what you say, and generally have been supportive of the intention of the bill, but there are a certain number of unintended consequences. Remarkably, Mr. Martin raised a few of them. One of them is that there are fiercely fought collective bargaining agreements and contracts in place. Air Canada pilots are quite different from, say, Jazz or WestJet and other pilots because of that structure. You can't compare the two because it's like comparing apples and oranges.

Part of the consideration that I'm going to embark upon was actually raised by Mr. Kesselman, and that's things like pension benefits, health insurance, disability coverage, and life insurance—which, of course, exponentially increases in cost to those within the collective bargaining agreement and others as you extend the age of retirement. I'll start from this proposition. It would be fair to say, specifically with Air Canada, that your salary range increases exponentially based on age, and probably maxes out, as I understand it, at about age 55 to age 60, which is the top of the salary line. Would you agree with that?

Secondly, the salaries are based on how big a bird you fly. You were mentioning the 777. Would one who hits the age of 55 to 60 and is flying a 777 be at the peak of their salary range?

● (1150)

Mr. Robert Kelly: They would indeed be at the peak of their salary range. However, age is not a direct correlation to seniority. The seniority dictates which aircraft you fly, not the age.

Many pilots are being hired these days in their forties—

Mr. Ed Komarnicki: Let me just close this a little further. The pensions you get, roughly, are about $120,000 a year, if you max it out.

Mr. Robert Kelly: For some.

Mr. Ed Komarnicki: Now, the big issue would be that the drag on employee benefits, on the cost of employee benefits, on the cost of pensions, would be negatively affected if we were to extend the mandatory retirement age past 60, for some of the reasons that I've outlined. Would you agree with me on that?

Mr. Robert Kelly: Actually, no. The maximum pension level for Air Canada pilots is when they reach 35 years of service. If they were hired at 19 or 20 years of age, that would happen long before their mandatory retirement age. They would no longer be contributing to the plan and their pension payments would not be any larger if they stayed any longer.

Mr. Ed Komarnicki: So are you saying that by extending the mandatory retirement age past 60 to whatever it might be, it would not negatively impact the cost of benefits, the cost of programs, as mentioned—

Mr. Robert Kelly: Obviously, some programs, yes—the health programs, insurance programs—but for pension programs, it would probably save it money. You'd be contributing to the pension plan rather than drawing from it, and, obviously, when you do finally retire, you're not going to be around as long as you would have been before.

Mr. Ed Komarnicki: Let me ask you this. Some of the provinces have specifically included a provision with respect to eliminating mandatory retirement that recognizes that employers are permitted to differentiate between employees on the basis of age with respect to employee pension benefits—and we'll argue about that—in other insurance plans, and this is something Mr. Kesselman referred to. Are you agreeable to age discrimination at least for that purpose?

The Chair: I think Mr. Kesselman did want to have a chance to respond, so....

Mr. Ed Komarnicki: In time, but I'm presently speaking to Mr. Kelly.

Mr. Robert Kelly: Right. I would basically say that Professor Kesselman obviously has the information on this.

Mr. Ed Komarnicki: No, but are you, as a group, and you individually, agreeable to that limited age discrimination for that specific purpose? It has a direct impact on collective bargaining agreements and the cost for those who are behind you.

Mr. Robert Kelly: I don't believe it has an impact on it.

Mr. Ed Komarnicki: Okay. I'll come back to—

Mr. Robert Kelly: We're not looking at age here; we're looking at seniority. Some pilots are hired at 40; some pilots are hired at 20. Obviously, they're going to reach maximum pensionable ages long before their retirement age.

Mr. Ed Komarnicki: This might be a good place for Mr. Kesselman to make a comment, but I have another question I want to ask on age that Mr. Martin touched upon.

Mr. Kesselman, could you briefly give your comment? I'd like to move onto another area.

Prof. Jonathan Kesselman: I was hired by the Fly Past 60 Coalition to undertake analysis and provide expert witness testimony in some of their previous proceedings, and the area of pensions is very interesting. Actually, by and large, Air Canada saves money by allowing pilots who wish to, to work beyond 60. It's a defined benefit plan. For a pilot who has maxed out, or even approached the maxing out of the pension, by working an extra year, what happens? They're going to be drawing that pension one year less. Or by working an extra five years, they'll be drawing it five years less. Each of us has an unknown date of death, but it's not affected by any of these issues. So the company actually—

● (1155)

Mr. Ed Komarnicki: What about the areas of life insurance, health insurance, and disability insurance?

Prof. Jonathan Kesselman: Those do become more costly. The pension contribution is probably the largest single cost of these employee fringe benefits, and that actually has a declining cost for pilots who are allowed to, and choose to, work longer.

I don't know whether it's a wash overall, but, yes—

Mr. Ed Komarnicki: Are you familiar with the New Brunswick limited age discrimination to deal with these specific areas that you raise? What's your position on that?

Prof. Jonathan Kesselman: Not New Brunswick specifically, but I do know this has arisen in Canada. In my own province, British Columbia, it is allowable for the employer to differentiate at age 65 and beyond in some of these fringe benefits. I think which ones may be actually listed in the legislation.

Mr. Ed Komarnicki: Okay. And you're okay with that?

Prof. Jonathan Kesselman: Overall, I think it is reasonable. It's arguable, but I think it is reasonable.

Mr. Ed Komarnicki: You were retained by the Fly Past 60 Coalition, and you are presently retained by them?

Prof. Jonathan Kesselman: No, not presently. This was a case that ended in the previous...actually, it was in 2009, not 2010.

The Chair: Thank you very much.

Our time is up for the seven-minute round. I know Mr. Savage had a very quick one-minute question. I'm going to let him do that, and then I'll see if there's anyone else with a one-minute question.

I'll let Mr. Savage go quickly.

Mr. Michael Savage (Dartmouth—Cole Harbour, Lib.): Thank you, Chair.

In terms of Tony's comments about the unions, I know that Madam Folco has consulted with a number of unions, including the FTQ, who are supportive of this measure.

A voice: CSN.

Mr. Michael Savage: CSN and others.

My question is I think for Mr. Kesselman, because you raised this as an economic argument.

We all know the demographic crunch that's coming down on Canada. The Association of Canadian Community Colleges has an interesting statistic that indicates that right now 44% of Canadians are not in the workforce—that's seniors, that's children, that's the unemployed—but that the number is going to rise to over 60% by 2031, which provides obvious challenges for Canada.

Just generally, how much of an opportunity do we have to fill some of those skill gaps if we do away with mandatory retirement or have a serious look at it?

Prof. Jonathan Kesselman: I think we have a significant, but obviously still limited, ability to get more years out of people who wish to work more years.

Yes, I mean, that certainly is an important reason, one among many, on the economic side for removing the constraint of mandatory retirement.

The Chair: Thank you.

I'll just give Mr. Komarnicki one more minute.

Mr. Ed Komarnicki: Thank you, Madam Chair.

Mr. Martin touched on the issue of younger workers. Certainly within the commercial airline industry there is a limited number of opportunities for employment of pilots. At Air Canada, I understand, that's about 3,000 pilots at any one time. The only way a new pilot can be employed, or one of the ways, is if an existing pilot leaves for reasons of health, career change, or retirement.

Would you agree with me on that?

Mr. Robert Kelly: Those would be some of the factors. Obviously, were the airline to increase in size, that would have a proportionately larger—

Mr. Ed Komarnicki: Just speaking to where Air Canada is right now, it would prevent the flow of younger pilots into the system if the mandatory retirement age were lifted altogether, without any exceptions, because there simply wouldn't be room for mobility within the system.

Mr. Robert Kelly: With respect to Air Canada itself, that is probably true. However, there are many other airlines within Canada, coming and going. I think within Canada there are approximately 980 airlines of various sizes.

The Chair: Thank you very much.

Our time has expired.

Again, I want to thank the witnesses for being here and for their contribution.

I will suspend for two minutes while we bring in the new witnesses for the next hour.

Thank you.

● (1155)

(Pause)

● (1205)

The Chair: We will resume our meeting. I'd like to ask everyone to please take their seats so we can resume.

We are going to begin with our witnesses. In the second hour we have representatives from the Canadian Human Rights Commission, David Langtry, the acting chief commissioner. Welcome, Mr. Langtry. We also have Philippe Dufresne, director and senior counsel from the Canadian Human Rights Commission.

We have representatives from Federally Regulated Employers-Transportation and Communications, known as FETCO. We'll call you FETCO, if that's all right.

Mr. John Farrell (Executive Director, Federally Regulated Employers - Transportation and Communications (FETCO)): That's okay.

The Chair: Mr. Farrell is here, the executive director, and with him is Christopher Pigott. Welcome.

Each one of you, Mr. Langtry, will have seven minutes. Mr. Farrell will have seven minutes, and then we'll go to our questions.

I'll begin with you, Mr. Langtry, please.

Mr. David Langtry (Acting Chief Commissioner, Canadian Human Rights Commission): Thank you, Madam Chair, members of the standing committee.

[*Translation*]

Thank you for the opportunity to speak to the committee as you review Bill C-481. As the chair noted, with me is Mr. Philippe Dufresne, our Director of Litigation and Senior Counsel.

[*English*]

Requiring people to retire at a specified age is discrimination. The Canadian Human Rights Commission has called for repeal of the mandatory retirement provisions of the Canadian Human Rights Act since 1979, just one year after the commission opened its doors. Back in 1979, the commission's opinion was held by a minority. As recently as the 1990s, the Supreme Court ruled that although mandatory retirement was discriminatory, it was a permissible limit under the Canadian Charter of Rights and Freedoms.

[*Translation*]

The commission is aware of the rationale of the court at that time. Job progression, safety and pensions were, and still are, important. However, the commission maintains that these can be accommodated without perpetuating a discriminatory practice.

[*English*]

All Canadian jurisdictions, with the exception of the federal jurisdiction and, in a limited way, New Brunswick, have abolished mandatory retirement. Over the years, many federally regulated employers in the federal public service abolished it on their own initiative.

There is no evidence of any significant detrimental impact on employers, pensions, safety, or job progression.

Turning 65, or any other age, does not make someone less qualified to work. In our view, the qualifications of the person measured against the requirements of a job should be the relevant criteria in determining whether someone should be employed.

There are legitimate concerns about the impact of abolishing mandatory retirement in safety-sensitive occupations. Some may ask whether a 75-year-old pilot should be flying a plane. I suggest that this is the wrong question. The real question is whether the pilot is fit to fly the plane. The ability of a pilot may be impacted by a variety of factors unrelated to age, such as lack of sleep, stress, or medical conditions.

From a human rights perspective, what is required is an individualized assessment aimed at determining the ability of individuals to perform the requirements of their job. This should apply regardless of a person's age.

In some circumstances, a job requirement based on a prohibited ground of discrimination may be essential to the performance of the job. The Canadian Human Rights Act provides for the defence of a bona fide occupational requirement, or BFOR , in these cases. For example, bus drivers are required to have good vision. Although this requirement discriminates against people who are visually impaired, it is an acceptable form of discrimination in this occupation.

The act sets out that an employer seeking to prove a BFOR must also be able to show that accommodating people who do not meet the job requirement would impose an undue hardship, taking into consideration cost, health, and safety. As a result, should Bill C-481 be enacted, an upper age limit in specific job situations could be considered non-discriminatory if an employer is able to argue a BFOR.

You, of course, have already heard about the Air Canada pilots cases from the previous witnesses. The cases illustrate how a BFOR works. The Federal Court upheld the Canadian Human Rights Tribunal's finding that the mandatory retirement defence in the Canadian Human Rights Act was inconsistent with the charter. At the same time, the Federal Court sent the case back to the tribunal for a re-determination of whether Air Canada's age requirement was a bona fide occupational requirement for its pilots.

It is important to mention that mandatory retirement is not just about age. It has a disproportionate impact on certain groups in Canadian society. For example, women who have accumulated fewer years of work, or delayed their higher education due to child rearing, are particularly disadvantaged by mandatory retirement. Likewise, new Canadians and people with disabilities may be more disadvantaged by being forced to retire.

● (1210)

[*Translation*]

These were among the factors considered by the Federal Court in the Air Canada case, and were cited as elements in support of the Court's conclusion that the mandatory retirement defence in the Canadian Human Rights Act is not justified.

[*English*]

The commission supports this bill, and we thank you for the opportunity to be here to express that support.

We would be pleased to answer any questions you may have.

The Chair: Thank you very much, Mr. Langtry.

We'll now go to Mr. Farrell, for seven minutes, please.

Mr. John Farrell: Thank you, Madam Chair.

FETCO represents approximately 586,000 employees in the federal jurisdiction.

First and foremost, FETCO members support the principle of removing the provision in the Canadian Human Rights Act that permits mandatory retirement. The time has come. The provinces have adopted this principle in their human rights legislation and regulations. Indeed, most companies in the federal jurisdiction that are members of FETCO have already adopted the principle that employees may work beyond age 65.

We are here today fundamentally to assist the Government of Canada in crafting new legislation and regulations that will address the complexities of changing from the current regime to a new regime. Our objective here is to end up with better legislation that will stand the test of time and address issues appropriately.

The federal sector includes interprovincial and international transport undertakings such as airlines, air traffic control, shipping, railways, and trucking, in which the nature of work performed raises concerns regarding significant risks to public safety.

Repealing the provisions of the Canadian Human Rights Act that allow mandatory retirement will remove an important mechanism that has been available to federal employers to manage some older workers with dignity with regard to diminishing performance resulting from advancing age. The management challenges presented by older workers, particularly in safety-sensitive workplaces, will remain and cannot simply be ignored. FETCO is concerned that Bill C-481 fails to provide any guidance or assistance to employers in respect of these significant management challenges.

We are suggesting two policy options. First, employers should be permitted to apply reasonable mandatory retirement ages in certain circumstances and only in specific occupations where the performance of work is associated with a high risk to public safety and the safety of other workers.

Second, a provision should be included in the CHRA that stipulates that it is not a discriminatory practice on the basis of age for an employer to impose periodic skills and competency testing on employees in safety-sensitive positions after they have reached a certain age.

This targeted approach would reduce a potentially significant burden on employers and would not interfere with employees' equality rights. Indeed, in some industries, such as the trucking industries, medical examinations for drivers over age 65 are required on an annual basis. We heard earlier that there are specific arrangements that are required in the airline industry.

Now we want to address issues with respect to the effect of removal of mandatory retirement on pensions and benefit plans.

Regarding pensions, Bill C-481 does not address how the elimination of mandatory retirement will be reconciled with pension plans that are designed to be integrated with the Canada Pension Plan, a practical problem we have to deal with.

Bill C-481 does not contemplate how the elimination of mandatory retirement will affect the ongoing transition in many workplaces to systems of phased retirement that allow employees to access earned pension benefits while they also continue to accrue pension benefits as a result of a change in employment status.

Turning to benefits now, Bill C-481 fails to address how benefits and insurance programs will be treated if mandatory retirement policies are prohibited. Various provinces, such as British Columbia, Alberta, Saskatchewan, New Brunswick, and Nova Scotia, have enacted specific exceptions that allow employers to continue to differentiate between employees on the basis of age in the administration of employee pensions, benefits, and insurance plans.

These legislative exceptions address the legitimate concerns of employers that the cost of financing certain employee benefits and/or insurance plans will increase in respect of older employees who choose to continue working beyond the so-called normal retirement age.

It is FETCO's position that Parliament must address the similar legitimate concerns of employers in the federal jurisdiction regarding benefits such as life insurance and extended health care, for which costs increase substantially with age, and disability benefits, for which costs increase dramatically as a result of increases in the duration of benefit and the frequency of claims.

FETCO notes that, in its current form, Bill C-481 will impact the Canadian human rights benefit regulations.

● (1215)

We must say that if you take a look at those regulations as they currently exist, they apply to a different regime, which is going away. So there is a great deal of work that needs to be done by the Government of Canada to consider rewriting regulations that will suit new legislation, and we employers want to be part of that process so that we end up with proper regulations that will stand the test of time.

Finally, removal of mandatory retirement could materially affect federal employers' costs of workers compensation benefits, which is another problem. These benefits are administered by the provinces on behalf of federally regulated employers. There is no doubt that as employees get older, the cost of workers compensation benefits will increase. The probability of injury will increase, and the probability that an employee will not be able to return to work and recover from an injury, because he or she is older, will increase. We have to find a way to balance increasing age with workers compensation regimes managed by the provinces. It's a very real, practical problem.

With respect to severance pay, FETCO is concerned that Bill C-481 adds unnecessary ambiguity to the severance provisions of the Canada Labour Code. We're not satisfied that the way you're dealing with this provision is technically clear enough to prevent problems from occurring.

First, section 235 of the Canada Labour Code should make it clear that any employee who voluntarily decides to retire and thereby terminates the employment relationship is not entitled to statutory severance. The existing provisions don't necessarily allow people to see that immediately.

Second, FETCO believes that federal employers should be entitled to continue to impose reasonable mandatory retirement ages where there is a significant risk to public safety arising from a particular occupation. In cases where a legitimate mandatory retirement age is in place and an employee retires with pension benefits upon reaching that age, FETCO's position is that the employer should continue to be relieved of the statutory severance obligation.

What are our conclusions? FETCO supports the Government of Canada's initiative, but it needs to be accompanied by legislative exceptions that continue to allow reasonable age-based retirement policies in some limited circumstances. Specifically, and further, FETCO—

● (1220)

The Chair: I'm sorry, sir, but your time is up. Could you quickly wrap those recommendations up? Thank you.

Mr. John Farrell: I certainly will.

We recognize the Canadian Armed Forces exception that has been raised in the legislation, and we think that in some cases there are analogous situations that could occur in the private sector.

We believe that the elimination of mandatory retirement must include an exception that allows mandatory retirement policies negotiated with employers and unions to be implemented in respect of positions that have public safety implications.

Second—

The Chair: I'm sorry, Mr. Farrell, but you've gone well over your time. Knowing that you have those recommendations, possibly during the questions and answers, I could let you make them.

Mr. John Farrell: I can get to them again?

The Chair: You'll have a chance to do that.

We'll begin with Madam Folco.

[*Translation*]

Ms. Raymonde Folco: Thank you, Madam Chair.

[*English*]

Thank you, both to the Canadian Human Rights Commission and to the Federally Regulated Employers—Transportation and Communication.

First of all, Mr. Farrell, I have three remarks to make. The first one is that it's not a government initiative; it's a private member's bill. I think it's really important to understand what a private member's bill can do. As I am sure you already know, a private member's bill cannot call on any financial elements because it would require royal assent.

As you know, I initiated this bill, so I was therefore very severely restricted in what I could suggest. It is very clear to everyone in Parliament that if it is to make its way through Parliament, no private member's bill can in any way ask for royal assent. This goes against the rules.

Nonetheless, the elements you presented are important. I would suggest that if this private member's bill eventually finds its way into the current legislation, there is a lot of work to be done subsequently. I would certainly look forward to doing that kind of work. But this private member's bill could in no way touch that. I was limited by this.

Those are elements I wanted to bring up.

Mr. Langtry, in your presentation you mentioned abolishing mandatory retirement in safety-sensitive occupations. I felt that was extremely important in your presentation, and I thought it segued very nicely into Mr. Farrell's presentation. It's the way I thought of the private member's bill as well.

I would like to touch on another point. When I studied this I was made aware that notwithstanding the fact that two former Air Canada pilots had won their case before the tribunal and before the courts, if other Air Canada pilots want to work beyond the age of 60, the whole process would have to be undertaken by those people. The court's decision and the tribunal's decision—correct me if I am wrong—apply only to those two people.

Could you explain why that is so?

Mr. David Langtry: First, you are correct; the declaration was limited to the two.

The pilots had sought to have all of them included. There are many cases that are before the tribunal right now, and those cases are having to be heard.

Perhaps I'll ask Philippe Dufresne, as the legal counsel, to explain further.

Mr. Philippe Dufresne (Director and Senior Counsel, Litigation Services Division, Canadian Human Rights Commission): Thank you.

It is a function of the limits of the administrative tribunal's authority. They were given the ability to interpret the charter and to make a ruling that a piece of legislation like section 15 is unconstitutional. But they don't have the power the courts have to strike it down; they only have the power to declare it inoperative for the purpose of the case before it.

That's what the tribunal did. The case came from Mr. Vilven and Mr. Kelly, and for the purpose of those complainants they declared it inoperative. But others need to be bringing different complaints.

That is one of the challenges with the system. Therefore, this committee's work can address the issue much more broadly than a specific complaint could.

● (1225)

Ms. Raymonde Folco: I will come back to that. I hope I have another minute.

That segues into why this bill...because as I mentioned, Justice La Forest had mentioned that it was up to the legislator, and this is why the legislator is now looking at this bill.

Thank you very much.

The Chair: Thank you very much.

Mr. Lessard, please, for five minutes.

[*Translation*]

Mr. Yves Lessard (Chambly—Borduas, BQ): Thank you, Madam Chair. I also want to thank you, gentlemen, for being here this morning.

First, I want to talk about the concern expressed by Mr. Farrell. We feel that we need to differentiate between what comes under the bill and what comes under collective agreements or agreements between parties. For instance, when there is no union involved, the Minimum Wage Act or the Act respecting labour standards apply. You are worried about retirement. If someone is over the age of 60 or 65—depending on the retirement age set by the employer—and they continue working, they continue contributing to the pension plan and do not receive benefits until they stop working, unless the parties have come to another agreement. So, the two parties continue contributing to the pension plan as they would in the case of any other salaried employee. This person's benefits will be higher when they leave their employment at 68 instead of at 65 years of age because of an additional three-year contribution period. The same goes for other social benefits, such as sick leave. From what I understand, you are talking specifically about leave prescribed by collective agreements or leave also prescribed by the Act respecting labour standards.

This does not increase costs because individuals who leave their employment are usually replaced at the same cost. What may sometimes differ are health-related absences. However, as I have been the employer of 120 people, I can tell you that the oldest employees are not necessarily the ones who take the most sick leave. So, there is an age-related prejudice involved. I am not accusing you of being prejudiced, but this is what often comes to mind.

This bill seems interesting to me, and I believe that we will support it. Amendments will probably have to be introduced, in light of your comments. However, I don't believe that the amendments moved will reflect your position, Mr. Farrell. We are talking about age discrimination. In any company, when employees—whether they are 30 or 40 years old—become unfit to do their job, the employer has the right to let them go, to demote them or to offer them another position. This can also happen with 65-year-old employees. They can be told that their job description has changed and that the position now requires technical skills they do not possess, that the company cannot provide them with the necessary training, that they will not be able to adapt and that they must leave their job. All employers will always have this right, whether the employee is 40 or 68 years of age. I think that we must understand this fact.

There is another consideration here, which will be the topic of my question. Is there an age for retirement when we say that there should be no age discrimination? I will give you the example of the Canadian Senate. Senators are active until the age of 75. Recently, the Senate made a decision not to debate Bill C-311, which had been adopted by the House of Commons. I have seen the vote and can tell you that it was not the oldest members who refused to do the work. Senators are appointed by one person, and they went against a decision made by the elected representatives of 33 million citizens.

This analysis brings us to the question my colleague asked airplane pilots earlier. Who determines when we must leave our job? I think that this decision should always be based on employees' ability to do their job properly. Do you agree with me?

If you do, we will base ourselves on this principle.

● (1230)

[*English*]

The Chair: Mr. Lessard has only left you 10 seconds to answer that question. So it will be a yes or a no.

Mr. John Farrell: It's unfair to say yes or no. It's the longest question I've ever been asked.

The Chair: I'm sorry, there's really no time to answer. So I'll go to Mr. Martin. Thank you.

Mr. Tony Martin: Thank you very much.

I do want to give Mr. Farrell a chance to finish the recommendations he didn't get to. Could you just do those?

Mr. John Farrell: One is constrained when you have messages that you want to convey in this process. I thank you very much for allowing me to continue a little longer than I was allotted.

The reason we need to take some time is because fundamentally we believe we're on the right track here. We're making an amendment to a law that needs to be amended. It needs to be amended properly. We have to have good dialogue and we have to not rush to push a piece of legislation through Parliament. I think we have to make sure that we study it properly and make the proper decisions, and we'll avoid problems as we move down the road. This is why we need to make these recommendations.

Our key recommendations really are this.

In safety-sensitive positions we have to have the flexibility to look at these matters appropriately and to make decisions that will protect the safety of Canadians. We want the law to allow federally regulated employers to comply with applicable international standards that include mandatory policies. We cannot ignore the fact that we operate in a global economy.

We want to include explicit provisions that recognize that employers are permitted to differentiate between employees on the basis of age with respect to pension arrangements, benefits, and other insurance plans because the structure of these benefits is dependent on age. It's a natural process for benefit plans to change depending on age and depending on the duration of benefits. We don't want to be in a situation where we don't have the flexibility to manage our workforce and our pension plans properly. You see now that employers are gradually moving to health care spending accounts, which provide employees of different ages with different options to manage their affairs. We don't want to be caught with certain employees saying we're discriminating against them in one way or another.

Another recommendation is that we want an explicit provision that allows employers to establish workforce skills testing and competency programs that may increase in frequency as an employee's age increases, because we don't want to be caught with a situation where we believe that as employees get older we have to make sure they're meeting the competency requirements. We don't want to test everybody from age 20 to age 75...if we really want to make sure that elderly people are able to demonstrate that they have the physical and mental capabilities to do their work.

We want to include transition provisions that allow employers and unions to make gradual adjustments to the human resources policies, pension and benefits plans, and collective agreements to ensure that there is compliance with these amendments. And that will take some time. We want to include a coming into force provision that allows employers a significant period of time to make the adjustments necessary to comply with the amended legislation. We want the legislation to explicitly state that an employee is only entitled to severance pay if he or she is involuntarily terminated because the current language doesn't necessarily make that clear.

FETCO respectfully submits that we be permitted to engage in meaningful discussions with this committee and other parliamentarians to make sure that when we transition from the old law to the new law we understand the ramifications for the companies in the federal sector. If I ask you if you have actually talked to Air Canada about how this might be restructured, if you have talked to Canadian National Railways, if you have talked to Nav Canada, if you have talked to the grain elevators—they all have different issues that have to be taken into consideration and they will all be affected improperly if we don't make sure we get it right the first time.

That's fundamentally our position.

● (1235)

Mr. Tony Martin: Okay.

The Chair: We'll have time for a second round, but you have about 30 seconds left.

Mr. Tony Martin: I have a quick question flowing from what you just said. This may affect hundreds of thousands of workers in significant ways. Some of it we don't see at the moment. For example, the Canada Pension kicks in at 60 and 65. There's now a movement to try to move that up a year. How will that be impacted by a decision made on mandatory retirement in this instance, because then you're talking about all of Canada? There are savings for some folks in that and there are losses for others.

The Chair: Be very brief, please.

Mr. John Farrell: The simple answer is that we have to take a look at these effects and make rational decisions. You can't just take a simplistic approach. We have to spend a little bit of time to study this, but when we do, we'll end up with a better law, I think.

The Chair: Mr. Komarnicki.

Mr. Ed Komarnicki: First, with respect to Mr. Farrell's issue regarding the time you need for adjustments—he said a significant amount of time—and time to deal with the ramifications of a change like this, can you give us some idea of what you're talking about?

Mr. John Farrell: You have to appreciate that the old regime has been around for a long time, and work practices have been built around the existing law. You can't just turn that around on a dime because you've restructured your workforces and the rules and regulations governing them in accordance with the existing law. Clearly, if you're engaged in collective bargaining with unions, you have to have enough time to get to the point where you can deal with this, perhaps, in collective bargaining, if it requires, eventually, a change to collective agreements. I'm talking about implementation from an employer's perspective.

I think we need a year or a year and a half so that people can begin to plan how they're going to approach changes in their workplaces.

Mr. Ed Komarnicki: The bill potentially could provide for coming into force a year after royal assent. That could address some of that. Was there another timeframe you had in mind, or is that what you were talking about?

Mr. John Farrell: Definitely it would need a minimum of a year.

Mr. Ed Komarnicki: I understand that Mr. Pigott is a lawyer, and we've heard from another lawyer.

There has been some mention that Alberta, Saskatchewan, New Brunswick, and other provinces have done away with mandatory retirement, yet at least as far as New Brunswick is concerned, they have specific provisions that allow employers to differentiate between employees on the basis of age with respect to employee pensions, benefits, and other insurance plans. That has seemed to be an issue for other witnesses.

Are you familiar with those exemptions? I understand, with respect to New Brunswick, that the age-related protections do not apply to the termination of employment or to a refusal to employ because of the terms or conditions of any bona fide retirement or pension plans. Tell me if I'm correct in that. Explain it if you can, and give me your comments on that. Perhaps each of you could answer, in whichever order you want.

Go ahead, Philippe.

M. Philippe Dufresne: I can say briefly that you're correct with respect to the New Brunswick plan. It does allow it if it's part of a bona fide pension plan. That, in fact, was the subject of a Supreme Court decision last year when it debated what a bona fide pension plan meant. Did it have to be justified from the standpoint of safety and so on? The court found that it didn't and that it was really looking at the sincerity of the pension plan.

Those are types of measures.... In fact, in the Federal Court's recent decision, last week, the Federal Court judge found that making changes to benefits and making changes to insurance plans was a less intrusive way than blanket mandatory retirement to address some of those concerns about the complex social and economic matter of having deferred compensation and so on. That was specifically addressed.

● (1240)

Mr. Ed Komarnicki: We have some precedents for the type of language that could be used to accommodate that position, I take it.

Mr. Philippe Dufresne: In those decisions, yes, we do, and in that legislation in Ontario as well.

Mr. Ed Komarnicki: It is in Ontario as well. Do you have a copy of those pieces.

Mr. Christopher Pigott (Legal Counsel, Heenan Blaikie, Federally Regulated Employers - Transportation and Communications (FETCO)): I can speak to that if you'd like.

In fact, it is important to note that the New Brunswick legislation is slightly different, which the Supreme Court decision my friend referred to does establish as sort of a good faith qualification. That's when you're terminating someone. However, all provinces have legislation that specifically allows employers to differentiate, on the basis of age, between employees in respect of benefits, pension plans, and some other insurance plans.

I'll give you some examples. We have subsection 13(3) of the B.C. Human Rights Code, which says that discrimination based on age does not apply as it relates to:

> the operation of a bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan, whether or not the plan is the subject of a contract of insurance between an insurer and an employer.

There are similar provisions in, as far as I'm aware, all provincial legislation, including section 7 of the Alberta Human Rights Act, section 16 of the Saskatchewan Human Rights Code, section 25 of the Ontario Human Rights Code, section 6 of Nova Scotia's Human Rights Act, and I believe in both Newfoundland and P.E.I. human rights legislation.

The Chair: Thank you.

Madam Minna.

Hon. Maria Minna (Beaches—East York, Lib.): Thank you, Madam Chair.

Mr. Farrell, I think in principle you support this kind of direction, but I wanted to ask you a couple of other things.

With respect to the Canada Labour Code, part III, which we are responsible for, how will this change affect it?

Mr. John Farrell: First of all, there is that provision dealing with severance pay. Severance pay was designed to permit a transition from one job to another. Now we're saying that this will continue beyond age 65.

Previously, it stopped at age 65, because under the old set-up it was expected that people would be retiring when they took a pension and therefore would no longer be entitled to severance pay in accordance with the current statute.

What we're saying is that if an employee voluntarily quits at age 67 or takes retirement at age 77, that employee is entering those arrangements on a voluntary basis and will not be entitled to severance pay, which is fundamentally the way it exists now.

But we want to make sure that the law makes this clear. We don't want to have people who decide they're going to retire at age 68 or 69 think that because of the way the current proposal is written they're entitled to severance pay. That's where we're coming from.

Hon. Maria Minna: Would increasing it to 65, or at least getting rid of mandatory retirement, create problems with labour negotiations? Right now, for instance, police forces tend to have an earlier retirement. If we remove mandatory retirement, will it put pressure on labour negotiators to increase the minimum requirement in dangerous areas of employment? Will that create problems?

Mr. John Farrell: Employers accept that while we need flexibility we have to be prepared to demonstrate that there are bona fide reasons for distinctions. You have to have fit police officers who can do their job, and if it's a bona fide occupational requirement, then perhaps they should be retired at a certain age. But it's going to be up to the individual industry to prove the bona fides of these matters—

● (1245)

Hon. Maria Minna: You don't see removing the mandatory retirement putting pressure on—

Mr. John Farrell: It could create pressure in collective bargaining and it could create litigation in which individuals are advancing their own view contrary to the public interest. It may be contrary to safety in sensitive situations. So we need flexibility to address these issues. We hope the legislation will build that flexibility in, so that you don't have to come back to Parliament to deal with issues that can't be dealt with by regulation.

Hon. Maria Minna: With respect to the more frequent health exams for older workers in the interest of public safety, you have engineers on VIA and pilots. Would the more frequent health tests have to be embedded in regulations to prevent potential pushback on age discrimination?

Mr. John Farrell: As for health benefits, the criteria have to be determined by health care professionals. There are physicians who specialize in geriatric medicine and they would have a view. There are physicians who can deal specifically with airline pilots, and there are physicians who can make recommendations with respect to truck drivers or locomotive engineers.

You have to rely on appropriate data from experts, but you have to have the flexibility once those decisions are made. You have to be able to manage those decisions without being accused of discriminatory practices.

The Chair: Thank you.

Mr. Komarnicki, five minutes.

Mr. Ed Komarnicki: Thank you.

Perhaps I will pose a question to the two lawyers. With respect to the New Brunswick case, I would suspect that they called expert testimony to show the cause and effect of age on benefits and pensions and so on. Do you know who they might have been?

Another question flowing from this is that there was a suggestion, at least I think so, by Mr. Farrell that there be an explicit provision—I would gather in the legislation we're considering—to allow employers to establish workforce skills testing programs that commence or increase in frequency as an employee's age increases, which in itself would be age discrimination. But if one were to do that, what's your point of view on that? Secondly, is there any legislation that allows for that to happen?

I have a third question, and I'll leave it at that. As you start thinking about this thing it becomes more complex. Employers can always prove an issue of bona fide requirements, but I suspect it would be much harder for them to do that on an objective or subjective basis than allowing for an exception specifically provided for by legislation, as Mr. Farrell suggests.

Perhaps, Christopher, you may want to start, and then we'll move over to Philippe. I had three points.

Mr. Christopher Pigott: Sure.

My first point is I don't know, with respect to the New Brunswick decision. Frankly, I'm not sure what the nature of the expert evidence was there specifically.

However, I will say that one of the pre-eminent concerns in that case was the fact that there are existing highly complex pension structures that are predicated on the idea that people will retire at 65. So what the court was doing there was I think treading quite a fine balance between legitimate employer workplace concerns and pre-existing structures and the rights of employees to be free from discrimination. That's why they really said the test here is a good faith one based on the intentions of the employer. The employer can't be using a pension plan as a sort of sham to retire people at 65.

In terms of your second question—I think your second and third questions are related—with respect to the idea that you're going to have some sort of differentiation, whether it be based on skills testing or medical testing, in respect of age, and would it be a good idea to have an explicit legislative provision in the legislation that allows for that, as opposed to, say, going down the road of having to prove a bona fide occupational requirement, it's our position that, yes, a specific exception is necessary. And that's really so that we avoid five-year periods of litigation that go to the question of whether or not a specific test that is applied.... As we've heard, these tests do exist. In the airline industry, tests increase in frequency at age 40. It's important that neither employers or employees are going to court to try to justify the validity or invalidity of those laws every time an issue arises.

● (1250)

Mr. Philippe Dufresne: My answer is the same with respect to the New Brunswick case. We weren't involved in that case, but the Supreme Court was dealing with the legislative interpretation.

On the issue of whether courts talked about the impact on benefits and pensions and so on, in the Vilven decision—indeed, Professor Kesselman, who was here this morning, was a witness in this case. The Federal Court talked about his testimony on the issue of what would be the impact of removing mandatory retirement. So there is evidence in this case.

And on the third, does the legislation allow it, the Canadian Human Rights Act already allows for a bona fide occupational requirement. It's a fair point that in some cases it'll lead to litigation, because you have a specific case. The issue is, does that meet this obligation? The legislation, however, is flexible in that it already allows for the making of regulations to specify the standards for undo hardship, and that's subsection 15(3). So there is already this power down the line to put in place regulations.

Mr. Ed Komarnicki: Okay. I'll just stop you there because I have another question flowing from that.

If we change the regime from what was to what is now, is that change going to impact a whole bunch of regulations that exist in different occupations presently that would need changing?

Mr. Philippe Dufresne: Mr. Farrell mentioned the human rights benefit regulations, and they do use the same language of “normal age of retirement”. So there would need to be some corresponding amendments to those regulations—

Mr. Ed Komarnicki: But what about other legislation?

Mr. Philippe Dufresne: With respect to other legislation, it seems that, legislatively speaking, it wouldn't be as direct as for those regulations, but factually, there are some elements to consider—

Mr. Ed Komarnicki: How many regulations do we have out there that would need changing? Do you know?

Mr. Philippe Dufresne: I know for a fact that there would be one regulation to change—

Mr. Ed Komarnicki: I agree.

Mr. Philippe Dufresne: —and that's the benefit regulation.

The Chair: Very quickly.

Mr. Philippe Dufresne: Other than that, I couldn't say.

Mr. John Farrell: There are lots of recommendations. The railways have special regulations. The truckers have regulations.

The Chair: Thank you.

Madame Beaudin, you have five minutes.

[*Translation*]

Mrs. Josée Beaudin: Thank you very much, Madam Chair. Gentlemen, thank you for being here. My question is for Mr. Farrell.

The bill aims to abolish the mandatory retirement age. I listened to your comments and your answers. You talk about management challenges for employers. At the beginning of your presentation, you talked about significant management challenges, about mechanisms, about ways of doing things, about solutions for the employer and about how programs will be treated.

Am I wrong in saying that you agree with the principle of abolishing mandatory retirement age? The issue is more with regard to finding ways to meet management challenges, right?

[*English*]

Mr. John Farrell: We agree with the principle of mandatory retirement. We want a law such that when workplaces have to change the way work is performed, how employees are moved through an organization, and how employers are compelled to look at health and safety issues, we have the flexibility to do that in a reasonable way. We don't want to get tied down to simplistic legislation that could cause us problems.

Mr. Justice La Forest, who was brought up in this conversation today, has stated at the outset that these are complex matters and they require thoughtful solutions.

[*Translation*]

Mrs. Josée Beaudin: Okay, thank you very much.

Earlier, you also talked about the issue involving severance pay, which must be regulated by legislation if people decide to leave their employment at the age of 65, 67 or 70. Is severance pay not already prescribed by collective agreements, even in the case of employees who decide to leave their job at the age of 59?

[*English*]

Mr. John Farrell: Yes. There are a variety of ways in which severance pay is provided. There are some minimum standards that exist in the Canada Labour Code. Employers negotiate and provide severance arrangements for their employees through collective bargaining. Sometimes they provide severance payments voluntarily. Under common law, employees who believe they've been unfairly treated have the option to advance their rights in the court. So there are all kinds of ways in which Canadians can address severance pay.

Our only problem is that the language in this proposed legislation is not as clear as it probably could be on this matter. We just want to make sure it's explicit language.

● (1255)

[*Translation*]

Mrs. Josée Beaudin: So, there could be a bona fide occupational requirement, a BFOR, as was mentioned by the Canadian Human Rights Commission. We agree that there should not necessarily be a mandatory retirement age. I realize that this will be a lot of work, but we need to decide how to proceed and we need to ensure that employers have all the tools they need for a good relationship with employees or unions. When it comes to the key issue of mandatory retirement age, we agree. What we need to do is set exceptions, outline the requirements and make employees pass tests, if necessary. So, there are no issues with that.

[*English*]

Mr. John Farrell: It sounds as if we agree, then.

Mrs. Josée Beaudin: *Merci.*

The Chair: You have just a brief three minutes, Ms. Block. Do you have a question?

Mrs. Kelly Block (Saskatoon—Rosetown—Biggar, CPC): Yes. Thank you very much, Madam Chair.

I would like to thank our witnesses for being here today. I've really appreciated the discussion we've had. And as you've stated, Mr. Farrell, taking the time to have a full and thorough conversation and taking into consideration all the factors that we need to in looking at this private member's bill I think is a good idea.

Mr. Langtry, I want to give you an opportunity to expand on one of the statements you made in your opening remarks. We touched on it a little bit. But it's this comment specifically:

> Turning 65, or any other age, does not make someone less qualified to work. In our view, the qualifications of the person measured against the requirements of a job should be the relevant criteria....

Would you expand on that in terms of how an organization would go about ensuring that's the case?

Mr. David Langtry: There are many times during the course of a person's employment when, for reasons not related to age, they are no longer fully able to perform their services. I'll use the example of somebody who is a bus driver. Of course, you'd have to have good vision. Over the course of time, somebody might lose their vision, and although they would no longer be qualified, that would have nothing to do with how old they were but would be because of that. You're not able to accommodate somebody who is sightless being a bus driver, to put it very simply.

Many of the cases that do come before us are situations in which an employer says an employee is no longer qualified. I'm talking about cases other than the mandatory retirement ones in which they would then have independent medical assessments or that kind of thing. We heard earlier that in the airline industry, testing and so on is done frequently. At the commission we recognize that especially in safety-sensitive positions there is testing that can rightfully be administered. I'll use a mandatory drug and alcohol testing policy, for example. For safety-sensitive positions it is certainly permissible to do that.

Mrs. Kelly Block: Thank you very much.

The Chair: I would like to thank the witnesses for being here and for being part of our discussion on this bill.

I want to remind the committee members that we will be continuing to look at this bill next week, on Tuesday. If you have amendments and you are willing to share them with us, it would be good to get them to the clerk as soon as possible. I want to remind everyone of that, because we're hoping to look at this bill clause by clause at the end of Tuesday's meeting, probably during the last half-hour.

Yes, Madam Folco.

Ms. Raymonde Folco: Do you have the list of witnesses for next Tuesday?

The Chair: We're still finalizing it. We're hoping to have three for the first 45 minutes and three for another 45 minutes.

And I think you possibly want to speak?

● (1300)

Ms. Raymonde Folco: No. I just felt that given the number of witnesses, I wanted to give the witnesses the maximum time, so I will not be participating in that part of it.

The Chair: All right.

We're still finalizing the list of witnesses, and you'll have it as soon as it is finalized.

Thank you, everyone.

The meeting is adjourned.

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