NO.C767038

IN THE SUPREME COURT OF BRITISH COLUMBIA

RE: FOREST INDUSTRIES FLYING TANKERS LIMITED AND WILLIAM F. WADDINGTON	
BETWEEN:	REASONS FOR JUDGMENT
FOREST INDUSTRIES FLYING TANKERS LIMITED and WILLIAM F. WADDINGTON	OF THE HONOURABLE
PETITIONERS	MR. JUSTICE ANDREWS
AND:	IN CHAMBERS
THOMAS RELLOUGH, BOARD OF INQUIRY, Appointed pursuant to the Human Rights Code of British Columbia Act, S.B.C. 1973 (2nd Sess.) C. 119, and DIRECTOR, appointed pursuant to the Human Rights Code of British Columbia Act, S.B.C. 1973, (2nd Sess.)) C. 119	
RESPONDENTS	

D.M.M. Goldie, Q.C. and K.P. O'Neill — for the Petitioners;

D.H. Vickers, and H. Ivens — for the Respondents;

Date and place of hearing — December 4, 1978, Vancouver, B.C.

The "facts" of this application are as follows:

"1. The Petitioner Forest Industries Flying Tankers Limited ('Flying Tankers') is a company incorporated in British Columbia, under the British Columbia 'Companies Act', on the 30th day of December, 1959. The Petitioner William F. Waddington ('Waddington') is Manager of Flying Tankers.

2. Flying Tankers operate two Martin Mars water bomber airplanes, a Grumman Goose airplane, and a Bell Jet Ranger helicopter for the purposes of forest fire suppression. In addition, the latter two aircraft are also used for fire environmental evaluation, ambulance service, and senior executive inspections.

3. Flying Tankers is licensed to operate its aircraft by the Canadian Transport Commission pursuant to Aeronautics Act, R.S.C. 1970, C.2 as mended.

4. The Department of Transport, Civil Aviation Branch, pursuant to the Aeronautics Act, issues an operating certificate to Flying Tankers. In order for Flying Tankers to carry on business it is necessary to have a valid operating certificate.

5. The operations base of Flying Tankers is Sproat Lake Seaplane Base, Vancouver Island, British Columbia and the aircraft owned by Flying Tankers do not operate outside of the geographical boundaries of the Province of British Columbia.

6. Flying Tankers has a total staff of 23 and of those 23, 6 are licensed pilots.

7. It is a legal prerequisite for continued employment for the pilots and crew who operate the aircraft of Flying Tankers to possess a valid licence issued by the Federal Ministry of Transport.

8. In 1966 the Federal Department of Labour, pursuant to the Canada Labour Code approved a 52 week averaging plan for employees of Flying Tankers. The 52 week averaging plan was requested because of the seasonal nature of the work performed by employees of Flying Tankers.

9. The Respondent Thomas Kellough ('Kellough'), commenced employment as a pilot with Flying Tankers in May of 1964.

10. Pursuant to the policy of Flying Tankers, Kellough was retired from his employment on his 60th birthday, December 12, 1977.

11. On September 7th, 1977, Kellough filed a complaint with the Director, Human Rights Code, Parliament Buildings, in Victoria, British Columbia alleging discrimination regarding his employment because of his age.

12. By letter dated October 13th, 1978 Flying Tankers was informed by Allan Williams, Minister of Labour of the Province of British Columbia, that a Board of Inquiry, pursuant to Section 16 of the Human Rights Code of British Columbia, S.B.C. 1973 (2nd Sess.) C. 119, had been appointed to deal with the allegations of Kellough.

13. By Notice of Hearing dated October 25th, 1978 the Director, appointed pursuant to the Human Rights Code of British Columbia, notified Waddington and Flying Tankers that the Board of Inquiry will, commencing at 10:00 a.m. on December 12th-13th, 1978, hear the allegations of Kellough pursuant to Section 8 of the Human Rights Code of British Columbia against Flying Tankers and Waddington."

The petitioner now seeks an order pursuant to the Judicial Review Procedure Act, S.B.C. 1975, C. 25 prohibiting the Board of Inquiry from taking any further proceedings pending the hearing and determination of this application.

In September 1977 Mr. Kellough was asked to decide whether he would accept employment as Supervisor of Stores (at a 40% reduction in salary) or face termination on his 60th birthday. He then filed a complaint under Sec. 8 of the Human Rights Code that:

> "I allege that I have been discriminated against regarding my employment because of my age."

I add, parenthetically, that Kellough's termination resulted from a policy decision reached by the directors of the company in 1975 without regard to him specifically.

Section 8 of the Human Rights Code reads as follows:

"8. (1) Every person has the right of equality of opportunity based upon bona fide qualifications in respect of his occupation or employment, or in respect of an intended occupation, employment, advancement, or promotion; and, without limiting the generality of the foregoing,

(a) no employer shall refuse to employ, or to continue to employ, or to advance or promote that person, or discriminate against that person in respect of employment or a condition of employment; and

(b) no employment agency shall refuse to refer him for employment,

unless reasonable cause exists for such refusal or discrimination.

(2) For the purposes of subsection (1),

(a) the race, religion, colour, age, marital status, ancestry, place of origin, or political belief of any person or class of persons shall not constitute reasonable cause;

(a1) a provision respecting Canadian citizenship in any Act constitutes reasonable cause;

(b) the sex of any person shall not constitute reasonable cause unless it relates to the maintenance of public decency;

(c) a conviction for a criminal or summary conviction charge shall not constitute reasonable cause unless such charge relates to the occupation or employment or to the intended occupation, employment, advancement, or promotion, of a person.

(3) No provision of this section relating to age shall prohibit the operation of any term of a bona fide retirement, superannuation, or pension plan, or the terms or conditions of any bona fide group or employee insurance plan, or of any bona fide scheme based upon seniority." (My underlining.)

The position of the petitioner in the present case, is that the company, Flying Tankers, is wholly regulated by federal jurisdiction under the Aeronautics Act. The Board of Inquiry which is appointed pursuant to the Human Rights Code of British Columbia Act, is provincially constituted and derives its authority from provincial legislation. The petitioner claims therefore that it has no power to deal with the labour relations of a company which is subject to federal jurisdiction. In support of this proposition the petitioner relied primarily on the case of Re Cully and Canadian Pacific Airlines Ltd. et al (1977) 1 W.W.R. 393, a decision of Macdonald, J. of our Supreme Court. That case had similar facts to the case at bar in that it involved a complaint under Sec. 8 of the Human Rights Code of B.C. by a female flight attendant. A Board of Inquiry was appointed to enquire into a rule of the employer which prohibited female flight attendants from working on aircraft flights after the 13th week of pregnancy. The jurisdiction of the Board was challenged on the grounds that the Human Rights Code of B.C. could not apply to employer-employee relations of an employer of a federal undertaking. In discussing this point, Mr. Justice Macdonald stated at p. 394:

> "... it is not disputed that the whole field of aeronautics comes under the jurisdiction of Parliament and the undertakings and activities of CP Air are in that field. Further, Mr. Leask and Mr. Hall do not take issue with the proposition of law that the labour relations of persons employed in a work or undertaking coming within the exclusive jurisdiction of Parliament are beyond the competency of a provincial legislature. However they argue that s. 8 of The Human Rights Code of British Columbia -- which is the section invoked in this complaint -- is not labour law

> legislation and does not interfere with a federal undertaking. Rather it is, they submit, a provincial law of general application bestowing statutory rights which people carry with them when they work in federal undertakings."

He concluded, at p. 398:

> "Section 8 of The Human Rights Code of British Columbia Act declares the right of every person to equality of opportunity in respect of his employment. Then it goes on to prohibit an employer from refusing to employ, or to continue to employ, or to porote any person, or discriminating against any person in respect of employment or a condition of employment without reasonable cause for the refusal or discrimination. In my opinion that is legislation respecting employer and employee relations. Therefore, it cannot apply to persons employed by CP Air.
>
> It therefore follows that this application succeeds upon the first ground and CP Air is entitled to a writ of prohibition prohibiting the board of inquiry from proceeding further in this matter."

The petitioner filed a number of documents in support of his contention that Flying Tankers, like CP Air in the Culley case, comes within the exclusive jurisdiction of Parliament and thus within the four-corners of the Culley case. These documents include a number of licences issued by the Federal Ministry of Transport, which both the company and its pilots are required to hold in order to carry on their business. The petitioner claims that Flying Tankers is in precisely the same position as CP Air in every aspect of its operations and particularly with regard to its employer-employee relationship.

The petitioner's second consideration is the extent to which

federal control constitutionally extends over the field of aeronautics. The petitioner cites a number of cases in support of its contention that the federal government has complete jurisdiction over the whole field of aeronautics. The leading case in this regard is the Privy Council decision of In Re the Regulation and Control of Aeronautics in Canada (1932) W.L. (P.C.), A.C. 54 which held that the whole field of legislation in relation to aerial navigation in Canada belongs to the Dominion. The Privy Council stated that as aerial navigation was a matter of national interest the Parliament of Canada must have the authority to enact the Aeronautics Act and its Regulations, particularly with respect to the licensing of pilots and aircraft and the regulation of air navigation generally. The Supreme Court of Canada in Konrad Johannesson and The Rural Municipality of West St. Paul and A.G. of Manitoba and A.G. of Canada (1952) 1 S.C.R. 292 at p. 303, after noting the Privy Council's comment that aerial navigation was a subject which affected the body politic of the Dominion, went on to say that "In those circumstances it would not matter that Parliament may not have occupied the field". The Johannesson case involved municipal control by virtue of a by-law over land sought to be used for a landing strip. It was determined there that the municipality, which derived its powers from the province, had no power of control with respect to land which was going to be so used. At p. 311 the court said:

> "It is no doubt true that legislation of the character involved in the provincial legislation regarded from the standpoint of the use of property is normally legislation as to civil rights, but use of property for the purposes of an aerodrome, or the prohibition of such use cannot, in my opinion, be divorced from the subject matter of aeronautics or aerial navigation

as a whole. If that be so, it can make no difference from the standpoint of a basis for legislative jurisdiction on the part of the province that Parliament may not have occupied the field."

In relation to an airline which operates solely within the boundaries of the province, such as Flying Tankers does, our Court of Appeal held in Jorgenson v. North Vancouver Magistrates, Pool, Stipendiary Magistrate, and North Vancouver (City) (1959) 28 W.W.R. 265 that the Aeronautics Act and Regulations enacted by the Parliament of Canada do regulate and control the operation of aircraft operating solely within a province.

The petitioner's final point is whether or not the employer-employee relationship in dispute here, falls within the federal jurisdiction over aeronautics. Referring again to the passage cited above in the Culley case, the petitioner reiterated Mr. Justice Macdonald's conclusion that Sec. 8 of the Human Rights Code is legislation respecting employer-employee relations . In further support of this point, counsel also cited our Court of Appeal in Western Stevedoring Co. Ltd. et al v. Pulp Paper & Woodworkers of Canada (1975) 61 D.L.R. (3d) 701 which held that the B.C. Labour Code could not apply to employers in the stevedoring business as that is a federal undertaking. The petitioner argues that just as the word "employer" in the B.C. Labour Code must be confined to employers whose relations with their employees are within provincial jurisdiction, so must the reference to an employer in Sec. 8 of the Human Rights Code refer only to employers who are within the legislative jurisdiction of the province.

While the respondent contends that Sec. 3 of the Human Rights Code is not, in pith and substance, legislation relating to labour relations but rather legislation relating to civil rights, he concedes that the Culley case goes against him on this point. He also agrees with the petitioner that aeronautics is a matter within federal jurisdiction. However, the thrust of the respondent's argument is that the petitioner in the case at bar is not engaged in the field of aeronautics but is in fact engaged in the forestry industry within this province. Such a classification of the petitioner's business would bring the matter entirely within the jurisdiction of the provincial authorities. The respondent argues that the federal government is entitled to grant licences concerning the aircraft of the petitioner company and its pilots but the granting of these licences does not remove the company into the federal jurisdiction entirely. Counsel states that mere licensing alone is not enough and that the court must look at the substance of the industry. As evidence of the provincial nature of the petitioner's business, the respondent first notes that the petitioner's shareholders include MacMillan Bloedel Limited, Pacific Logging Co. Ltd., Tahsis Company Ltd., B.C. Forest Products Ltd. and Western Forest Products Ltd., all of whom are provincial companies. These companies operate under provincial forest licences and are involved in the forest industry in this province. The petitioner provides a service to the above-noted companies and is essentially an adjunct to the forest industry. These services include fire patrol and security, timber cruising and engineering, environmental evaluation, and, on an infrequent basis, ambulance service, and from time to time senior

executive inspections. These services are performed exclusively for persons within the forestry industry within the province of British Columbia.

While the respondent concedes that at one time the petitioner applied to the Federal Department of Labour for approval of a wage averaging plan for its employees, he argues that the jurisdiction which the Federal Department of Labour took may well have been in error and such application could have been made to the provincial labour authorities. The respondent also notes that the employees are covered by Provincial Workers Compensation rules.

The first two cases which the respondent referred to have similar fact patterns and decisions. Both of these cases, Field Aviation Company Limited v. Alberta Board of Industrial Relations and International Association of Machinists and Aerospace Workers, Local Lodge 1579 (1974) 6 W.W.R. 596 (Alberta Supreme Court Appellate Division), and Butler Aviation of Canada Limited and International Association of Machinists and Aerospace Workers and C.L.R.B. and A.G. of Canada (1975) F.C. 590 involve companies which serviced federally licensed aircraft. In both of these cases the court had to consider whether or not the servicing of aircraft was an integral part of, or necessarily incidental to, the operation of a federal work. Both courts held that the employees were so intimately connected with aeronautics as to constitute a business coming under federal jurisdiction. The respondent in the case at bar, emphatically distinguishes both of these cases on the grounds that the petitioner is not engaged in similar activities as the employees in

the Field and Butler cases.

The case upon which the respondent relies most heavily, and which he feels is the most similar to the case at bar, is that of our Court of Appeal in Mark Fishing Company Ltd. et al v. United Fishermen & Allied Workers' Union et al (1972) 3 W.W.R. 641. That case involved a labour dispute between owners of fishing vessels and their crews, and raised the constitutional question of whether the dispute came within the jurisdiction of federal or provincial labour legislation. It was argued by the petitioner and the Minister of Justice that Sec. 91(12) of the B.N.A. Act, "Sea-coast and Inland Fisheries" conferred that authority upon parliament, and removed it from the provincial legislatures, where otherwise it would vest under head (13) of Sec. 92, "Property and civil rights in the Province". At p. 646 Davey, C.J.B.C., stated:

> "It may be that some aspects of employment on fishing vessels involved 'Navigation and shipping' under head (10) of S. 91 and so fall within the authority of Parliament, e.g., qualifications of captains, engineers, and seamen. However, those special aspects of maritime employment do not bear upon the broad question that arises here of whether Parliament or the Legislative Assembly has the power to legislate upon labour relations generally in the fishing fleet."

The respondent argues that while Parliament has the authority to grant fishing licences and aircraft pilots licences, this does not necessarily mean that the fishermen or the pilots are engaged in a federal undertaking. Chief Justice Davey goes on at p. 647 to state:

> "However, I consider the weight of authority supports the opinion that the subject of the authority conferred upon Parliament is the natural resource itself, and

> not the relation of employers and employees who are engaged in exploiting it."

In further regards to the federal licensing authority, the court in the Mark Fishing case continued at p. 651:

> "I can see the need of federal power to require the licensing and even to specify the qualifications of fishermen employed on the vessels in order to exclude fishermen who are not qualified in their trade, or who habitually and wilfully violate Regulations passed for the protection and preservation of the fish. But I am unable to see how the regulation of terms and conditions of employment as between crews and vessel owners can advance the protection and preservation of the fish, in view of Parliament's clear authority to limit catches, to specify the hours and seasons of fishing, and to provide for closures, etc. . . . There is no ground upon which it can be held that such a power is necessary, essential or vital to Parliament's exclusive control over sea-coast and inland fisheries, so labour relations in the fishing industry must belong to the provinces."

The analogy with the Mark Fishing case which the respondent makes is that although the petitioner is federally licensed, its activities such as fire fighting and ecological surveys, are part and parcel of the forest industry and cannot be classified as aeronautics.

The respondent also cites the case of Re Staron Flight (1972) Ltd. et al and Board of Industrial Relations (1977) 82 D.L.R. (3d) 213. In that case our Court of Appeal reversed the trial Judge's finding that the Provincial Payment of Wages Act could not apply to Staron because it was essentially aeronautics, a federal undertaking. At p. 215 Mr. Justice Hinkson states:

> "In the field of aeronautics Parliament could enact legislation which completely occupied

> the field. Then it would be necessary to consider whether or not a civil remedy arising from provincial legislation would be available to an employee against his employer for arrears of wages. But in the present case I conclude that while Parliament has to a certain extent occupied the field by the provisions of the Canada Labour Code, it has expressly not occupied the field in respect of civil remedies otherwise available to an employee against his employer for arrears of wages. Thus, the civil remedy provided by the Payment of Wages Act is available and can be invoked by Mr. Phillips against his employer."

Again the respondent, while conceding that this case is not precisely on point with his argument that the petitioner is not at all engaged in the business of aeronautics, argues that if the court finds the petitioner is engaged in the aeronautics business, then this particular aspect of aeronautics, the control of the employment contract by reason of discrimination based on age, is not occupied by the federal government.

In conclusion the respondent cited two cases which he stated were on the extreme other side of the Butler and Field cases which were cited above. In Murray Hill Limousine Service Ltd. v. Sinclair Batson et al (1966) C.L.L.R. 538 which involved baggage porters at the airport; and Re Colonial Coach Lines Ltd. et al and Ontario Highway Transport Board et al (1967) 62 D.L.R. (2d) 270 which involved a limousine service to the airport, the courts found that the activities of the companies in these two cases could not be classified as aeronautics. The respondent feels that the case at bar falls midway between these two cases which are clearly not aeronautics and the Field and Butler cases where the activities of the latter companies were considered an intimate part of the aeronautics business.

In reply to this point, the petitioner maintains that the activities of Flying Tankers comes within the definition of "commercial air service" given in Section 9 of the Aeronautics Act. That section reads:

> "'Commercial air service' means any use of aircraft in or over Canada for hire or reward."

After consideration of these arguments I must conclude that either the petitioner's business is classified as aeronautics and comes under federal authority; or its business is classified as simply part of the forest industry and comes under provincial authority; or the petitioner's business is classified as aeronautics to the extent that the federal authority has the power to grant licences, but is not involved in the labour relations of a business which is essentially engaged in the management of a provincial resource (i.e. the forest industry). The Culley case clearly states that Sec. 8 of the B.C. Human Rights Code involves labour relations which can have no effect over a federal employer. The petitioner maintains that you cannot split the federal jurisdiction over aeronautics on a functional basis. It maintains that although the activities of CP Air and Flying Tankers may be quite different, they are both essentially involved in the flying of planes for hire which must come under the federal aeronautics authority. However, in my respectful opinion, there is a very real difference in the activities of a large international commercial airline and a small provincial forest fire control aircraft company, which is essentially an arm of a number of provincial forest companies. I think the respondent's

point is well taken that the mere licensing by the federal authorities does not necessarily make the petitioner's business a federal undertaking.

Counsel for the respondent pointed out there are other examples of federal licensing of provincial undertakings. These include the transport licences issued to B.C. Rail and the B.C. Ferries, and the energy export licences which would be issued to B.C. Hydro. With regard to the licensing argument I think that the Mark Fishing case most closely applies. In that case our Court of Appeal felt that simply because the federal government controlled the qualifications of captains and seamen through their licensing power, this did not mean that they were necessarily involved in all the activities of the fishing fleet. I think that Culley can be distinguished simply on the basis of the differences in activities of the two airlines. Clearly a large organization like CP Air which has no attachment to any provincial undertaking, must come under the federal authority. However, a company such as Flying Tankers which is controlled and operated by five provincial forest companies for the purpose of working in one area of the forest industry, can, and in my opinion, does, come under the jurisdiction of the provincial Human Rights Code.

I accordingly reject the petitioner's application and hereby allow the respondent, Kellough, to pursue his civil remedies under the Human Rights Code and accordingly declare that the Board of Inquiry appointed pursuant to the Human Rights Code of British

point is well taken that the mere licensing by the federal authorition does not necessarily make the petitioner's business a federal undertaking.

Counsel for the respondent pointed out there are other examples of federal licensing of provincial undertakings. These include the transport licences issued to B.C. Rail and B.C. Ferries, and the energy export licences which would be issued to B.C. Hydro. With regard to the licensing argument I think the Mark Fishing case most closely applies. In that case our Court of Appeal felt that simply because the federal government controlled the qualifications of captains and seamen through their licensing power, this did not mean that they were necessarily involved in all the activities of the fishing fleet. I think that Culley can be distinguished simply on the basis of the differences in activities of the two airlines. Clearly a large organization like CP Air, which has no attachment to any provincial undertaking, must come under the federal authority. However, a company such as Flying Tankers, which is controlled and operated by five provincial forest companies for the purpose of working in one area of the forest industry, can, and in my opinion does, come under the jurisdiction of the provincial Human Rights Code.

The petitioners' application is dismissed.

Vancouver, B.C.
January 3, 1979.

Court of Appeal

BETWEEN:

FOREST INDUSTRIES FLYING TANKERS LIMITED and WILLIAM F. WADDINGTON

PETITIONERS (APPELLANTS)

AND

THOMAS KELLOUGH, BOARD OF INQUIRY, appointed pursuant to the Human Rights Code of British Columbia Act, S.B.C. 1973 (2nd Sess.) C. 119, and DIRECTOR, appointed pursuant to the Human Rights Code of British Columbia Act, S.B.C. 1973 (2nd Sess.) C.119

RESPONDENTS (RESPONDENTS)

REASONS FOR JUDGMENT

OF THE HONOURABLE

MR. JUSTICE HINKSON

Coram: The Honourable Mr. Justice Taggart
The Honourable Mr. Justice Carrothers
The Honourable Mr. Justice Hinkson

Counsel for the Appellants: D. M. M. Goldie, Esq., Q.C.
K. P. O'Neill, Esq.

Counsel for the Respondents: D. H. Vickers, Esq.,
P. G. Foy, Esq.

Vancouver, British Columbia
January 22, 1980.

Per Curiam

This is an appeal from a decision of a judge in Chambers dismissing the application of the petitioners for an order,

pursuant to the Judicial Review Procedure Act, S.B.C. 1975, c.25 to prevent a Board of Enquiry from taking any further proceedings in the matter of a notice of hearing dated the 25th of October 1978.

The facts upon which the petition is based do not appear to be in dispute Those facts are as follows:

1. The Petitioner Forest Industries Flying Tankers Limited ("Flying Tankers") is a company incorporated in British Columbia, under the British Columbia "Companies Act", on the 30th day of December, 1959. The Petitioner William F. Waddington ("Waddington") is Manager of Flying Tankers.

2. Flying Tankers operate two Martin Mars water bomber airplanes, a Grumman Goose airplane, and a Bell Jet Ranger helicopter for the purposes of forest fire suppression. In addition, the latter two aircraft are also used for fire patrol and security, timber cruising and engineering reconnaissance, environmental evaluation, ambulance service, and senior executive inspections.

3. Flying Tankers is licensed to operate its aircraft by the Canadian Transport Commission pursuant to the Aeronautics Act, R.S.C. 1970, C.2 as amended. Forming part of the Facts, set out as Schedule "A", are the current licenses, for rotating and fixed wing aircraft, of Flying Tankers.

4. The Department of Transport, Civil Aviation Branch, pursuant to the Aeronautics Act, issues an operating certificate to Flying Tankers. In order for Flying Tankers to carry on business it is necessary to have a valid operating certificate. Forming part of the facts, set out as Schedule "B", is a copy of the current operating certificate of Flying Tankers.

5. The operations base of Flying Tankers is Sproat Lake Seaplane Base, Vancouver Island, British Columbia and the aircraft owned by Flying Tankers do not operate outside of the geographical boundaries of the Province of British Columbia.

6. Flying Tankers has a total staff of 23 and of those 23, 6 are licensed pilots.

7. It is a legal prerequisite for continued employment for the pilots and crew who operate the aircraft of Flying Tankers

to possess a valid license issued by the Federal Ministry of Transport.

8. In 1966 the Federal Department of Labour, pursuant to the Canada Labour Code approved a 52 week averaging plan for employees of Flying Tankers. The 52 week averaging plan was requested because of the seasonal nature of the work performed by employees of Flying Tankers. Forming part of the facts, set out as Schedule "C"., is a copy of a letter dated July 18th, 1966 from the Director, Labour Standards Branch, Canada Department of Labour to Mr. R. A. Fulton, Labour Relations, MacMillan, Bloedel, and Powell River Limited. In 1966 MacMillan, Bloedel, and Powell River Limited changed its name to MacMillan Bloedel Limited. MacMillan Bloedel Limited is the majority shareholder of Flying Tankers.

9. The Respondent Thomas Kellough ("Kellough") commenced employment as a pilot with Flying Tankers in May of 1964.

10. Pursuant to the policy of Flying Tankers, Kellough was retired from his employment on his 60th birthday, December 12th, 1977.

11. On September 7th, 1977, Kellough filed a Complaint with the Director, Human Rights Code, Parliament Buildings, in Victoria, British Columbia alleging discrimination regarding his employment because of his age.

12. By letter dated October 13th, 1978 Flying Tankers was informed by Allan Williams, Minister of Labour of the Province of British Columbia, that a Board of Inquiry, pursuant to Section 16 of the Human Rights Code of British Columbia, S.B.C. 1973 (2nd Sess.) C. 119, had been appointed to deal with the allegations of Kellough. Forming part of the facts, set out as Schedule "D", is a copy of the October 13th, 1978 letter and the attachments thereto.

13. By Notice of Hearing dated October 25th, 1978 the Director, appointed pursuant to the Human Rights Code of British Columbia, notified Waddington and Flying Tankers that the Board of Inquiry will, commencing at 10:00 a.m. on December 12th-13th, 1978, hear the allegations of Kellough pursuant to Section 8 of the Human Rights Code of British Columbia against Flying Tankers and Waddington. Forming part of the facts, set out as Schedule "E" is a copy of a Notice of Hearing and the attachments thereto.

In 1977, when Mr. Kellough was approaching his 60th birthday he was asked to decide whether he would accept employment as supervisor of stores, at a reduction in salary,

or face termination of his employment on his 60th birthday. That request was made to Mr. Kellough as a result of a policy decision reached by the Directors of the company in 1975, without regard to him specifically.

Upon receipt of that request, Mr. Kellough filed a complaint pursuant to the provisions of s.8 of the Human Rights Code of British Columbia, in the following terms:

> I allege that I have been discriminated against regarding my employment because of my age.

Section 8 of the Human Rights Code provides as follows:

> 8. (1) Every person has the right of equality of opportunity based upon bona fide qualifications in respect of his occupation or employment, or in respect of an intended occupation, employment, advancement, or promotion; and, without limiting the generality of the foregoing,
>
> (a) no employer shall refuse to employ, or to continue to employ, or to advance or promote that person, or discriminate against that person in respect of employment or a condition of employment; and
>
> (b) no employment agency shall refuse to refer him for employment,
>
> unless reasonable cause exists for such refusal or discrimination.
>
> (2) For the purposes of subsection (1),
>
> (a) the race, religion, colour, age, marital status, ancestry, place of origin, or political belief of any person or class of persons shall not constitute reasonable cause;

(al) a provision respecting Canadian citizenship in any Act constitutes reasonable cause;

(b) the sex of any person shall not constitute reasonable cause unless it relates to the maintenance of public decency;

(c) a conviction for a criminal or summary conviction charge shall not constitute reasonable cause unless such charge relates to the occupation or employment or to the intended occupation, employment, advancement, or promotion, of a person

(3) No provision of this section relating to age shall prohibit the operation of any term of a bona fide retirement, superannuation, or pension plan, or the terms or conditions of any bona fide group or employee insurance plan, or of any bona fide scheme based upon seniority.

Before the learned Chamber judge the petitioners contended that Flying Tankers comes exclusively within the jurisdiction of Parliament upon the basis that it is engaged in the field of aeronautics. The petitioners contended that therefore the Province had no right to deal with the labour relations of that company. Before the learned Chamber judge the respondent agreed that aeronautics is a matter within federal jurisdiction, however, the respondent contended that Flying Tankers is not engaged in the field of aeronautics but rather is engaged in the forest industry within British Columbia. The learned judge acceded to that submission and dismissed the petition.

Three issues were raised on the appeal. First it was contended on behalf of the appellants that upon the basis of the decisions in *In Re the Regulation and Control of Aeronautics*

in Canada [1932] A.C. 54 and *Konrad Johannesson and The Rural Municipality of West St. Paul and Attorney-General of Manitoba and Attorney-General of Canada* [1952] 1 S.C.R. 292 that the whole field of aeronautics is under the jurisdiction of the federal government. In *Construction Montcalm Inc. v. The Minimum Wage Commission et al* [1979] 1 S.C.R. 754, Beetz, J. delivering the judgment of the majority said at p. 769:

> The main submission made on behalf of *Montcalm* starts from the premise that aeronautics is a clsss of subjects which comes under exclusive federal authority; *Johannesson v. The Rural Municipality of West St. Paul* [1952] 1 S.C.R. 292.

He continued at p. 770:

> The construction of an airport is not in every respect an integral part of aeronautics. Much depends on what is meant by the word "construction". To decide whether to build an airport and where to build it involves aspects of airport construction which undoubtedly constitute matters of exclusive federal concern: the *Johannesson* case.

Thus it has been affirmed that the subject of aeronautics is a matter of exclusive federal concern. On this appeal counsel for the respondent did not contend otherwise. Rather he sought to support the conclusion of the learned Chamber judge that Flying Tankers is not engaged in the field of aeronautics but is engaged in the forest industry within British Columbia.

It is not suggested by the petitioners that s.8 of the Human Rights Code of British Columbia is ultra vires the

legislature. Thus s.8 of the Human Rights Code would apply to Flying Tankers as an undertaking, service or business operating within the Province, unless the operations and normal activities of Flying Tankers can be characterized as federal undertakings, services or businesses. In *Four B Manufacturing Limited v. United Garment Workers of America and Ontario Labour Relations Board et al*, a judgment of the Supreme Court of Canada pronounced December 21, 1979, Beetz, J. delivering the judgment of the majority said at p. 3:

> In my view the established principles relevant to this issue can be summarized very briefly. With respect to labour relations, exclusive provincial legislative competence is the rule, exclusive federal competenance is the exception. The exception comprises, in the main, labour relations in undertakings, services and businesses which, having regard to the functional test of the nature of their operations and their normal activities, can be characterized as federal undertakings, services or businesses ...

Adopting that approach and applying that test to the facts of this matter, it is clear that the operations and normal activities of Flying Tankers are to provide a commercial air service. Flying Tankers provides a specialized type of service to its customers, but it seems to me that does not detract from the essence of its operations, namely, the providing of air services on a commercial basis. The fact that it provides these specialized services to companies engaged in the forest industry does not thereby change the essential nature of the company's operations. Throughout, the operations of Flying Tankers remain the same, that is, the providing of specialized air services.

For these reasons I conclude that the learned Chamber judge erred in reaching the conclusion that Flying Tankers was not engaged in the field of aeronautics but was engaged rather in the forest industry within British Columbia.

The second issue raised on the appeal was, assuming that Flying Tankers was engaged in the field of aeronautics and that that field was within the jurisdiction of Parliament, whether valid Provincial legislation could nevertheless apply to an employee of Flying Tankers.

At the time that the respondent filed his complaint the Canada Labour Code contained, in Part I, provisions with regard to fair employment practices. In particular, s.5(1) provided:

> No employer shall refuse to employ or to continue to employ or otherwise discriminate against any person in regard to employment or any term or condition of employment because of his race, national origin, colour or religion.

Counsel for the respondent contended that until Parliament passed legislation in the field of aeronautics dealing with discrimination upon the basis of age, the provisions of the Human Rights Code of British Columbia should apply.

The authorities to which I have already referred, in dealing with the first issue, would appear to afford no basis for such a proposition. In delivering the judgment of the Privy Council in the *Aeronautics* case [1932] A.C. 54, Lord Sankey, L.C. said at p. 77:

> ... it would appear that substanially the whole field of legislation in regard to aerial navigation belongs to the Dominion. There may be a small portion of the field which is not by virtue of specific words in the British North America Act vested in the Dominion; but neither is it vested by specific words in the Provinces. As to that small portion it appears to the Board that it must necessarily belong to the Dominion under its power to make laws for the peace, order and good government of Canada. Further, their Lordships are influenced by the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under s.132 are matters of national interest and importance; and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion.

Subsequently in the *Johannesson* case Kellock, J. said at p. 311:

> It is no doubt true that legislation of the character involved in the provincial legislation regarded from the standpoint of the use of property is normally legislation as to civil rights, but use of property for the purposes of an aerodrome, or the prohibition of such use cannot, in my opinion, be divorced from the subject matter of aeronatucs or aerial navigation as a whole. If that be so, it can make no difference from the standpoint of a basis for legislative jurisdiction on the part of the province that Parliament may not have occupied the field.
>
> Once the decision is made that a matter is of national interest and importance, so as to fall within the peace, order and good government clause, the provinces cease to have any legislative jurisdiction with regard thereto and the Dominion jurisdiction is exclusive. If jurisdiction can be said to exist in the Dominion with respect to any matter under such clause, that statement can only be made because of the fact that such matters no longer come within the classes of subject assigned to the provinces. I think, therefore, that as the matters attempted to be dealt with by the provincial legislation here in question are matters inseparable from the field of aerial navigation, the exclusive jurisdiction of Parliament extends thereto. The non-severability of the subject matter of "aerial navigation" is well illustrated by the existing Dominion legislation referred to below, and this legilsation equally demonstrates that there is no room for the operation of the particular provincial legislation in any local or provincial sense.

While those decisions make it clear that Parliament has an exclusive jurisdiction in the field of aeronautics, they do not resolve the issue at the heartof this matter, which is whether intra vires provincial laws are constitutionally applicable to a pilot employed by a commercial air service. This issue was dealt with by Beetz, J. in the *Montcalm* case. He said at p. 768:

> The issue must be resolved in the light of established principles the first of which is that Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule: *Toronto Electric Commissioners v. Snider* [1925] A.C. 396. By way of exception however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject: *In re the validity of the Industrial Relations and Disputes Investigation Act* [1955] S.C.R. 529 (the *Stevedoring* case). It follows that primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it demonstrated that federal authority over these matters is an integral element of such federal competence; thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one;... The question whether an undertaking, service or business is a federal one depends on the nature of its operation: ... But, in order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of "a going concern"...

Counsel for the appellants contended that, applying that test to the facts of the present matter, it should be held that Parliament has exclusive jurisdiction over the labour relations between the operator of a commercial air service and its pilots. In support he relied upon the judgment in the case of *In Re the Validity of the Industrial Relations and Disputes Investigation Act* (the *Stevedoring* case) [1955] S.C.R. 529 and particularly the judgment of Abbott, J. at 592 where he said:

> ...the determination of such matters as hours of work, rates of wages, working conditions and the like, is in my opinion a vital part of the management and operation of any commercial or industrial undertaking. This being so, the power to regulate such matters, in the case of undertakings which fall within the legislative authority of Parliament lies with Parliament and not with the Provincial Legislatures.

Applying the tests laid down by those decisions to the facts of the present matter, it is clear that the subject of labour relations in respect of an enterprise engaged in the field of aeronautics is within the exclusive jurisdiction of Parliament. Thus, the provisions of s.8 of the Human Rights Code of British Columbia, although they are intra vires the legislature, do not have application to a pilot employed by a commercial air service.

The third issue was as to whether or not the provisions of s.8 of the Human Rights Code of British Columbia involved labour relations legislation. In dealing with this issue counsel for the respondent submitted that the proper approach was to first

identify the "pith and substance" of s.8 of the Human Rights Code. He contended that the pith and substance of that section was discrimination. Upon that basis he contended that the Human Rights Code was aimed not at regulating labour relations, but rather at protecting the statutory right to freedom of all persons within the Province, including employees of federal undertakings.

Counsel for the respondent then challenged the decision in *Re Culley and Ca nadian Pacific Air Lines Limited et al* [1977] 1 W.W.R. 393 and submitted that case was wrongly decided. Macdonald J. (as he then was) said at pp. 397-8:

> Now The Human Rights Code of British Columbia Act in nine sections prohibits various discriminatory practices. Some are totally unrelated to the employer-employee relationship. But s.6, for example, is not in that category. It prohibits an employer discriminating, as to rates of pay, between male and female employees. And the Parliament of Ca nada has enacted the same prohibition in Pt. II of the Canadian Labour Code, R.S.C. 1970, c.L-1. Section 8 of The Human Rights Code of British Columbia Act declares the right of every person to equality of opportunity in respect of his employment. Then it goes on to prohibit an employer from refusing to employ, or to continue to employ, or to promote any person, or discriminating against any person in respect of employment or a condition of employment without reasonable cause for the refusal or discrimination. In my opinion that is legislation respecting employer and employee relations. Therefore, it cannot apply to persons employed by CP Air.

While in one sense s.8 may be regarded as dealing with discrimination, it does so in the context of regulating relations between employers and employees. In that sense, it deals with labour relations. In my view the *Culley* case

was correctly decided and has application to the present matter. Thus s.8 has no application to the respondent.

For these reasons I would allow the appeal.