The Duty to Accommodate Senior Workers: Its Nature, Scope and Limitations

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Canada's labour force is increasingly relying on senior workers who are dealing with disabilities and various age-related needs which are not often accommodated. In light of these challenges, the author advocates a strong senior workers' right to participate in the labour market. The narrow understanding of workplace age discrimination typical of current analyses fails to explain when and why age-based distinctions might be harmful, and tends to emphasize the high cost of accommodating senior workers. The result is to limit the duty to accommodate from the outset. The author examines this issue through the lens of her innovative Dignified Lives Approach to age discrimination, which centres on the argument that every person deserves to be treated with equal concern and respect at any given point in time. The five principles comprising the Dignified Lives Approach help determine when a distinction amounts to discrimination. The principles illustrate that advancing the right of senior workers to age equality includes a broad and extensive duty to accommodate their workplace needs, whether these needs stem from pre-existing disabilities or are age-related. Two key points result: first, the duty to accommodate younger workers with disabilities should apply to senior workers with disabilities; and second, the duty to accommodate senior workers should extend to accommodating their age-related needs apart from any disability. Since the duty to accommodate is already limited by the doctrine of undue hardship, there is no reason to deny accommodation. It may justifiably be limited on a case-by-case basis, but only when strong evidence of undue hardship is presented.

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Introduction

The workforce is now comprised of a growing number of senior workers,[1] because people are living longer and staying healthier than ever before.[2] The failure of employers to provide workplace accommodations in light of this demographic change has become an increasingly topical issue. The disability-related needs of senior workers and their age-related needs are not being adequately addressed.

1. Although I prefer the expression "people at advanced age", I will use the term "senior" for the sake of convenience.

2. According to a medium-variant projection, global life expectancy at birth increased from 58 years for 1970–1975 to 67.2 years for 2005–2010, and will reach 75.4 years by 2045–2050. Projected life expectancy in developed countries is much higher. In Canada, life expectancy at birth was 80.7 years in 2005–2010, and is projected to reach 85.3 years by 2045–2050. A significant share of senior Canadians report themselves to be in good or excellent health, and until age 75 almost all of them can carry on daily life activities without assistance. See Population Division, *World Population Prospects: The 2006 Revision, Volume I: Comprehensive Tables*, UNDEASOR, 2007, UN Doc/ST/ESA/SER.A/261 at 14, 17. See also Statistics Canada, *A Portrait of Seniors in Canada* by Martin Turcotte & Grant Shellenberg (Ottawa: Stats Can, 2006) at 46–48.

As the population ages,[3] the labour market will increasingly rely on senior workers,[4] who are more likely than younger workers to have a disability that may affect their job performance.[5] While disability rates and functional limitations among seniors have dropped significantly in the last two decades,[6] chronic health conditions (such as arthritis, hypertension, heart disease and diabetes) and sensory or mobility-related disabilities are still relatively frequent among them and may pose major challenges to continued employability.[7] At the same time, medical advances and

3. According to the United Nations, 10.3% (673 million) of the world population was aged 60 or above in 2005. By 2050, that proportion is expected to more than double, reaching 21.8% (2 billion). By contrast, the number of children aged 0–14 years is expected to decline from 1.84 billion to 1.82 billion during the same period, a drop from 28.3% to 19.8% of the total population. In Canada, the share of people aged 60 years and above will increase from 17.8% to 31.9%, whereas the share of children aged 0–14 years will drop from 17.6% to 15.6%. See Population Division, *supra* note 2 at 2–3 and tables I.3 and A.10.

4. The global share of those aged 50–64 years within the population aged 15–64 is projected to grow rapidly from 17% in 2005 to 27.1% in 2050. In the developed countries, those aged 50–64 are expected to represent almost one third (31.2%) of the working age population by 2050. In Canada, the median age of the labour force rose from 39.5 years in 2001 to 41.2 years in 2006. The proportion of the working-age population aged 55–64 is expected to grow from 16.9% in 2006 to more than 20% in 2016. In other words, more than one in five workers will be in the 55–64 age-group. See *World Economic and Social Survey 2007: Development in an Ageing World*, UNDEASOR, UN Doc E/2007/50/Rev.1 at 24; Statistics Canada, *Canada's Changing Labour Force, 2006 Census* (Ottawa: StatCan, 2007) at 25; Statistics Canada, *2006 Census: Portrait of the Canadian Population in 2006 by Age and Sex: Findings* by Laurent Martel & Éric Caron Malenfant (Ottawa: StatsCan, 17 July 2007).

5. See Antoine Laville & Serge Volkoff, "Elderly Workers" in Jeanne Mager Stellman, ed, *Encyclopedia of Occupational Health and Safety*, 4th ed (Geneva: International Labour Office, 1998) 29.83 (for an overview of the expected decline in physical and cognitive abilities due to aging, including changes in muscular strength, vision, hearing and mental functioning). According to the 2001 Participation and Activity Limitation Survey the overall disability rate in the working age population (15–64) was about 10%. It was about 4% for those 15–24, about 9% for those 25–54, and about 22% for those 55–64. See Cara Williams, "Disability in the Workplace" in Statistics Canada, *Perspectives on Labour and Income* 7:2 (Ottawa: StatCan, February 2006). See also Diane Galarneau & Marian Radulescu, "Employment Among the Disabled" in Statistics Canada, *Perspectives on Labour and Income*, 10:5 (Ottawa: StatCan, May 2009) 5.

6. See US Census Bureau, *65+ in the United States: 2005* by Wan He et al (Washington, DC: US Department of Commerce, December 2005) at c 3 (summarizing of studies on the reasons for these declines in the US).

7. See e.g. Turcotte & Schellenberg, *supra* note 2 at 47–48 (Canadian findings); He et al, *supra* note 6 at c 3 (United States findings).

technological innovation are substantially increasing the proportion of senior people with disabilities who are now able to participate in labour markets by, for example, working from their homes.[8] However, those options are not often implemented by employers.

In addition to these disability-related needs requiring accommodation, seniors also have age-related needs which may fall short of a disability. For example, senior workers may require more frequent rest periods to combat a generally higher incidence of fatigue than younger workers. A growing number of senior workers express the wish to postpone retirement,[9] especially in light of the negative impact of the global economic crisis on pension funds and individual savings.[10] Many jurisdictions, including most Canadian provinces, have recently abolished mandatory retirement,[11]

8. Among Canadians aged 65, only 15% report a disability affecting the ability to work due to medical advances, accommodation and technological innovations. Ontario, Policy and Education Branch, *Discrimination and Age: Human Rights Issues Facing Older Persons in Ontario*, (Toronto: Ontario Human Rights Commission, 2000) at 15. See also Morley Gunderson, "Implications of the Duty to Accommodate for Industrial Relations Practices" (1992) 1 Can Labour LJ 294 at 308.

9. According to a national survey of 1 500 Canadians, a growing number expect to work beyond 65. Only a third expect to retire before 65 and almost one in five expect to continue working after 70. See The Gandalf Group, "Consumerology Report: Retirement", (5 November 2010), online: The Gandalf Group <http://www.gandalfgroup.ca/consumerology.html>); Benoît-Paul Hébert & May Luong, "Bridge Employment" in *Perspectives on Labour and Employment* 9:11 (Ottawa: StatCan, November 2008).

10. See e.g. Desjardins, *Rethink Retirement: 2008 Survey of Canadians' Preparedness for Life after Work*, online: Desjardins <http://www.desjardins.com/en/a_propos/publications/repenser-retraite/repenser-retraite-2008.pdf>. The initial survey found that the majority of Canadians felt confident about their financial security and retirement plans. A follow-up survey in October 2008 found that 42% of those over 40 (50% of women, compared to 36% of men) wished to postpone retirement by an average of 5.9 years. See Sudipto Banerjee, *Retirement Age Expectations of Older Americans Between 2006 and 2010*, (2011) 32:12 EBRI Notes 2, online: SSRN <http://www.ssrn.com> (a similar study in the United States).

11. See Martin Lyon Levine, *Age Discrimination and the Mandatory Retirement Controversy* (Baltimore: The Johns Hopkins University Press, 1988); Rachael Patterson, "The Eradication of Compulsory Retirement and Age Discrimination in the Australian Workplace: A Cause for Celebration and Concern" (2004) 3 Elder L Rev 1; CT Gillin, David MacGregor & Thomas R Klassen, eds, *Time's up! Mandatory Retirement in Canada* (Toronto: James Lorimer, 2005). The average retirement age in Canada has been relatively stable (at around 62) since 2004. However, a study based on methods used to calculate life expectancy demonstrated a significant increase in the expected length of working life for a 50-year-old worker, from 14 years in 1977 to 16 years in 2008. See Yves Carrière &

and almost all industrialized countries have increased or propose to increase the age of eligibility for full public pension and social security benefits.[12] Some countries have introduced penalties for early retirement and incentives for delayed retirement.[13] This suggests that demands for accommodation of age-related needs will become increasingly common.[14]

The current lack of accommodation for disability-related needs and age-related needs can be construed as a form of discrimination because employers are under a legal duty to accommodate workers' needs. Anti-discrimination laws are widespread around the globe, prohibiting differential treatment that amounts to discrimination on the basis of different grounds such as sex, race, religion or age in spheres such as employment, housing and provision of services. Some laws not only require various actors, including employers, to refrain from discrimination but also to actively promote equality by taking into consideration the special needs of the members of a protected group and ensure that they are reasonably accommodated.

Despite the demonstrated practical importance of the legal duty to accommodate senior workers, its theoretical underpinnings have yet to

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Diane Galarneau, "Delayed Retirement: A New Trend?", in Statistics Canada, *Perspectives on Labour and Income* 23:4 (Ottawa: StatCan, 2011).

12. In the United States, the Normal Retirement Age under the *Social Security Act*, 1935, 42 USCA § 301 et seq is expected to gradually increase from 65 in 2000 to 67 by 2022. In Canada, the federal government has recently introduced changes to the Old Age Security (OAS) pension and the Guaranteed Income Supplement (GIS) which will gradually increase the age of eligibility, from 65 to 67 between 2023 and 2029. Based on simulations of demographic, economic and political scenarios for the year 2050, it is expected that the age of eligibility for full public pension or social security benefits will have increased while contribution rates will have risen in many Organisation for Economic Co-operation and Development (OECD) countries. See Vincenzo Galasso, "Postponing Retirement: The Political Push of Aging" (2008) 92:10–11 Journal of Public Economics 2157.

13. See Changes to the Canada Pension Plan (Service Canada, 2010), online: Service Canada <http://www.servicecanada.gc.ca/eng/isp/pub/factsheets/ISPB-348-11-10_E.pdf>. Similar changes were made in the Quebec Pension Plan. See Bill 10, *An Act respecting the implementation of certain provisions of the Budget Speech of 17 March 2011*, 2d Sess, 39th Leg, Quebec, 2011. See Geneviéve Reday-Mulvey, *Working Beyond 60: Key Policies and Practices in Europe* (New York: Palgrave Macmillan, 2005) at 49–54 (for European changes).

14. Between 1996 and 2006, the employment rate for Canadians 65 and older increased from 12% to 15% for men and from 4% to 6% for women. See Sharanjit Uppal, "Labour Market Activity among Seniors" in Statistics Canada, *Perspectives on Labour and Income* 11:7 (Ottawa: StatCan, July 2010) 5.

be constructed in great detail. Since there is scarce legal literature and case law which examines the justification for or application of this duty, its nature and scope remain undefined. This paper applies an innovative approach to age discrimination which I have set out elsewhere—namely, the Dignified Lives Approach.[15] This approach considers the theoretical foundations of the duty to accommodate senior workers with a view to providing a clearer understanding of the nature, scope and limitations of the duty in the Canadian context. Under the Dignified Lives Approach, every person has a right to be treated with equal concern and respect at any point in time, regardless of age. It follows that the duty to accommodate senior workers should be sufficiently broad and extensive to provide meaningful protection against age discrimination and its associated wrongs. As the duty to accommodate disability or religion-related needs has been interpreted liberally, so should the duty to accommodate age-related needs.

Part I expands upon the Dignified Lives Approach as a framework providing a broader understanding of age and disability discrimination. Parts II and III clarify the nature and scope of the duty to accommodate seniors in the workplace by addressing two central questions. First, does the duty to accommodate younger workers with disabilities similarly apply to senior workers with disabilities? While the duty to accommodate workers with disabilities at any age is well established in Canadian law, senior workers with disabilities are often treated differently than younger workers with disabilities. Second, what is the nature and scope of the duty to accommodate senior workers who have age-related rather than disability-related needs? While the case law focuses on accommodating disability-related needs of senior workers, it has failed to give due consideration to age-related needs, especially in cases of adverse effect discrimination. Both questions are highly contestable and have not yet been thoroughly discussed in the legal literature. Part IV maintains that while the Dignified Lives Approach to age discrimination advocates a comprehensive and robust duty to accommodate senior workers, it also helps to identify factors that may warrant limiting the scope of the duty on a case-by-case basis. This section also stresses the advantages of accommodation for senior workers, younger co-workers, employers and

15. "The Unequal Right to Age Equality: Towards a Dignified Lives Approach to Age Discrimination" (2012) 25:2 Can JL & Jur 243 [Alon-Shenker, "Unequal Right"].

society as a whole, and seeks to justify the imposition of its reasonable costs on employers and the state.

I. Theoretical Underpinnings of the Duty to Accommodate Senior Workers

A. Problems with a Narrow Duty to Accommodate Senior Workers

The nature and scope of the duty to accommodate senior workers hinges on a determination of which of their interests ought to be protected and how these interests should be balanced against those of other workers, employers and society as a whole. If the right of senior workers to age equality is important and fundamental, the duty to accommodate them should be broad and extensive.

Proponents of a narrow duty to accommodate senior workers rely heavily on two major assertions. First, they argue that discrimination on the basis of age is neither as severe nor as outrageous as other forms of discrimination.[16] While one of the aims of anti-discrimination laws is to eradicate historical, pre-existing disadvantages, stereotypes, prejudice or vulnerabilities of individuals and groups, the claim is that there is no history of hostility toward senior workers as there has been towards members of other protected groups.[17] For those who hold this view, it follows that the right to age equality is not as fundamental or as important

16. See e.g. Howard Eglit, *Elders on Trial: Age and Ageism in the American Legal System* (Gainesville, FL: University of Florida Press, 2004) at 18–20, 23–27; *McKinney v University of Guelph*, [1990] 3 SCR 229 at 297, 76 DLR (4th) 545 citing John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980) at 160:

> Racial and religious discrimination and the like are generally based on feelings of hostility or intolerance. On the other hand, . . "the fact that all of us once were young, and most expect one day to be fairly old, should neutralize whatever suspicion we might otherwise entertain respecting the multitude of laws . . . that comparatively advantage those between, say, 21 and 65 vis-à-vis those who are younger or older".

17. See Bill Bytheway, *Ageism* (Buckingham, UK: Open University Press, 1995) at ch 2; Bruce M Burchett, "Employment Discrimination" in Erdman B Palmore, Laurence Branch & Diana K Harris, eds, *Encyclopedia of Ageism* (New York: Haworth Pastoral Press, 2005) 122 at 123; Eglit, *supra* note 16 at 24–27.

as other equality rights. Second, ending the duty of accommodation at a certain advanced age does not amount to wrongful age discrimination because senior workers, unlike younger workers, have already enjoyed opportunities in the workplace and are currently eligible for pensions which replace their employment income. It follows that workers aged 65 and above have less right to participate in the workplace and consequently to be accommodated.[18] For these reasons, "losing one's employment due to age does not have a significant negative effect on dignity given the work lifecycle and the general expectation that people will age".[19] Furthermore, we all age, and as more and more senior workers participate in the workplace, expanding the duty to accommodate them may impose undue hardship on employers.[20] In light of these considerations, some advocate a narrow duty to accommodate because they believe that considerable weight should be accorded to the costs associated with accommodation.

This view is also reflected in the fact that age-based distinctions are widely accepted and are found in many laws. For example, several Canadian provinces prohibit age discrimination in the provision of benefits, such as health or life insurance, only to workers aged 18 to 64. This allows employers to provide workers aged 65 and over with fewer

18. See Julie McAlpine Jeffries, *The Duty to Accommodate Aging Workers in Employment* (LLM Thesis, University of Toronto, Faculty of Law, 2008) at 100–02 [unpublished], reprinted in Julie McAlpine Jeffries, *The Duty to Accommodate in Employment: Applying the Principles of Accommodating Disabilities to the Accommodation of Age* (Germany: Lambert, 2010).

19. *Ibid* at 124.

20. *Ibid* at 107–08, 120.

benefits or none at all.[21] Similarly, statutory loss of earning benefits for injured workers end at certain advanced ages in some provinces.[22]

These assertions advance a narrow understanding of age discrimination, by focusing on the total share of resources allocated to each individual and by comparing the treatment of the young and the senior on the basis of their entire lifetime experience.[23] The idea is that if the younger worker receives the same benefits and bears the same burdens in the future as the senior receives and bears now, the distinction on the basis of age is not

21. See e.g. *Human Rights Code*, RSO 1990, c H-19, ss 25(2.1)–(2.3); *Employment Standards Act*, SO 2000, c 41, s 44(1); O Reg 286/01, ss 1, 7–8. These provisions were subject to constitutional challenge in *Chatham-Kent (Municipality of) v Ontario Nurses' Assn (O'Brien Grievance)* (2010), 202 LAC (4th) 1, 88 CCPB 95. They were found to be in violation of section 15 but justified under section 1 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c 11. For a critique of this decision, see Pnina Alon-Shenker, "'Age is Different': Revisiting the Contemporary Understanding of Age Discrimination in the Employment Setting" (2012) 17:1 CLELJ [forthcoming] [Alon-Shenker, "Revisiting"].

22. See e.g. *Workplace Safety and Insurance Act*, SO 1997, c 16, Schedule A, ss 43(1)(b)–(c). Workers who are injured when they are less than 63 years old receive loss of earning benefits until they reach 65, while workers who are injured when they are 63 or over will receive benefits for a maximum of only two years. The Workplace Safety and Insurance Appeals Tribunal in Ontario held that s 43(1)(c) did not violate section 15 because the distinction was not discriminatory. See *Decision No 512/06*, 2011 ONWSIAT 2525 (available on QL). For a critique of this decision, see Alon-Shenker "Revisiting", *supra* note 21. For similar provisions in other provinces, see *The Workers' Compensation Act*, SS 1979, c W-17.1, s 68(2); *Workers' Compensation Act*, RSNB 1973, c W-13, s 38.2(5). Note that the Saskatchewan Court of Queen's Bench ruled that a provision of that province's statute, which denies loss of earnings benefits to workers over the age of 65 and substitutes substantially lower annuity benefits, violated section 15(1) of the *Charter* yet was justified under section 1 because creating a distinction between lost earning benefits and retirement benefits was a reasonable and rational objective and the means employed by the Act were proportional. *Zaretski v Saskatchewan (Workers' Compensation Board)* (1997), 156 Sask R 23, 148 DLR (4th) 745 (QB), aff'd (1998), 168 Sask R 57, 163 DLR (4th) 191 (CA), leave to appeal to SCC refused, 26727 (June 23, 1998). Finally, the New Brunswick Court of Appeal ruled that a provision, which terminates the payment of long-term compensation benefits once an injured worker reaches age 65, did not violate section 15(1) of the *Charter* because it did not harm the human dignity of citizens over 65, nor did it marginalize senior workers on the basis of age. *Laronde v New Brunswick (Workplace Health, Safety and Compensation Commission)*, 2007 NBCA 10, 280 DLR (4th) 97.

23. This approach was named "Complete Lives Egalitarianism". See Dennis McKerlie, "Equality between Age-Groups" (1992) 21:3 Phil Pub Affairs 275; Alon-Shenker "Unequal Right", *supra* note 15 at 247–49.

discriminatory. However, age-based distinctions are often associated with significant wrongs, such as oppression, economic deprivation and social exclusion, which cannot be compensated for by future or past benefits. Furthermore, the presumption that senior workers can rely upon publicly or privately funded pensions is rebuttable at a time when the Canadian Pension Plan benefits have been reduced, defined benefit pension plans have been converted to defined contribution plans, and the social safety net of Old Age Security plans and the General Income Supplement has been eroded.[24]

Finally, some argue that since accommodation encourages seniors to stay in the workplace, this means fewer jobs and promotion opportunities for younger workers. Similar arguments have been made about the implications for younger workers of ending mandatory retirement.[25] These arguments can be rebutted on several grounds. First, there is no empirical support for the assumption that young employees and senior employees are interchangeable, or that there is a zero-sum relationship between employment opportunities for them.[26] Since labour markets are flexible and dynamic, the proposition that any job held by a senior worker is one less job available for a younger worker has been widely rejected in economic literature.[27] To the extent that any such adverse effect might exist, labour force demographics indicate that it will be reduced over time as the number of young workers declines.[28] Second, from a human rights perspective, generating job opportunities for younger workers should not constitute a legitimate aim justifying the infringement of a fundamental right to age equality. Finally, younger workers can benefit

24. See *supra* notes 12–13. See also Michael C Wolfson, *Projecting the Adequacy of Canadians' Retirement Income: Current Prospects and Possible Reform Options*, Study No 17 (Montreal: Institute for Research on Public Policy, 2001) (discussing the inadequacy of Canadians' retirement income).

25. See e.g. *McKinney*, *supra* note 16 at 294–95.

26. See Adriaan S Kalwij, Arie Kapteyn & Klaas De Vos, "Early Retirement and Employment of the Young", RAND Labour and Population Working Paper Series No WR-679 (March 2009), online: SSRN <http://www.ssrn.com>.

27. This proposition is known as the "lump of labour fallacy". See Jonathan R Kesselman, "Challenging the Economic Assumptions of Mandatory Retirement" in Gillin et al, *supra* note 11 161 at 170–71.

28. See *supra* note 4; *infra* note 104. Younger generations are also spending more time in school and university, so they are entering the labour market at later ages than their parents.

from interaction with senior workers, who can serve as trainers and mentors, and ensure that their valuable knowledge and experience are transferred to younger workers.[29]

B. The Dignified Lives Approach: The Basis for a Broader Duty

In response to the arguments for a narrow understanding of discrimination against senior workers, I have elsewhere proposed an alternative theoretical framework for identifying cases of wrongful age discrimination: the Dignified Lives Approach.[30] This paradigm assumes that all human beings are of equal moral worth, and advocates treating each individual with equal concern and respect at any point in her life. It assesses age inequality through a set of five principles stemming from the theory's foundational notion of equal concern and respect.[31] These five principles set out rights of workers, and therefore impose corresponding obligations on employers that should be incorporated into the duty to accommodate.

29. See Job Accommodation Network, *Workplace Accommodations: Low Cost, High Impact* (US Department of Labor, Office of Disability Employment Policy, 2010), online: Job Accommodation Network <http://AskJAN.org> [JAN study]. See also Sloan Center on Aging & Work, *Flex Strategies to Attract, Engage & Retain Older Workers* (2012), online: Boston College <http://www.bc.edu> (an American study that found that workplace flexibility initiatives, such as offering part time positions, hiring retirees as consultants or temporary workers, and offering other flexible work arrangements, are highly beneficial to both senior workers and their employers when properly matched to employee needs).

30. Alon-Shenker, "Unequal Right", *supra* note 15. This integrates equality theories and empirical evidence on the wrongs that are associated with age discrimination against senior workers. It draws on the work of Sandra Fredman, "The Age of Equality" in Sandra Fredman & Sarah Spencer, eds, *Age as an Equality Issue* (Oxford: Hart, 2003) 21. It also draws upon more general work on discrimination and equality. See e.g. Elizabeth S Anderson, "What is the Point of Equality" (1999) 109:2 Ethics 287; Harry Frankfurt, "Equality as a Moral Idea" in *The Importance of What We Care About: Philosophical Essays* (Cambridge: Cambridge University Press, 1988) 134; Donna Greschner, "The Purpose of Canadian Equality Rights" (2002) 6:2 Rev Const Stud 291; Sophia R Moreau, "The Wrongs of Unequal Treatment" (2004) 54:3 UTLJ 291; John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001); Denise Réaume, "Discrimination and Dignity" (2003) 63:3 La L Rev 645; TM Scanlon, *The Difficulty of Tolerance* (Cambridge: Cambridge University Press, 2003); Iris Marion Young, *Justice and the Politics of Difference* (New Jersey: Princeton University Press, 1990).

31. See Alon-Shenker, "Unequal Right", *supra* note 15 at 252–56.

First, individuals have unconditional, intrinsic value. They should therefore be treated according to their own merits and not on the basis of irrelevant characteristics, stereotypes or prejudice. This is the principle of *individual assessment*.[32] Second, individuals should be provided with an opportunity to have equal influence in certain social contexts thereby eliminating the perpetuation of unequal power relations. This is the principle of *equal influence*.[33] Third, individuals should have access to basic goods that would allow for minimum living conditions and would alleviate their suffering. This is the principle of *sufficiency*.[34] Fourth, individuals have a right to be involved in communities, to participate meaningfully in social life and to be able to develop themselves. This is the principle of *social inclusion*.[35] This requires the recognition of differences and the provision of special treatment that will allow members of disadvantaged groups to realize their potential, exercise their capabilities and pursue their goals. Fifth, individuals have the right to the protection of and respect for their liberty and autonomy. This is the principle of *autonomy*. This includes allowing people to have control over their lives, make decisions, exercise the capacity to choose and pursue their own version of a good life.[36]

32. See e.g. Moreau, *supra* note 30 at 297–99; Scanlon, *supra* note 30 at 204; Rawls, *supra* note 30 at 130–31. See also Geoffrey Cupit, "Justice, Age and Veneration" (1998) 108:4 Ethics 702 at 710 (arguing that the wrong of inferiority is the ultimate wrong of age discrimination).

33. See e.g. Moreau, *supra* note 30 at 303–07; Scanlon, *supra* note 30 at 205; Rawls, *supra* note 30 at 130–31. See also Anderson, *supra* note 30 at 288–89; Samuel Scheffler, "What is Egalitarianism?" (2003) 31:1 Phil Pub Affairs 5 at 21–22; Young, *supra* note 30. All of these authors emphasize the goal of ending oppression in their accounts of equality.

34. See e.g. Moreau, *supra* note 30 at 307–12; Scanlon, *supra* note 30 at 203; Rawls, *supra* note 30 at 130. See also Frankfurt, *supra* note 30 at 134–135 (arguing that the ultimate moral problem with inequality is not that A has less than B but that A has less than enough—a sufficiency concern).

35. See e.g. Hugh Collins, "Discrimination, Equality and Social Inclusion" (2003) 66:1 Mod L Rev 16; Greschner, *supra* note 30 at 315, 321; Réaume, *supra* note 30 at 686–89; Young, *supra* note 30 at ch 6. See also Fredman, *supra* note 30 at 45–46 (arguing that the primary aim of age equality is social inclusion).

36. See e.g. Ronald Dworkin, *Sovereign Virtue* (Cambridge, MA: Harvard University Press, 2000) at 122, 133, 148, 181; Réaume, *supra* note 30 at 689. See also Fredman, *supra* note 30 (arguing that one of the aims of equality is "to give all people, regardless of their sex, race, or age, an equal set of alternatives from which to choose and thereby pursue their own version of a good life" at 43).

While the idea of equal concern and respect is abstract, the five principles of equality serve as concrete and objective indicators of discrimination when they are not upheld. Put simply, when one of these principles is not respected at any particular time, a wrong is done and any resulting age-based distinction amounts to wrongful age discrimination.[37] Not every age-based distinction amounts to such discrimination. It is wrongful, for example, when unequal treatment is based on ageist stereotypes or ageism towards senior workers (breaching the principle of individual assessment), when it perpetuates oppression of senior workers (breaching the principle of equal influence), when it denies them access to minimum conditions of living (breaching the principle of sufficiency), when it excludes them from full and meaningful participation in social life (breaching the principle of social inclusion), or when it reduces their autonomy and free will (breaching the principle of autonomy).[38] These are significant wrongs that cannot be compensated for by past or future benefits.[39] In other words, even though a senior worker has been working for many years and is currently entitled to pension benefits,[40] treating him differently than a younger worker is wrong if it is based on ageist stereotyping, if it perpetuates oppression or if it might exclude him from an active and social life. Even if an age-based distinction is wrongful, it may still be justifiable under certain circumstances. But given these considerable wrongs, compelling reasons and substantive evidence are required.[41]

Having outlined the Dignified Lives Approach, I will now discuss in detail the current responsibilities of employers with respect to accommodating the needs of senior workers and the shortcomings of these responsibilities.

37. A violation of any one of the five principles would be enough to constitute wrongful age discrimination, but it is clear that a stronger case is made out when more than one is infringed, and that more compelling reasons are needed to justify multiple violations.

38. See Alon-Shenker, "Unequal Right", *supra* note 15 at 255.

39. See *ibid* at 253.

40. Note that despite eligibility, a pension might not be adequate to maintain decent living conditions. See Wolfson, *supra* note 24.

41. See Alon-Shenker, "Unequal Right", *supra* note 15 at 247, n 16.

II. The Duty to Accommodate Disability-Related Needs of Senior Workers

A. The Narrow Approach of Current Canadian Law

With few exceptions,[42] the legal duty to accommodate usually focuses on one protected group: people with disabilities.[43] In the employment context, the laws currently require employers to consider any physical and mental impairment of workers, and to adjust or modify workplace rules, policies or devices so that those workers can adequately perform their essential job duties.[44]

The duty to accommodate workers with disabilities is broad. Employers may have to modify or adjust work procedures, hours of work, workplace layout, equipment and vehicles or other aspects of

42. In Canada, the duty applies to all protected grounds. *Infra* notes 97–101 and accompanying text. See *Title VII of the Civil Rights Act*, 42 USC § 2000e(j) (2002) (the duty of reasonable accommodation of an employee's or applicant's religious observances and practices in the United States). Some countries have specific statutory provisions that could be viewed as including a comparable duty to accommodate certain communities. See e.g. *The Management of Health and Safety at Work Regulations*, SI 1999/3242, ss 16–18 and *Employment Rights Act 1996* (UK), c 18, ss 66–68 (this includes an obligation to alter working conditions or hours of work to avoid health and safety risks to pregnant or breast-feeding women). Statutory provisions which promote positive action may also be interpreted as including a duty to accommodate certain communities. See e.g. *Equality Act 2010* (UK), c 15, ss 158–159 (which permits positive action to alleviate, prevent or compensate for disadvantage, as well as to meet the needs of persons who have a protected characteristic or to combat disproportionate under-representation).

43. See e.g. *Americans with Disabilities Act*, 42 USC § 12101-12213 (1990), ss 12112(a), (b)(5) [*ADA*]; Directives EC, *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*, [2000] OJL 303, Article 5 (European Union legislation); *Disability Discrimination Act 1995* (UK), c 50; *Equality Act 2010* (UK), c 15, ss 20–22; *Equal Treatment (Disability and Chronic Illness) Act 2003* (Netherlands); *Employment Equality Act, 1998* (Ireland), s 16, as amended by *Equality Act 2004* (Ireland), s 9.

44. In the United States, there is a debate over whether the obligation to accommodate workers with disabilities is different from other obligations under anti-discrimination law. See Samuel Issacharoff & Justin Nelson, "Discrimination with a Difference: Can Employment Discrimination Law Accommodate the American with Disabilities Act?" (2001) 79:2 NCL Rev 307 at 310; Christine Jolls, "Anti-Discrimination and Accommodation" (2001) 115:2 Harv L Rev 642 at 645.

the job to allow the worker to perform it.[45] The duty may require an employer to rewrite job descriptions as "there may be different ways to perform the job while still accomplishing the employer's legitimate work-related purpose".[46] If that is not possible, the employer has to search for reasonable alternatives, including transferring the worker to a comparable and not inferior position that she can perform, or to a job in a modified or re-bundled form which was created to accommodate the needs of the worker.[47] In such a case, the employer may also have to provide the necessary training.[48]

Employers need only accommodate workers with disabilities up to the point of undue hardship. The term "undue hardship" suggests a balance between the interests of the worker with disabilities and those of the employer, other workers and society as a whole. In weighing the likelihood of undue hardship, the factors that may be considered include the financial cost of the possible method of accommodation, the relative interchangeability of the workforce and facilities, and the prospect of substantial interference with the rights of other workers. Although these factors are not exhaustive and results may vary from case to case,[49]

45. See e.g. Ontario Human Rights Commission , *Policy and Guidelines on Disability and the Duty to Accommodate* (23 November 2000), online: OHRC <http://www.ohrc.on.ca/en> ["Policy and Guidelines on Disability"].

46. *British Columbia (Public Service Employee Relations Commission) v BCGSEU (Meiorin Grievance)*, [1999] 3 SCR 3 at para 64, 174 DLR (4th) 1.

47. See e.g. *Ahkwesahsne Police Assn v Mohawk Council of Ahkwesahsne (White Grievance)* (2003), 122 LAC (4th) 161 (available on QL) (Can); *York County Hospital v Ontario Nurses' Assn* (1992), 26 LAC (4th) 384 (available on QL) [*York*]; *Calgary District Hospital Group v United Nurses of Alberta, Local 121-R* (1995), 41 LAC (4th) 319 (available on QL); *Greater Niagara General Hospital v Ontario Nurses' Assn* (1995), 50 LAC (4th) 34 (available on QL); *Essex Police Services Board v Essex Police Assn* (2002), 105 LAC (4th) 193 (available on QL) (Ont); *VSA Highway Maintenance Ltd v BCGSEU (Beraducci Grievance)*, [2002] BCCAAA no 321 (QL).

48. See e.g. *York*, *supra* note 47.

49. See *Meiorin*, *supra* note 46 at para 63. See also *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*, [1990] 2 SCR 489 at 520–21, 72 DLR (4th) 417. Some human rights codes mention specific considerations. See e.g. *Human Rights Code*, *supra* note 21, ss 11(2), 17(2) (referring to only three factors: costs, outside sources of funding, and health and safety requirements). However, the Supreme Court of Canada has held that other factors may be relevant, including the potential disruption of a collective agreement and morale problems with other employees. *Central Okanagan School District No 23 v Renaud*, [1992] 2 SCR 970, 95 DLR (4th) 577.

the doctrine of undue hardship imposes a very high threshold upon employers.[50]

The duty to accommodate a worker with disabilities applies regardless of the worker's age. However, while this duty covers anyone with a disability or perceived disability, including a senior worker,[51] the law does sometimes limit the duty at a certain advanced age. For example, while many Canadian provinces oblige employers to re-employ their injured workers and provide accommodation to the point of undue hardship, these obligations cease when the worker reaches sixty-five.[52]

Empirical studies have shown that in practice senior workers with disabilities often do not receive appropriate accommodation, which is

50. But see *Hydro-Québec v Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, [2008] 2 SCR 561 (clarifying its ruling in *Meiorin*). The Court stated that the duty to accommodate does have limits and an employer is not required to "completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration" (*ibid* at para 15). Where an employer has taken all reasonable measures to accommodate an employee and enable her to do her work, but she still remains unable to do so in the reasonably foreseeable future, the employer has established undue hardship.

51. See e.g. the broad definition of "disability" in the *Human Rights Code*, *supra* note 21, s 10(1)(a):

> Any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device, a condition of mental impairment or a developmental disability, a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language, a mental disorder . . .

The *Act* also adds that "the right to equal treatment without discrimination because of disability includes the right to equal treatment without discrimination because a person has or has had a disability or is believed to have or to have had a disability" (*ibid*, s 10(3)). Similar provisions apply in other provinces. See e.g. *Human Rights Act 2010*, SNL H-13.1, s 2(c); *Alberta Human Rights Act*, RSA 2000, c A-25.5, ss 44(1)(h),(1).

52. See *Workplace Safety and Insurance Act*, *supra* note 22, s 41(7) (in Ontario, the duty to re-employ and accommodate lasts for two years from the date of injury; one year from the date when the employee is able to do the essential duties of the job; or until the employee reaches 65). See also *Workplace Health, Safety and Compensation Act*, RSNL 1990, c W-11, s 89.1(8).

available to younger workers with disabilities, and are forced to quit or retire as they encounter difficulty in fulfilling essential job duties.[53] Although the duty to accommodate disabilities is supposed to be broad, it seems not to be broad enough to efficiently cover workers with disabilities that typically manifest themselves at advanced ages. As one study suggests, the "presence of *ageism and age discrimination* in the workplace may compound the effect of disability for older workers".[54]

Finally, the existence of a duty to accommodate workers with disabilities which does not vary with age has been contested in the literature. Julie Jeffries argues that since age is different from disability,[55] senior workers with disabilities have less of a right to participate in the labour market than younger workers with disabilities,[56] so the duty to accommodate should apply differently to younger and senior workers with disabilities. Jeffries proposes that the duty to accommodate senior workers only applies to employees who are determined, on an individual basis, to be capable of performing their jobs. Alternatively, Jeffries recommends that the duty should be limited to minor modifications to a current job, and should not impose broader obligations such as a transfer to another job.[57]

The following section will assess these suggested limitations on the duty to accommodate senior workers with disabilities in light of the five principles under the Dignified Lives Approach to age discrimination.

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53. As one United States empirical study reveals, the provision of accommodations varies by age. More specifically, senior workers with disabilities are less likely to get accommodations, and the proportion of workers who receive no accommodation consistently increases with age. Michael Williams, Dory Sabata & Jesse Zolna, "Accommodating Aging Workers Who Have a Disability" in Alex Mihailidis et al, eds, *Technology and Aging: Selected Papers from the 2007 International Conference on Technology and Aging* (Amsterdam: IOS Press, 2008) 51. See Julie Ann McMullin & Kim M Shuey, "Ageing, Disability and Workplace Accommodations" (2006) 26:6 Ageing & Society 831 (a Canadian study). The Canadian 2001 Participation and Activity Limitation Survey found that senior workers who attributed their functional limitation to aging (rather than disability) were less likely to recognize the need for a workplace accommodation, and among those who acknowledged a need for an accommodation, senior workers who ascribed their limitation to aging were less likely to have their needs met. Williams, *supra* note 5.

54. McMullin & Shuey, *supra* note 53 at 835 [emphasis in original].

55. See text accompanying *supra* notes 16–20.

56. *Supra* note 18 at 128–30.

57. *Ibid* at 88.

B. Applying the Dignified Lives Approach to Disability-Related Needs

Suggestions to limit the duty to accommodate senior workers with disabilities are often based on the assumption that since many senior workers have a disability, accommodating them will create undue hardship for employers. This assumption violates the first principle of individual assessment because it applies in a sweeping way to senior workers as a group, and arbitrarily denies some of them benefits that they would have been eligible for if assessed individually. Moreover, limiting the duty to accommodate senior workers with disabilities perpetuates assumptions about the work lifecycle embedded in our legislation,[58] and reinforces social expectations about the eroded role of seniors in our society. Although age and disability are closely related,[59] senior people usually experience declines in physical capacity in different ways and at different points in time. Furthermore, these declines often do not affect job performance, or can be offset against other skills and experience.[60] Even if some senior workers do have job-related disabilities, most of those disabilities can usually be accommodated easily and inexpensively.[61] The fact that disability rates increase with age does not necessarily suggest that the accommodation needs of senior workers with disabilities are more complex and expensive than those of younger workers with disabilities. Most requests for accommodation of senior workers with disabilities

58. See e.g. *supra* notes 21–22.

59. See *supra* note 5.

60. There is little systematic *overall* relationship between age and productivity or job performance. See Levine, *supra* note 11 at 108–17; Morley Gunderson, "Age Discrimination in Employment in Canada" (2003) 21:3 Contemporary Economic Policy 318 at 325; Howard C Eglit, "The Age Discrimination in Employment Act at Thirty: Where It's Been, Where It Is Today, Where It's Going" (1997) 31:3 U Rich L Rev 579 at 679.

61. A study conducted by the Job Accommodation Network (JAN), a service of the United States Department of Labor's Office of Disability Employment Policy (ODEP), shows that workplace accommodations are low in cost and that the benefits employers receive from making them far outweigh the cost. The employers in the study reported that a high percentage (56%) of accommodations cost absolutely nothing, while the rest typically cost only $600. *Supra* note 29. Similarly, a study conducted in 2003 by the Canadian Abilities Foundation found that the annual costs of accommodation would be less than $500 in most cases and under $1 500 in almost all cases. *Neglected or Hidden: Connecting Employers and People with Disabilities in Canada* (Toronto: May 2004) [CAF, *Neglected or Hidden*].

involve simple adjustments which are relatively inexpensive, such as adapted keyboards, adjustable chairs and magnifying monitor screens.[62]

A duty to accommodate workers with disabilities which ceases or gradually decreases at a certain advanced age does not respect the second principle of equal influence because it perpetuates the unequal treatment of senior workers. Although many countries now encourage (and even compel) senior workers to work longer due to impending labour shortages and pension deficits,[63] senior workers are denied an opportunity to have equal influence in the labour market. They are subordinated to economic needs yet are not provided with adequate means to increase their employability, or with comprehensive protection against discrimination in the form of accommodation. This systemic subordination might have the impact of a self-fulfilling prophecy affecting senior workers' decisions and behaviour. These workers may internalize the inequality and perform badly or exit the labour market.[64]

A duty to accommodate workers with disabilities which ceases or gradually decreases at a certain advanced age also does not respect the third principle of sufficiency. By negatively affecting senior workers' employability, it may lead to economic deprivation resulting from inadequate income. It may deny them access to minimum standards of living (such as food, clothing and shelter) that are crucial to the maintenance of personal dignity. Although they may be entitled to pension benefits, public pensions are often not sufficient to allow for decent living conditions.[65] Many workers do not have private retirement savings plans or enough savings to afford retirement, and as a result wish

62. There is no statistically significant difference between the accommodation needs of senior and younger workers. Around 42% of those aged 25–54 with disabilities who did not participate in the labour force reported a need for some type of workplace modification, compared with only 32% of their senior colleagues. See Williams, *supra* note 5.

63. See *supra* notes 11–13.

64. See e.g. John Macnicol, *Age Discrimination: An Historical and Contemporary Analysis* (Cambridge, NY: Cambridge University Press, 2006) at 65; Geoffrey Wood, Adrian Wilkinson & Mark Harcourt, "Age Discrimination and Working Life: Perspectives and Contestations—A Review of the Contemporary Literature" (2008) 10:4 International Journal of Management Reviews 425 at 429; Young, *supra* note 30 at 148.

65. See *supra* notes 12–13, 24.

to continue working.[66] Senior workers should therefore be given an equal opportunity to participate in the workplace, or they may be pushed into poverty, dependence and insecurity. This does not suggest that employers are obliged to hire senior workers. Yet by failing to recognize the special circumstances and needs of senior workers, even if through a policy that is neutral on its face, employers negatively affect senior workers' equal opportunity and freedom of occupation. This limits their access to basic goods and impairs their attainment of minimum living conditions that are essential to a life of dignity.

A duty to accommodate workers with disabilities which ceases or gradually decreases at a certain advanced age also does not respect the fourth principle of social inclusion. Work is a key component in most people's lives. It is a place where individuals develop social lives and friendships and gain access to cultural and educational resources and opportunities. It is central to one's sense of self-worth, and has a major influence on the quality of life and health. The workplace is an essential part of one's identity and self-fulfillment and a major means of contributing to society.[67] Since work is much more than a means of living, the fact that senior workers are entitled to a pension should not weaken their right to equal opportunity in the workplace. Limiting the duty to accommodate undermines their ability to participate in the workplace. Indeed, senior workers with disabilities are more likely to be excluded from the labour market than younger workers with disabilities.[68] Providing simple accommodations such as part-time arrangements may increase participation rates among senior workers with disabilities who

66. The share of employed Canadian tax filers participating in a private retirement savings plan was 50% in 2008. Only 34% contributed to a Registered Retirement Savings Plan in that year, and only 32% participated in an employer-sponsored pension plan. See *Participation in Private Retirement Savings Plans 1997—2008* by Karim Moussaly (Ottawa: StatCan, 2010); Monica Townson, *Growing Older, Working Longer: the New Face of Retirement* (Ottawa: Canadian Centre for Policy Alternatives, 2006). See also Bannerjee, *supra* note 10 (discussing the growing financial needs among senior people which often drive them to work longer).

67. See e.g. Vicki Schultz, "Life's Work" (2000) 100:7 Colum L Rev 1881 at 1886–92; *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 368, 38 DLR (4th) 161, Dickson J.

68. Around 55% of individuals with disabilities aged 25–54 were in the labour force in 2001 compared with only 27% of those aged 55–64. See Williams, *supra* note 5.

otherwise would have withdrawn from the labour market.[69] Limiting the duty to accommodate lowers senior workers' self-worth and self-esteem and frustrates their personal development. It might also involve the loss of identity and social ties, causing emotional harm to those who have worked full-time for many years and are still capable of working with some adjustments.[70]

Finally, the failure to accommodate senior workers with disabilities does not respect the fifth principle of autonomy. As life expectancy increases and health and living conditions improve, more and more workers, including those with disabilities, wish to remain active contributors in the labour market.[71] However, without accommodation this choice is not available to many. They lose control and influence over where, when and how to work and retire.[72]

Approaching the topic through the lens of the Dignified Lives Approach means that senior workers who have (or are perceived to have) disabilities should be entitled to accommodation similar to that of younger workers with disabilities. The duty to accommodate workers with disabilities should not decrease or cease at a certain age. Employers' obligations to senior workers with disabilities should be as broad as their obligations to younger workers with disabilities. These may include general obligations such as adjusting the work environment by, for example, taking into account lighting, heat and ergonomics. It may also include an obligation to modify, bundle or alter the duties of a position, or to take even larger steps such as starting a transfer to another job.

69. See Ricardo Pagán, "Part-Time Work Among Older Workers with Disabilities in Europe" (2009) 123:5 Public Health 378 (drawing on data from the 2004 Survey of Health, Ageing and Retirement in Europe, which found a positive relationship between disability and part-time work among workers aged 50–64 in most of the 11 European countries surveyed, and concluded that part-time employment provides flexibility to senior people with disabilities, thus enabling them to remain in the labour market despite their health limitations).

70. Alon-Shenker, "Limiting Right", *supra* note 15 at 276.

71. See *supra* note 9.

72. See *supra* note 53 and accompanying text.

C. *The Undue Hardship Limitation on the Duty to Accommodate*

Although the Dignified Lives Approach indicates that the duty to accommodate senior workers with disabilities should not be limited *ex ante* through legislation or through general workplace policies, it accepts that limiting the duty may be justified on a case by case basis through the doctrine of undue hardship. Employers have a strong interest in being allowed to run their business effectively and efficiently. However, because the wrongs associated with unequal treatment on the basis of age are so significant, only compelling counter-considerations will justify limiting the duty to accommodate senior workers with disabilities. When the requirement of accommodation imposes an excessive economic burden on an employer, the senior worker's right to age equality may yield. This would be determined after considering, among other things, the size of the business, its private or public nature and its financial stability.[73]

Another consideration that might be relevant on a case by case basis is a worker's proximity to retirement. It may, for example, be an undue hardship to have to accommodate a senior worker who needs long and expensive training but has firm plans to retire soon.[74] Also relevant may be the fact that the particular worker is entitled to a generous occupational pension upon retirement, so that the principle of sufficiency would not be compromised.[75] Considerations such as cost, proximity to retirement and pension eligibility should not be taken to impose blanket *a priori* limitations on the scope of the duty to accommodate senior workers, but may be relevant on a case by case basis.

Two recent cases involving airline pilots and school bus drivers provide useful illustrations of how the undue hardship requirement can fit with the Dignified Lives Approach. Both cases deal with accommodation in the context of mandatory retirement in situations where the employer argued that age was a *bona fide* occupational requirement. While the workers

73. Large corporations as well as governmental offices and agencies "usually have the budgetary and organizational scale and flexibility to accommodate special needs at relatively little cost". See Canadian Human Rights Commission, *Preventing Discrimination*, online: Canadian Human Rights Commission <http://www.chrc-ccdp.ca>.

74. Of course, if it is only based on the employer's ageist speculations, the argument will not prevail.

75. The employer may still have to show that the breach of other principles of equality can be mitigated.

involved had no disabilities, treating these cases as dealing with the duty to accommodate senior workers with perceived disabilities is warranted by the fact that senior workers are often presumed to have disabilities that might raise safety concerns.

(i) Accommodating the Needs of Senior Pilots

Entrusted with the security of their passengers, pilots are held to a particularly high level of fitness and job performance. This has a negative impact on senior pilots who are given less accommodation for what amounts to perceived disabilities than other senior workers. This was at issue in *Vilven v Air Canada*, a dispute which has produced numerous judicial decisions.[76] The case deals with a provision in a collective agreement between Air Canada and the Air Canada Pilots Association (ACPA) which required pilots to retire at 60. My focus will be on the

76. First, the Human Rights Tribunal dismissed the complaints, holding that 60 was the "normal retirement age" for positions similar to those occupied by the complainants at the time of their retirement under section 15(1)(c) of the *Canadian Human Rights Act*, RCS 1985, c H-16 [*CHRA*]. *Vilven v Air Canada*, 2007 CHRT 36, [2008] 61 CHRR 149 [*Vilven* 2007 CHRT]. On judicial review, the Federal Court held that section 15(1)(c) of the *CHRA* violated section 15 of the *Charter* and remitted the complaint to the Tribunal to determine whether the breach could be justified under section 1. *Vilven v Air Canada*, 2009 FC 36 at para 340, [2010] 2 FCR 189 [*Vilven* 2009 FC]. The Tribunal then found that the breach was not justified, and turned to the question of whether the mandatory retirement provision in the collective agreement was a *bona fide* occupational requirement under sections 15(1)(a) and 15(2) of the *CHRA*. *Vilven v Air Canada*, 2009 CHRT 24 at para 156, 77 CCEL 3(d) 128 [*Vilven* 2009 CHRT]. On judicial review, the Federal Court upheld the Tribunal's decision with regard to section 1. *Air Canada Pilots Association v Kelly*, 2011 FC 120 at para 324, 282 FTR 198 [*Air Canada Pilots* FC]. The Federal Court of Appeal recently held that section 15(1)(c) of the *CHRA* was constitutionally valid and returned the matter to the Canadian Human Rights Tribunal with a direction to dismiss the complaints on the basis of section 15(1)(c). *Air Canada Pilots Association v Kelly*, 2012 FCA 209, 100 CCEL (3d) 1 [*Air Canada Pilots* FCA]. The Federal Court of Appeal held that the Tribunal and the Federal Court were bound by the Supreme Court's decision in *McKinney*, *supra* note 16. In *McKinney*, the Court held that provincial statutes which allowed for mandatory retirement at 65 or later violated section 15 of the *Charter* but were justified under section 1, on the basis that they allowed for a deferred compensation model, encouraged hiring of younger workers with fresh ideas, facilitated retirement with dignity at a fixed and unified age, and assisted with personnel planning.

decisions on whether that mandatory retirement provision was a *bona fide* occupational requirement for the purposes of sections 15(1)(a) and 15(2) of the *Canadian Human Rights Act*.[77] While these decisions have no impact on the particular parties, they provide some general insights into the analysis of the duty to accommodate senior workers.

The two complainant pilots sought to be reinstated to the positions they would have held had they not been required to retire at 60. Air Canada argued that it could not accommodate pilots over the age of 60 without experiencing undue hardship, in light of the constraints imposed on it by International Civil Aviation Organization (ICAO) standards governing international flights. Under the ICAO standards before November 2006, captains over 60 could not fly internationally, although there was no upper age limit for first officers. However, as of November 2006, captains over 60 can fly internationally, if one pilot in a multi-pilot crew is under 60. According to Air Canada, being able to fly lawfully over foreign countries was an integral part of a pilot's job.

The Canadian Human Rights Tribunal concluded that before 2006, the complainant pilots could have continued to fly internationally as first officers rather than as captains or pilots in command, and that Air Canada did not consider this type of accommodation and did not offer any evidence that it would cause undue hardship.[78] For the period after 2006, the issue was more complicated. Although ICAO standards were no longer a problem, Air Canada argued that accommodating the complainants by keeping them on the job would have a negative effect on scheduling and would increase the cost of hiring additional pilots.[79] Also, ACPA argued that such an accommodation would impose a significant and unreasonable burden on younger pilots, as they would be denied the right to move into the highest paid positions at Air Canada.[80]

At first, the Tribunal held that these concerns were based on unfounded assumptions and were not substantiated by evidence. In particular, ending mandatory retirement would likely bring only a slight delay in the career and salary progression of younger pilots,[81] who would themselves be able

77. *Supra* note 76, ss 15(1)(a), 15(2).
78. *Vilven* 2009 CHRT, *supra* note 76 at paras 92–94.
79. *Ibid* at paras 95–130.
80. *Ibid* at paras 131–32, 145–46.
81. *Ibid* at para 134 (according to one witness, a delay of one to four months).

to work past 60. Even if the delay turned out to be longer, the Tribunal was of the view that it would not substantially interfere with the rights of younger pilots.[82] Striking a balance between competing rights and interests, the Tribunal held that favouring the absolute preservation of younger pilots' seniority over the continued employment of their senior colleagues would amount to "making a purely age-based—and therefore arbitrary—value judgment about the relative worth to society of the work performed by each age group and about the relative importance of employment to each age group".[83] The Tribunal concluded that Air Canada and ACPA had not demonstrated undue hardship, and had not explored the many alternative ways of overcoming potential problems that would arise from ending mandatory retirement.[84]

On judicial review, the Federal Court upheld the decision with respect to the period before November 2006, but it found the decision about the period after November 2006 to be unreasonable. Air Canada did provide detailed evidence on scheduling problems and potential costs. The question of whether being under 60 was a *bona fide* occupational requirement for Air Canada pilots after November 2006 was remitted to the Tribunal.[85] After reconsidering Air Canada's evidence, the Tribunal accepted its submission that accommodating the complainants after November 2006 would have significantly increased operational costs, would have led to inefficiency in the scheduling of pilots, and would to a lesser extent have had negative ramifications for the pilots' pension plan and for the collective bargaining agreement, particularly with regard to the seniority rule.[86]

Despite what I see as a disappointing result, the multiple decisions in this case provide a good illustration of the high level of judicial scrutiny and the substantial evidence that should be required in accommodation cases. It would appear that all logistical and scheduling problems could have been

82. *Ibid* at paras 133–35, 140.

83. *Ibid* at para 144.

84. *Ibid* at paras 148–49. For example, as the Court noted, the respondents could agree that in the event of a scheduling problem, captains over 60 would have to bid for other positions in which they could be accommodated.

85. *Air Canada Pilots* FC, *supra* note 76.

86. *Vilven v Air Canada*, 2011 CHRT 10 at para 49, 92 CCPB 144.

avoided if Air Canada had simply required all pilots over 60 to work as first officers.[87]

(ii) Accommodating the Needs of Senior School Bus Drivers

Another example of what I see as the correct application of the undue hardship doctrine can be found in *Way v New Brunswick (Department of Education)*.[88] Way, a school bus driver in New Brunswick who had no health or safety restrictions, was dismissed by his employer (School District 10) solely on the basis of provincial regulations which compelled school bus drivers to retire at the age of 65. He filed a human rights complaint. The provincial Labour and Employment Board found the forced retirement requirement to be *prima facie* discriminatory.[89] In applying the three-step test set out by the Supreme Court of Canada in *Meiorin*[90] for the application of the *bona fide* occupational qualification defence, the Board held that the respondents had not established that the impugned standard was reasonably necessary to the goal of school bus safety. The respondents had not examined any form of possible accommodation, but had taken the rigid position that no one over 65 could drive a school bus safely, a

87. See *Air Canada Pilots* FC, *supra* note 76 at para 462 (as the pilots argued, if there had been no Captains/Pilots-in-command over 60 years of age, then the rule that captains over 60 could fly internationally only if accompanied by a pilot under 60 would never have come into play). It seems that these logistical and scheduling problems did not impose a substantial hardship on Air Canada, as the company has recently announced that it plans to end mandatory retirement for its pilots who turn 60 in response to the abolition of mandatory retirement in the federal jurisdiction, which will come into effect in December 2012. Bill C-12 repeals section 15(1)(c) but still allows mandatory retirement where it is a *bona fide* occupational requirement. The Bill does not affect the situation of those who turned or will turn 60 before December 2012. Bill C-13, *Keeping Canada's Economy and Jobs Growing Act*, 1st Sess, 41st Parl, 2011. Under this new arrangement, "as long as one of the pilots in a two- or three-pilot international crew is younger than 60, one or two others in the cockpit can be 60 or older". See Brent Jang, "Air Canada to allow older pilots", *The Globe and Mail* (27 January 2012), online: The Globe and Mail <http://www.theglobeandmail.com>.

88. 2011 CarswellNB 161 (WL Can) (Labour and Employment Board).

89. *Ibid* at paras 47–56.

90. *Supra* note 46.

position not supported on the evidence.[91] The Board ordered that Way be reinstated and compensated if he passed standard driving examinations and medical assessments.[92]

III. The Duty to Accommodate Other Age-Related Needs of Senior Workers

A. The Narrow Approach of Current Canadian Law

Another important question is whether the duty to accommodate senior workers includes a duty to accommodate age-related needs in the absence of any real or perceived disability. While Canadian law aims at protecting against both direct and adverse effect age discrimination and recognizes a duty to accommodate senior workers, the case law has typically centred on mandatory retirement, on other forms of direct discrimination, and on accommodation of disability-related needs. Adjudicators often fail to apply an accommodation analysis in adverse effect age discrimination cases that do not involve a disability. It is therefore unclear whether the duty to accommodate extends to broader age-related needs, and if so, to what types of needs.

There are competing opinions on this matter. Malcolm Sargeant, for example, argues that since aging involves a gradual decline in abilities, the duty of accommodation should extend to senior workers who suffer "from an ailment, or a disadvantage linked to age" which does not amount to a disability but requires protection because of stereotyping.[93]

Lisa Waddington disagrees with Sargeant. She argues that imposing such a duty would reinforce ageist stereotypes (for instance, the idea that senior workers require accommodation because they are incompetent) and that the inevitability of aging means that employers would be reluctant

91. *Way*, *supra* note 88 at paras 114–34.

92. *Ibid* at para 146. After he had retired, Way was rehired by the District as a custodian but his income level was reduced (*ibid* at paras 17–19). The Board rejected the submission that this was a type of reasonable accommodation (*ibid* at para 130).

93. "Older Workers and the Need for Reasonable Accommodation" (2008) 9:3 International Journal of Discrimination and the Law 163 at 176.

to hire senior workers who might soon require accommodation.[94] The United Kingdom government has recently decided not to extend the "reasonable adjustments" requirement in disability law to other grounds of discrimination. Among other reasons, the government stated that extending the requirement would impose undue hardship on employers and service providers, would increase uncertainty, and would reduce the extent of adjustments currently available to people with disabilities because of the demands it would place on resources.[95] However, as the default retirement age of 65 has recently been abolished in the United Kingdom, some scholars have called on the government to reconsider that decision in light of the need to accommodate those who work past 65.[96]

Canadian law takes a more progressive approach. The Supreme Court of Canada held many years ago that identical treatment can result in inequality and that the purpose of section 15 of the *Canadian Charter of Rights and Freedoms* is to achieve substantive equality, which may entail differential treatment and a duty to accommodate differences between individuals.[97] Human rights legislation in all Canadian jurisdictions

94. "Reasonable Accommodation: Time to Extend the Duty to Accommodate Beyond Disability?" (2011) 36:2 NTM|NJCM-Bulletin 186 at 191–92, online: SSRN: <http://ssrn.com>. Waddington acknowledges that a *de facto* duty to accommodate beyond the context of disability can be read into the European Union law's duty not to indirectly discriminate where a measure is likely to disadvantage a group of people who share a characteristic protected by anti-discrimination law, even if only one individual is disadvantaged in practice. She argues, however, that such an extension of the duty of accommodation should apply only to people who have a disability in combination with another characteristic protected by anti-discrimination law—for example a worker who is both old and has a disability (*ibid* at 192, 198).

95. UK, Department for Communities and Local Government, *A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain*, Consultation Paper (Wetherby: Communities and Local Government, 2007) at paras 4.39–40.

96. See e.g. Rory O'Connell & Julie McBride, *Age Discrimination in Employment: Comparative Lessons* (Report for the Changing Ageing Partnership, Institute of Governance, School of Law, Queen's University Belfast, September 2010) at 78, online: Academia.edu <http://qub.academia.edu>.

97. See *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at para 165, 56 DLR (4th) 1. The Supreme Court of Canada has relied upon the *Andrews* decision in developing recent section 15 jurisprudence. See *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 ("[t]he promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration" at para 15).

imposes a duty of accommodation on both public and private entities. In the context of employment, apart from the duty to accommodate workers with disabilities (which may include senior workers with a disability or perceived disability),[98] employers must also accommodate other protected groups such as female workers and religious workers, and notably for our purposes, senior workers. More precisely, when a *prima facie* case of direct[99] or adverse effect[100] age discrimination is established by an employee, an employer who wishes to make out a *bona fide* occupational requirement must show, among other things, that the employer attempted to accommodate the special needs of the employee up to the point of undue hardship.[101]

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98. See text accompanying *supra* note 51.

99. See e.g. *Human Rights Code*, *supra* note 21, ("every person has a right to equal treatment with respect to employment without discrimination because of . . . age", s 5). Section 24 of the *Code* states:

> The right under section 5 to equal treatment with respect to employment is not infringed where, . . . the discrimination in employment is for reasons of age . . . if the age . . . of the applicant is a reasonable and bona fide qualification because of the nature of the employment. No tribunal or court shall find that a qualification . . . is reasonable and bona fide unless it is satisfied that the circumstances of the person cannot be accommodated without undue hardship on the person responsible for accommodating those circumstances considering the cost, outside sources of funding, if any, and health and safety requirements, if any [quoting only sections relating to age] *(ibid*, s 24).

100. See e.g. *ibid*, s 11:

> A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where, the requirement, qualification or factor is reasonable and bona fide in the circumstances. . . . The Commission, the Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any [quoting only sections relating to age].

101. See *Meiorin*, *supra* note 46. The Court ruled that the duty to accommodate is implicitly incorporated into the BFOR defence in cases of both direct and indirect forms of discrimination. Accordingly, today an employer cannot claim a BFOR under any

However, while there is voluminous Canadian case law on the duty to accommodate groups such as religious workers and female workers,[102] there is little case law on the duty to accommodate senior workers.[103] One might argue that accommodation of senior workers' age-related needs should be left to market ordering and that state intervention in the form of regulation is unnecessary. As looming labour shortages make the added value of senior workers increasingly clear,[104] this argument runs, employers will voluntarily opt to accommodate them and to make the workplace more appealing to them. In reality, however, studies have shown that employers are not doing enough to recruit and retain

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Canadian human rights statute unless it has attempted to accommodate the employee up to the point of undue hardship, whether the discrimination is direct or indirect.

102. See e.g. *ibid* (accommodating female workers); *Central Alberta Dairy Pool*, *supra* note 49; *Dominion Colour v Teamsters Chemical Energy & Allied Workers, Local 1880 (Metcalfe Grievance)* (1999), 83 LAC (4th) 330 (available on QL) (Ont); *Ontario Public Service Employers Union v Hotel Dieu Hospital (Sebesta Grievance)*, [2001] OLAA no 659 (QL) (accommodating pregnant workers); *Ontario Human Rights Commission v Simpsons-Sears*, [1985] 2 SCR 536, 52 OR (2d) 799; *Renaud*, *supra* note 49; *Commission scolaire regionale de Chambly v Bergevin* [1994] 2 SCR 525, 115 DLR (4th) 609; *Jones v CHE Pharmacy Inc*, 2001 BCHRT 1, 29 CHRR 93 (accommodating religious workers).

103. A similar debate exists in the context of the duty to accommodate family status needs. Adjudicators in all Canadian jurisdictions generally require accommodation of such needs only when the workplace requirement or rule creates a "serious interference with a substantial parental or other family duty or obligation of the employee". *Health Sciences Association of British Columbia v Campbell River and North Island Transition Society*, 2004 BCCA 260 at para 39, 240 DLR (4th) 479. A different approach has recently been taken in the federal jurisdiction, where the duty to accommodate extends to any interference at all with parental obligations (as with religious obligations). See *Johnstone v Canada (Attorney General)*, 2007 FC 36, 306 FTR 271, aff'd 2008 FCA 101, 377 NR 235; *Whyte v Canadian National Railway*, 2010 CHRT 22, 71 CHRT D/316; *Seeley v Canadian National Railway*, 2010 CHRT 23 (available on QL); *Richards v Canadian National Railway*, 2010 CHRT 24 (available on QL).

104. The imminent retirement of many baby boomers, the ongoing decline in the proportion of younger workers and the slowdown in labour force growth are expected to create labour shortages in certain professions. See e.g. JD McNiven & Michael Foster, *The Developing Workforce Problem: Confronting Canadian Labour Shortages in the Coming Decades* (Halifax: The Atlantic Institute for Market Studies, 2009) at 8, online: Atlantic Institute <www.aims.ca>; Alexander Samorodov, *Ageing and Labour Markets for Older Workers*, Employment and Training Department Papers No 33 (Geneva, International Labour Office: 1999) at 32–33, online: International Labour Office, <http://www.ilo.int>.

senior workers.[105] Many jobs are designed to reflect the needs of younger workers, ageist stereotypes are widespread, and training opportunities for senior workers are often limited.[106] The use of flexible work arrangements (including formal job sharing and tele-work) is relatively rare.[107]

Even if it is agreed that a duty to accommodate senior workers should be set out in legislation, as it is currently in Canada, debate remains over its appropriate scope. More specifically, a pivotal question is whether the duty to accommodate senior workers' age-related needs should be as extensive as in disability cases. Of the few cases on the duty to accommodate seniors in Canada, some have in effect said no to that question. Adjudicators have at times focused only on direct discrimination on the basis of age. They have failed to come to grips with situations where an employer's decision or workplace policy or rule was neutral on its face but had an adverse effect on senior workers and overlooked their age-related needs. As the following three cases demonstrate, this has happened even where the employer failed to take any steps to accommodate those needs.

In *Riddell v IBM Canada*,[108] a long-time worker, whose minor accommodation needs were denied, found no remedy in the courts. Riddell had been working for IBM Canada since 1969. The business (along with its required skill set) changed dramatically in the 1990s. He was offered an early retirement package in 1993. He declined, and instead moved into administrative and clerical positions. His work was closely monitored, and his supervisors were unhappy with his performance. In

105. A 2007 survey of 28 000 employers in 25 countries by Manpower Inc. found that only 14% of employers had a strategy for recruiting senior workers, and only 21% had a strategy for retaining them past retirement age. Recruitment strategies specifically targeting senior workers were more common in Singapore (48%), Hong Kong (24%) and Austria (21%), and senior worker retention strategies were more prevalent in Japan (83%), Singapore (53%), South Africa (34%) and New Zealand (33%). Manpower, *Older Worker Recruiting & Retention Survey: Global Results* (April 2007), online: Manpower Group <http://www.manpower.com>.

106. See OHRC, *Time for Action: Advancing Human Rights for Older Ontarians* (Toronto: June 2001) at 41, online: Ontario Human Rights Commission <http://www.ohrc.on.ca>; OECD, *Aging and Employment Policies: Canada* (Paris: OECD, 2005) at 109–11; Jungwee Park, "Job-Related Training of Older Workers" 24:2 Perspective on Labour and Income (2012) 4.

107. See Health Canada, *Reducing Work-Life Conflict: What Works? What Doesn't?* by Chris Higgins, Linda Duxbury & Sean Lyons (Ottawa: Health Canada, 2008) at 35.

108. 2009 HRTO 1454 (available on QL).

2001 and 2002, due to his poor performance, he was offered a voluntary severance package, which he again declined. He was dismissed in 2003, when he was 59 years old after 33 years of service with IBM Canada.

Riddell filed a human rights complaint alleging age discrimination. IBM argued that the early retirement offers were company-wide workforce reduction initiatives, which targeted not senior workers but the least productive workers. It submitted that this was simply a case of poor performance, and that its actions were legitimate steps in its performance management process.[109] The Ontario Human Rights Tribunal accepted IBM's submissions. Among other things, it held that there was no basis for finding that age was a factor in how Riddell was treated.[110] The Tribunal found that the performance standards he was required to meet were company-wide or department-wide, were applied consistently over a number of years, and had been met by numerous employees. There was no evidence, it said, that age was a factor in the development or imposition of the standards, and it found that IBM had legitimate business reasons for closely monitoring Riddell's work.[111]

The Tribunal seems to have treated the complaint as solely one of a direct age discrimination. Interestingly, it noted that no other senior workers were employed in similar positions, and that all of Riddell's colleagues were "half his age".[112] During 2001 and 2002, Riddell had many discussions with his supervisors about his performance, and was twice placed on a formal performance improvement plan. Yet he was given only the standard training,[113] which may not have been sufficient or suitable given his age-related needs. Indeed, he argued that he had not been provided with the training he needed in order to do his job. But the Tribunal held that "there were standard training and familiarization periods, and the complainant was treated no differently than other employees".[114] True, Riddell may have just been a poor performer and nothing might have helped him, but IBM should at least have had to consider giving him special training because of his age, especially in light

109. *Ibid* at paras 2–3, 5–6.
110. *Ibid* at para 4.
111. *Ibid* at paras 52, 68.
112. *Ibid* at paras 27, 116.
113. *Ibid* at paras 11–26.
114. *Ibid* at para 85.

of his 33 years of service. If this was a disability case, the employer would likely have been required to do much more to accommodate his needs.[115]

In *Large v Stratford (City of)*,[116] a senior police officer unsuccessfully complained that he had suffered age discrimination contrary to Ontario's human rights act, after being mandatorily retired at 60, pursuant to a collective agreement. In dismissing his claim, the Supreme Court of Canada held that evidence of risk of cardiovascular disease and decline of aerobic capacity, taken together, met the employer's obligation under the objective branch of the *bona fide* occupational requirement test, and that individualized testing was not feasible. In considering whether the employer had a duty to accommodate Large by adjusting his job duties to avoid the risks that the mandatory retirement policy sought to address, Sopinka J refused to interfere with the job description of police officers.[117]

115. In another case, after a nurse was dismissed at 59 due to poor performance, the Human Rights Tribunal found that the issues identified in relation to her performance (such as inability to use computer software programs and lack of innovation and enthusiasm) were not tainted by age discrimination but were supported by evidence. However, age was held to be a factor in the employer's failure to take steps to address those issues, mainly because of the employer's inquiries about whether she planned to retire. While the Tribunal did not explicitly refer to "the duty of accommodation", taking steps to address these performance issues would mean accommodating her age-related needs through (for example) computer software training. *Clennon v Toronto East General Hospital*, 2009 HRTO 1242 at paras 104–106 (available on QL).

116. [1995] 3 SCR 733, 128 DLR (4th) 193.

117. *Ibid* at paras 33–34. *Large* was decided before *Meiorin*, *supra* note 46, which revised the legal test for establishing a BFOR by requiring the employer to accommodate the complainant up to the point of undue hardship. In *Large*, the Court distinguished between direct discrimination (which required the respondent to explore "reasonable alternatives") and adverse effect discrimination (which required the employer to consider "individual accommodation"). *Large*, *supra* note 116 at paras 30–34. Still, one might argue that "reasonable alternatives" should have included a transfer to another position. A similar case involving mandatory retirement for firefighters reached similar conclusions, although it was decided after *Meiorin*. The HRTO held that although a mandatory retirement provision in a collective agreement requiring firefighters to retire at age 60 was *prima facie* discriminatory, it was a *bona fide* occupational requirement and therefore did not violate the *Human Rights Code* because the increased risk of cardiac events for people at advanced age is even higher for firefighters. Following the decision in *Meiorin*, the Human Rights Commission and the complainant argued that individual testing was not only feasible but also showed that some firefighters over the age of 60 had a lower relative risk of cardiac events than those aged 55–59. However, the Tribunal held that the provision was reasonably necessary to ensure the health and safety of firefighters, and that accommodation of individual firefighters

The situation in *Large* can be distinguished from that which is found today: some recent decisions and legislative changes indicate that the duty to accommodate some firefighters may include individualized assessment and perhaps a transfer to a non-emergency position.[118]

In *Bastide v Canada Post Corp*,[119] temporary workers were asked to pass a manual dexterity test which was neutral on its face in order to obtain a permanent position.[120] The test aimed at predicting ability to complete training on a mechanized system. There was a statistically significant

would result in undue hardship to the municipality as there was no scientific research on whether methods of individual testing would predict risk for firefighters more accurately than age. Whether the complainant could have been accommodated or transferred to a different position was not considered, since the parties had agreed that the case would be argued as a challenge to the collective agreement provision, and that no evidence would be presented on the complainant's individual risk. The Tribunal, however, did not exclude the possibility that "where an individual firefighter initiates a request for an exception to the mandatory retirement date based upon his or her individual risk of cardiac events and medical evidence suggests an extremely low or negligible risk of cardiac events in that individual, accommodation may be required". *Espey v London (City of)*, 2008 HRTO 412 at 100 (available on QL).

118. See e.g. *Baker v Cambridge (City of)*, 2011 HRTO 1167 (available on QL) (where the municipality agreed that a firefighter would be allowed to continue working in fire suppression if he passed an annual physical fitness test). The *Fire Protection and Prevention Amendment Act*, SO 2011 c 13, which came into effect on June 1, 2011 in Ontario, provides for mandatory retirement at age 60 of firefighters regularly assigned to fire suppression duties. It allows two years for unions and municipalities to address the issue of retirement through collective bargaining. After this, if a collective agreement does not address the issue, "the agreement is deemed to contain a provision requiring firefighters to retire at the age of 60" (*ibid*, s 3(3.1)). However, the Act also stipulates that "[a] firefighter shall not be required to retire if the firefighter can be accommodated without undue hardship, considering the cost, outside sources of funding, if any, and health and safety requirements, if any" (*ibid*, s 2(4)). It thus leaves open the possibility of transferring a 60-year-old suppression firefighter to a non-emergency position.

119. 2005 FC 1410, [2006] 2 FCR 637, aff'd 2006 FCA 318, 365 NR 136, leave to appeal to SCC refused, 31732 (March 8, 2007).

120. *Bastide*, *supra* note 119 at para 3:

> [A]ll individuals who . . . [want] to obtain regular employment as a postal clerk . . . in a mechanized plant have . . . to pass a dexterity test. This test is intended to establish the basic skills to see if the employees are able to proceed with the training program intended to teach them to code postal codes in the mechanized plants . . . . [T]he coding work requires dexterity and the capacity to rapidly coordinate a visual observation and the action of the keys on a coding keyboard.

relationship between age and failure rates on the test,[121] and the employer did not examine any ways to accommodate those who failed. Nonetheless, the Federal Court ruled that the test was "reliable and relevant", and that it measured "the qualifications that are truly required to perform the work in question in an efficient and optimal manner".[122] The Court concluded that the testing "constitute[s] a form of accommodation in itself",[123] and accepted the employer's claim that without the test, the failure rate during training would constitute undue hardship because the employer would be unable to organize staffing in due time and would have to spend considerable amounts on training.[124] The question of whether those who failed the test could have been assigned other job duties or sent for special training was not even considered.[125]

These three cases illustrate that the scope of the duty to accommodate senior workers' age-related needs is in practice quite narrow. The cases all dealt with large employers with considerable resources and a wide variety of positions. As we have seen, the duty to accommodate is supposed to be very broad and the threshold of undue hardship is high, at least in disability cases. If those concepts had been properly applied, the result would have been different in each case, especially in light of the size of the employers involved. It might be argued, for example, that Riddell could have been provided with longer and more intensive training, and that Large could have been transferred to a position in the Police Service which did not require high physical fitness. Similarly, on the high standard that is supposed to prevail in disability cases, Canada Post's claim of undue hardship in *Bastide* should not have been accepted without the employer having at least shown that it had explored all possible methods of accommodation on a case-by-case basis for workers who have lower technological ability particularly because of age.[126] Individualized testing

121. *Ibid* ("the failure rate increases in proportion to age, namely 1.2% per year" at para 13).

122. *Ibid* at para 48.

123. *Ibid* at para 47.

124. *Ibid* at para 50.

125. *Ibid* (the Court, although they did not explore other methods of accommodation, did acknowledge that "individualized assessment does not always constitute sufficient accommodation" at para 48).

126. *Ibid* (the workers who failed the test argued that " . . . employees who passed this test, for the most part, were not at all subsequently assigned to tasks for which the test would have been relevant" at para 24).

is not the final stage of the accommodation process when disabilities are involved. Even when employees fail such tests, the employer may still be obliged to accommodate them if their failure is associated with a prohibited ground of discrimination.[127]

B. Applying the Dignified Lives Approach to Age-Related Needs

The Dignified Lives Approach helps to explain how anti-age discrimination law would fail to further substantive equality if it did not require accommodation for age-related needs. The essence of the duty to accommodate is individualism, specifically individualized assessment.[128] The Ontario Human Rights Commission has noted that there is no formula for fulfilling the duty to accommodate: "each person's needs are unique and must be considered afresh when an accommodation request is made".[129]

The first principle of the Dignified Lives Approach (individual assessment) is advanced through the process of accommodation of age-related needs when each senior worker is assessed and treated on his own merits. One might argue that individualized assessment is more humiliating than a general standard, and this is true if its purpose is to target senior workers and get rid of them. However, if an individualized process looks to work-related factors and is applied to all workers, it advances rather than diminishes dignity.

Accommodating age-related needs also furthers the second principle (equal influence) because, rather than ignoring relevant differences between age groups, it recognizes the need for differential treatment of age groups on the basis of their special needs.

Accommodation of age-related needs of senior workers satisfies the third principle of sufficiency by increasing their employability. Senior workers who have been dismissed have great difficulty finding a decent job. In almost all countries of the Organisation for Economic

127. See *Meiorin*, *supra* note 46 ("[a]part from individual testing to determine whether the person has the aptitude or qualification that is necessary to perform the work, the possibility that there may be different ways to perform the job while still accomplishing the employer's legitimate work-related purpose should be considered in appropriate cases" at para 64).

128. *Policy and Guidelines on Disability*, *supra* note 45 at 10.

129. *Ibid.*

Co-operation and Development (OECD), they remain unemployed for longer than younger workers and can often find only non-standard work with significantly reduced income.[130] Accommodation through (for example) a safe work environment, on-the-job training and suitable part-time opportunities may help to meet these difficulties.[131]

Similarly, accommodation of age-related needs is consistent with the fourth principle—that of social inclusion—in that it allows senior workers to be active participants in their communities and to gradually transition into retirement.[132] By prolonging their active social lives, accommodation is beneficial for their health and self-fulfillment.[133]

Finally, such accommodation furthers the fifth principle—that of autonomy—by giving senior workers a variety of meaningful choices about when and how to work, and when and how to retire.

It follows that the duty to accommodate age-related needs of senior workers should be a strong and extensive one. Just as accommodation laws recognize the special needs of a worker with a disability or a religious worker, or more recently, a worker with parental obligations, so the special needs of a senior worker should also be recognized and accommodated. "[H]uman rights codes, because of their status as 'fundamental law', must be interpreted liberally so that they may better fulfill their objectives.

130. See OECD, *Ageing and Employment Policies: Live Longer, Work Longer* (Paris: OECD, 2006) at 34–39, online: OECD <http://www.oecd-ilibrary.org>; Maria Heidkamp, Nicole Corre & Carl E Van Horn, "The 'New Unemployables': Older Job Seekers Struggle to Find Work During the Great Recession" *The Sloan Centre on Aging & Work* (November 2010), online: Boston College <http://www.bc.edu>; Susan Bisom-Rapp, Andrew D Frazer & Malcolm Sargeant, "Decent Work, Older Workers, and Vulnerability in the Economic Recession: A Comparative Study of Australia, the United Kingdom, and the United States", online: (2011) 15:1 Employee Rts and Employment Pol'y J 43 at 48–50 <http://www.kentlaw.lit.edu>.

131. See CAF, *Neglected or Hidden*, *supra* note 61; Pagán, *supra* note 69; Matteo Picchio & Jan C Van Ours, "Retaining through Training: Even for Older Workers", IZA Discussion Paper No 5591 (2011), online: SSRN <http://ssrn.com>.

132. See *Hydro-Québec*, *supra* note 50 at para 14 :

> [T]he goal of accommodation is to ensure that an employee who is able to work can do so. In practice, this means that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work. The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.

133. See text accompanying *supra* note 67.

It would . . . be inappropriate to select out one prohibited ground of discrimination for a more restrictive definition".[134]

Age-related needs should be broadly defined to include physical and mental declines that are linked to aging but do not fall within the definition of "disability".[135] They should include needs arising from factors that are more common to seniors than to other workers, such as job burnout and fatigue, outdated skills, fears of sharp transition to retirement, and the burden of taking care of very old family members (which may not be covered under family status).[136]

Further, the extent of the duty to accommodate should be interpreted broadly in a way that takes account of the circumstances of the particular case and balances the different interests and rights involved. Since the duty to accommodate applies to both direct and adverse effect discrimination, it is not enough to respond to the age-related needs of a particular senior worker on a case by case basis. As the Supreme Court of Canada held in *Meiorin*, employers must be aware not only of the differences between individuals but also of differences between groups,[137] and must develop standards that accommodate all employees with respect to discrimination on a prohibited ground up to the point of undue hardship.[138] Because age discrimination in employment is often systemic, employers should

134. *Hoyt v Canadian National Railway*, 2006 CHRT 33 at paras 120–21, 57 CHRR 437 [references omitted].

135. Sargeant, *supra* note 93 at 176. This point is important because many senior workers have disabilities but wish to avoid the stigma of being called disabled, so they attribute their functional limitation to aging. As a result, even if they ask for accommodation, they are less likely to get it. See McMullin & Shuey, *supra* note 53 at 835–36.

136. It is controversial whether family status includes elder care, and if so, to what extent. See *Human Rights Code*, *supra* note 21 (which, like most provincial human rights legislation, defines "family status" as "the status of being in a parent and child relationship", although the definition of "child" is unclear, s 10). In another context, the BC Court of Appeal interpreted the word "child" in section 52 of the BC *Employment Standards Act*, RSBC 1996, c 113, which deals with unpaid family responsibility leave, as meaning a person under the age of majority. s 52. *West Fraser Mills Ltd v Communications, Energy and Paperworkers Union of Canada*, 2088 BCCA 403 at paras 18–19, 84 BCLR (4th) 265. Some cases have suggested that family status includes the relationship between a senior worker and his or her parents. See e.g. *Devaney v ZRV Holdings Ltd*, 2012 HRTO 1590 (available on QL). However, family status would not include the relationship between the worker and other family members, such as spouses or siblings.

137. *Supra* note 46 at para 68.

138. *Ibid* at para 53.

not only have to refrain from it but should also have to act positively to alleviate it,[139] and to build conceptions of equality into their workplace rules and practices.[140]

The duty to accommodate may include a duty to implement general norms in order to promote the health, safety and well-being of all workers throughout their working lives and to improve the quality of work,[141] as well as a duty to provide career development opportunities and vocational training in order to make senior workers more employable.[142] In appropriate circumstances, reasonable accommodation may also include a duty to facilitate various forms of job flexibility that would help to meet the needs of senior workers.[143] While the threshold of accommodation required under the Dignified Lives Approach is higher than it is under the

139. See Fredman, *supra* note 30 at 61–63.

140. See *Meiorin*, *supra* note 46 at paras 67–68. This broad understanding of the duty of accommodation was adopted in Ontario legislation in an attempt to improve access to goods, services, facilities, accommodation, employment, buildings, structures and premises by January 1, 2025. *Accessibility for Ontarians with Disabilities Act*, SO 2005, c 11.

141. This duty includes the identification of ergonomic risks and the implementation of solutions that will reduce workplace accidents and injuries. Similar obligations already exist within provincial occupational health and safety legislation.

142. Due to constant technological and organizational changes, all workers need to maintain and upgrade their skills. Governments and employers should therefore strive to expand workers' opportunities for vocational training and lifelong learning to enhance their employability. At the same time, a special focus should be given to senior workers for two main reasons. First, senior workers are currently deprived of these opportunities. Second, they may require targeted training to help them re-enter the labour market, while taking advantage of their experience and knowledge.

143. For example, flexible work schedules, part-time work, flexible retirement arrangements, job sharing, career breaks and re-entry, teleworking, working from home, or a formal transition to contracting, consulting or mentoring, which would allow senior workers to manage their caregiving responsibilities and gradually phase into retirement. See OHRC, *Policy on Discrimination Against Older Persons Because of Age* (2002), online: Ontario Human Rights Commission <http://www.ohrc.on.ca>. Phased retirement is increasingly popular in Canada. See e.g. Sun Life Financial, *Canadian Unretirement Index Report* (2012), online: Sun Life Financial <http://cdn.sunlife.com> (a recent study which found that nearly half of Canadian workers expect to phase in their retirement, and that only 30% expect to fully retire at age 66). At the same time, there is a need to ensure that part-time opportunities are not associated with less employment protection or none at all, and with limitations on pension coverage. Employment protection laws and pension plans should be amended to cover people who work in nonstandard jobs. See Pagán, *supra* note 69.

current narrow view, I will now argue that the benefits of addressing age discrimination vastly outweigh the costs.

IV. Costs of Accommodations of Senior Workers

Imposing a strong substantive duty to accommodate senior workers requires a consideration of the potential costs. In cases where a wrongdoer can be identified, she should bear the costs of accommodating a particular senior worker, as is the case where accommodation is required for other types of discrimination. For example, in *Bastide*,[144] Canada Post ought to have borne the cost of modifying the manual dexterity test which adversely affected many senior workers, or of finding and implementing other ways to accommodate those who failed the test for age-related reasons.

However, a wrongdoer cannot always be identified. That is especially true in cases of systemic age discrimination, which is a societal problem that transcends the particular workplace. In such cases, the costs of accommodating senior workers should be borne by both governments and employers, because of their mutual interest in increasing the participation of senior workers in the labour market,[145] and because discrimination against senior workers is so severe and widespread.[146] As a matter of policy, employers should carry a share of the cost of remedying systemic age discrimination in the workplace, because they are in the best position to take the lead in effecting substantial social changes, to proactively eliminate institutional, structural and systemic discrimination and to initiate and implement schemes that would promote the inclusion of senior workers to that end.[147]

Voluntary codes of practice are often ineffective or insufficient. Employers may be shortsighted, focusing only on the immediate costs

144. *Supra* note 119.

145. See *supra* note 104.

146. See e.g. *Aging and Employment Policies: Canada*, *supra* note 106 at 109–11; Eglit, *supra* note 60; Lynne Bennington, "Age and Career Discrimination in the Recruitment Process: Has the Australian Legislation Failed?" in Mike Noon & Emmanuel Ogbonna, eds, *Equality, Diversity and Disadvantage in Employment* (Houndmills: Palgrave, 2001) 65.

147. See John Gardner, "Liberals and Unlawful Discrimination" (1989) 9:1 Oxford J Legal Stud 1 at 11; John Gardner, "Discrimination as Injustice" (1996) 16:3 Oxford J Legal Stud 353 at 363. See also Fredman, *supra* note 30 at 62.

of accommodation, and not many have taken innovative steps to encourage greater participation among senior workers.[148] Yet, innovative accommodation is also a public responsibility. Governments meet that responsibility by putting a strong emphasis on enforcement and by providing financial and other assistance to employers. Governments can provide financial incentives to employers who recruit, employ, retain and re-hire senior workers, or who offer them accommodations such as extended health care benefits, flexible working and retirement arrangements, paid education leave and vocational training. Those incentives might include subsidizing the wages or benefits of senior workers, or awarding workforce expansion grants that will lead to recruitment of senior workers or to the purchase of new equipment that will promote their employment.[149]

In considering the costs of the duty to accommodate senior workers, it must be remembered that this duty is not unlimited. For it to come into play, the employee first has to establish that her dismissal resulted from a *prima facie* case of age discrimination (either direct or adverse effect). An employer is not obliged, before dismissing a senior worker, to consider prospects of re-employment, namely whether that worker would have a harder time than a younger employee in finding another job.[150] And most importantly, as we have seen, the duty to accommodate a senior

148. See *supra* notes 105–106. It is argued that sooner or later, employers will be forced to consider the needs of senior workers and design their workplaces to meet those needs. Peter Cappelli & Bill Novelli, *Managing the Older Worker: How to Prepare for the New Organizational Order* (Boston: Harvard Business Review Press, 2010).

149. As part of a federal "50 plus" initiative on the part of the German government, employers are offered "integration subsidies" as incentives to hire workers aged 50 and over. Also, unemployed people who accept jobs which are lower-paid than their previous positions will receive government wage supplements to help make up the difference. This initiative has been claimed to be very successful. The OECD reports that in its two-year implementation phase (2005–2007), around 20 000 former long-term unemployed people over 50 were integrated into regular jobs. The German legislature extended this program until 2010. See Oliver Stettes, "Wage Incentives aim to boost Employment of Older Workers" *European Industrial Relations Observatory On-Line* (October 9, 2006), online: Eironline <http://www.eurofound.europa.eu/>; OECD *Perspective 50 plus—Employment Pacts for Older Workers in the Regions, Germany*, online: OECD <http://www.oecd.org>.

150. See *Durrer v Canadian Imperial Bank of Commerce*, 2008 FCA 384, 70 CCEL (3d) 193 (examining the *Meiorin* decision, the Court dismissed such a claim).

worker's age-related needs is limited by the doctrine of undue hardship. The fact that a senior worker will have only a short time in the labour market may well mean that having to train that worker for a new job, or to restructure the workplace to craft a job or her would cause undue hardship to the employer. In other words, the right of a particular senior worker to have a fair opportunity to participate in the workplace must be balanced against the employer's competing interest in running the business and maintaining its profitability.

As the costs of accommodation are often insignificant,[151] a reasonable and fair balance should be maintained between those competing rights and interests. Furthermore, although it is more likely that senior workers will retire than younger workers, proximity to retirement is not a serious concern. Since retention rates are higher and job turnover rates are lower among senior workers,[152] it is impossible to generalize about whether a senior worker is more likely to leave within a certain time. Moreover, not all senior workers require accommodation. On the contrary, studies have shown that those who remain in the labour market are the most likely to be competent. Finally, most forms of accommodation revolve around general norms and schemes to promote the health and well-being of all workers throughout their working lives.[153] Once these norms and

151. See *supra* note 61. Developments in ergonomics may make accommodation easier and cheaper. See Gunderson, *supra* note 8 at 308. Sharon Rabin-Margalioth has argued that all three types of employment mandates (accommodation, anti-discrimination and universal mandates which provide benefits to all workers, such as a safe work environment and overtime pay) are cross-employee distributional tools. Their redistribution outcomes are determined by three factors: the scope of coverage, employers' compliance costs, and the value assigned to the mandate by different groups of employees. Accordingly, "one cannot object to the model of accommodation mandates while embracing schemes of universal mandates or anti-discrimination mandates". "Anti-Discrimination, Accommodation and Universal Mandates—Aren't They All the Same?" (2003) 24:1 Berkeley J Emp & Lab L 111 at 114.

152. See Park, *supra* note 106 at 4; Bureau of Labor Statistics, *Employee Tenure in 2010*, News Release USDL-121887 (September 14, 2010), online: BLS <http://www.bls.gov> (the median tenure of workers ages 55–64 was more than three times that of workers ages 25–34 in the US); Rasa Zabarauskaite, "Older Workers Show Highest Levels of Company Loyalty" *European Working Conditions Observatory, Institute of Labour and Social Research* (2008), online: EWCO <http://www.eurofound.europa.eu> (an international study which found that loyalty increases with age).

153. See Canadian Centre for Occupational Health and Safety, *Aging Workers*, (2012), online: Canadian Centre for Occupational Health and Safety <http://www.ccohs.ca>.

schemes are in place, the cost of accommodation is likely to gradually decrease. It is therefore unlikely that the increasing number of senior workers in the workplace will create an undue hardship on employers.[154]

The duty to accommodate senior workers entails significant benefits which often offset the associated costs. Increasing the workforce participation rate of senior workers is a desirable goal in an era of an aging workforce, labour shortages and pension deficits.[155] As that rate remains relatively low despite various policy initiatives,[156] a duty of accommodation may have a positive impact. Accommodation allows senior workers to continue working according to their changing abilities, to reduce their workload and to work in flexible arrangements, thereby making continued employment and delayed retirement more attractive. It fights against economic inactivity and poverty at advanced age and eases the pressures on pension funds and health care systems.[157] It also allows employers to enhance their firm's numerical flexibility,[158] and to utilize senior workers as trainers and mentors, thereby ensuring that their

154. Workers with declining capabilities are more likely to retire voluntarily before 65 ("self-selection behaviour"). Jonathan R Kesselman, *Mandatory Retirement and Older Workers: Encouraging Longer Working Lives*, CD Howe Institute Commentary No 200 (June 2004) at 8–9, online: CD Howe Institute <http://www.cdhowe.org>.

155. See *supra* note 104.

156. In the developed world, labour participation rates of those aged 55 to 64 in 2005 were 63.9% for men and 44.9% for women, considerably lower than for those aged 25 to 54 (91.9% for men and 75.3% for women in the same year). In the same year, labour market participation for those aged 55 to 64 was 63.9% in Japan, 60.8% in the US, 56.8% in the UK, 54.8% in Canada, 53.7% in Australia, 52.0% in the OECD countries, 45.5% in Germany, 43.1% in Spain, 40.7% in France, and only 31.4% in Italy. The drop in participation rates among male seniors since the 1970s has recently been slightly reversed in OECD countries, whereas the participation rate for female seniors has been constantly rising. OECD Observer, *OECD in Figures 2006–2007 Edition* at 80, online: OECD <http://www.oecdobserver.org>.

157. See Council of Europe, *Active Ageing in Europe*, 1:41 Population Studies (2003) at 96–97. See also Richard V Burkhauser, Lauren Hersch Nicholas & Maximilian D Schmeiser, *The Importance of State Anti-Discrimination Laws on Employer Accommodation and the Movement of Their Employees Onto Social Security Disability Insurance*, Michigan Retirement Research Center Research Paper No 2011-151, online: SSRN <http://papers.ssrn.com> (workplace accommodation reduces the pressure on state disability insurance plans in the US).

158. See Wood, Wilkinson & Harcourt, *supra* note 64 at 427–28.

valuable knowledge is transferred to younger workers.[159] By increasing retention of talented and valuable workers, it improves productivity and morale and reduces the costs of recruiting and training new employees. And finally, accommodation of senior employees reduces litigation costs.[160]

Conclusion

The wrongs associated with age discrimination against senior workers are severe and widespread. Because everyone should have the right to be treated with equal concern and respect at any given time, senior workers should enjoy the same protection against age discrimination that they enjoy against other prohibited grounds of discrimination, and employers should act positively to promote age equality in the workplace. Protection against age discrimination must include a robust duty to accommodate senior workers with disabilities and those who have other age-related needs. The current case law has focused mainly on mandatory retirement or direct age discrimination and on the accommodation of senior workers' disability-related needs, but this paper has stressed the importance of accommodation of other age-related needs in cases of adverse effect age discrimination. At the same time, factors such as proximity to retirement may be relevant on a case by case basis when determining whether accommodation would impose undue hardship on the employer. The benefits of accommodation to senior workers, employers and society as a whole are enormous, but accommodation also has costs. When a wrongdoer can be identified, it should bear these costs. In cases of systemic discrimination, the cost should be shared by employers and the state, in light of the advantages that accrue to employers and to society as a whole from recognizing the equal participation of senior workers in the labour market and from recognizing them as valued members of society. Those costs are reasonable and justifiable.

159. See *supra* note 29.
160. See Fredman, *supra* note 30 at 64.