

## EMPLOYMENT LAW CONFERENCE—2015

PAPER 4.1

# Age Discrimination, Inclusive Design, and Older Workers

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## **AGE DISCRIMINATION, INCLUSIVE DESIGN, AND OLDER WORKERS**

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### **I. Introduction**

The stakes are high, for employers as well as employees. Ultimately, [inclusive workplace design] could be the only way of securing the supply of labor.

Lance S. Perry, *Designing Workplace for Aging Workforce*<sup>1</sup>

It is virtually a truism at this point to note that our population is aging. This is a trend generally heralded as a national social and economic disaster, a grey tsunami threatening our communities and our workplaces. This short paper aims to assist us to see the opportunity presented by an aging population, to enhance our understanding of age-related dynamics, ageism and age discrimination, and to support us to leverage this knowledge—both as employers and co-workers, and as lawyers practicing in the area of employment and human rights law. For employment lawyers, the aging of our population has the potential to impact both office culture and client work.

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<sup>1</sup> Lance S. Perry, *Designing Workplace for Aging Workforce*, at 5, online: <https://www.zurichna.com/NR/rdonlyres/AEFC0FF5-EE0B-4765-B5D4F640D99E1412/0/Designingtheworkplacefortheagingworkforce.pdf>

The aging of our population may shift dynamics in many of our workplaces, although different work environments will see different pressures. For example, in a physical labour environment there may be concerns that the older labourer is no longer able to meet the physical demands of the job. In a law office environment there may be concerns about how having a great number of senior partners affects billing patterns and opportunities for partnership. Ideological assumptions underlying collective agreements and benefit plans may need to be revisited in a post mandatory retirement era where we have a number of workers over age 65. Either way, the presence of a significant number of older workers in the workplace requires us to consider issues of inclusive workplace design from an aging perspective.

Employment lawyers will be seeing a greater number of cases involving older employees and be challenged to enhance their capacity to see the age discrimination issue buried within a set of facts. In the absence of robust jurisprudence on age discrimination, precedent may not provide us with a clear way forward in understanding, analyzing, and arguing new cases. This paper shares some social science research on older workers, and explores select cases that raise questions about the meaning of age discrimination in the workplace. The idea is to provide some background context, and plant some seeds.

## II. Our Population is Aging, and so is Our Workforce

From the early 1990s to the present, [the portion of the population aged 55 and over] rose again to approximately 25%, and is projected to reach about 30% by 2016. The increase is accelerating and increases are expected to continue in the decades after 2006.

Expert Panel on Older Workers, *Supporting and Engaging Older Workers in the New Economy*<sup>2</sup>

What do we mean when we speak of an aging population? Let's start out by getting the statistics over with. Two key related factors are increased life expectancy and older Canadians making up a larger subset of the overall population (i.e., more older people and people living longer lives).<sup>3</sup>

Life expectancy has increased consistently in Canada over the last 100 years. Average life expectancy is now over age 80 in BC (80 for men, 84 for women), making BC the oldest province in Canada based on the latest Statistics Canada figures.<sup>4</sup> In comparison, life expectancy for men was 75 in 1990 and 72 in 1980.<sup>5</sup> Increases in life expectancy are generally attributed to improvements in nutrition, and access to health care and medical interventions, and life expectancy is impacted by various

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2 Expert Panel on Older Workers, *Supporting and Engaging workers in the New Economy* (2008), online: [http://publications.gc.ca/collections/collection\\_2010/rhdcc-hrsdc/HS4-105-2008-eng.pdf](http://publications.gc.ca/collections/collection_2010/rhdcc-hrsdc/HS4-105-2008-eng.pdf)

3 A third factor is sustained below replacement level fertility. Replacement level fertility is the number of children per women necessary for the population to replace itself taking into account mortality between birth and age 15, and in the absence of migration. Replacement level fertility is currently 2.1 births per woman. Statistics Canada, Study: Women in Canada: Female Population, 2014, March 30, 2015, online: <http://www.statcan.gc.ca/daily-quotidien/150330/dq150330c-eng.htm> [Women in Canada]

4 Statistics Canada, Life Expectancy at birth, by sex, by province, Latest indicator tables, May 31, 2013, online: <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/health26-eng.htm>

5 *Ibid.*

factors, including income (i.e., in Canada people with lower incomes tend not to live as long as their wealthier counterparts).<sup>6</sup>

The aging of the post WWII baby boomers in part accounts for our older population in Canada. By 2015 many of the ‘baby boomers’ are now in their 60s. By 2014 15.7% of the population was age 65 or older,<sup>7</sup> with the female older adult numbers being slightly higher, at 17%.<sup>8</sup> Thirty years ago the figure was 10%. Growth of the older adult population has been increasing since 2000, and projections assume that by 1930 adults over age 65 will account for 22-24% of the overall population of Canada, with the BC numbers being higher: 24-27%.<sup>9</sup>

These demographics impact both the age distribution in the workforce and the size of the retired population. It means that our workplaces are likely to be made up of a much higher percentage of workers in their 50s and 60s than in the past, even assuming a general pattern of retirement at age 65. The first ‘baby boomers’ turned 55 in 2001. Statistics Canada points out an ever-increasing proportion of adults over age 55 in Canada, as illustrated in Figure 1 – close to 30% next year, based on their projections. They note, concurrently, an increasing number of adults over 55 in the workforce: “between 2001 and 2009, the proportion of people in the labour force aged 55 and over rose from 10% to 17%.”<sup>10</sup> Add to the mix the trend in retiring later in life – a pattern not likely to shift soon: younger workers on average spend longer in school, accruing greater debt and delaying the beginning of their professional lives, tend to have children later in life than their predecessors, and assume mortgages with longer amortization periods.<sup>11</sup> Today and in the future Canadians are paying off debt at an age when their parents were saving for retirement.

A further pressure that may cause some to delay retirement in the future is the federal policy shift in moving the Old Age Security and Guaranteed Income Supplement eligibility age from 65 to 67 – by 2029 OAS will not be payable until age 67. The federal government has also developed various programs to help encourage older workers to stay in the workforce to support ongoing economic growth. The elimination of mandatory retirement is also likely having some impact on labour patterns in BC.

In 2012 and 2013, the Canadian Centre for Elder Law collaborated with the West Coast Legal Education and Action Fund to undertake a series of consultation events involving older women in the Vancouver Lower Mainland. We heard that, for older women, work remains a tremendously important issue, that many cannot afford to retire in their 60s, and some feel that work contributes

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6 Statistic Canada, Life expectancy, January 11, 2010, online: <http://www.statcan.gc.ca/pub/82-229-x/2009001/demo/lif-eng.htm>

7 Statistics Canada, Canada’s Population estimate: Age and sex, 2014, September 26, 2014: online, <http://www.statcan.gc.ca/daily-quotidien/140926/dq140926b-eng.htm>

8 Women in Canada, *supra*, n. 3.

9 Statistics Canada, Population projections: Canada, the provinces and territories, 2013-2063, September 17, 2014, online: <http://www.statcan.gc.ca/daily-quotidien/140917/dq140917a-eng.htm>

10 Statistics Canada, *Projected Trends to 2031 for the Canadian Labour Force*, 2011, online: <http://www.statcan.gc.ca/daily-quotidien/110817/dq110817b-eng.htm>.

11 Mathew McClearn, “Retirement age in Canada Rising,” *Canadian Business*, March 27, 2012, online: <http://www.canadianbusiness.com/business-strategy/retirement-age-in-canada-rising/>

much purpose to their lives, helping them stay healthy and engaged in their communities even after age 65.<sup>12</sup> Whether by choice or by necessity, many people choose to work into their 60s and later.

Given the above statistics and recent developments, employers are likely to be faced with a greater number of workers wanting, or needing, to work beyond age 65. Why drag you through this background information and statistics? I think it is important to recognize that the labour force changes on the horizon will likely include both a greater proportion of older workers in the workplace AND a greater number older “older workers,” including workers over 65.

### III. Older Workers—Stereotype v. Science

People don't want to hire you. Because you are older they think you're going to get sick and cost them money, or you are too old to learn new technologies. There is a lot of ageism.”

Consultation participant, Older Women's Dialogue Project<sup>13</sup>

What is an older worker? The concept is fairly imprecise and relative. Most sources consider an older worker to be age 55 and over<sup>14</sup>; although the range is sometimes 55-64, suggesting a continuing presumption of retirement around age 65. In the absence of mandatory retirement in most sectors in BC, and the shifting of the OAS rate upward from 65, an upper limitation seems unnecessary. For the purpose of this paper I consider any individual over 55 who is still working or looking for work to be an older worker.

#### A. Stereotypes about Older Workers

Myths abound about the negative qualities of older workers. Let's get some of them out in the open right away.

*Older workers are less productive:* A recent study by Age UK noted that while some older workers demonstrate declines in some physical abilities as they age, “there was little sign of a decline in overall productivity because older workers compensated with skills and experience.”<sup>15</sup> The study noted that while younger adults may perform repetitive tasks more quickly, “older people are often faster at carrying out complex tasks that allow them to draw on their contextual knowledge and years of work experience.”<sup>16</sup>

*Older workers are more often off the job due to illness:* While older workers may be off for longer when they are ill, they have fewer short term absences from work.<sup>17</sup>

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12 Canadian Centre for Elder Law, *Your Words are Worth Something: Identifying Barriers to the Well Being of Older Women* (Vancouver: CCEL), 2013, at 33, online: <http://www.bcli.org/project/older-womens-dialogue-project>.

13 *Ibid.*

14 See, for example, Expert Panel on Older Workers, *supra*, n. 2.

15 Research by Essex Business School, University of Essex, cited in “Age study challenges stereotypes of older workers, Age UK,” online: <http://www.ageuk.org.uk/latest-news/archive/age-uk-study-challenges-negative-stereotypes-of-older-workers/>

16 *Ibid.*

17 *Ibid.*

*New older workers are a poor investment because they do not stay long in their positions, being closer to retirement:* In contrast, studies suggest that while some older workers may desire some reductions in hours as they age, especially beyond age 65, older workers tend to stay in their positions longer. One study by the US Department of Labor confirms that older workers are more loyal, staying in their jobs for longer periods of time: the study indicated that workers ages 55 to 64 had “been with their current employers a median of 9.3 years, while workers ages 25 to 34 have a median tenure of only 2.9 years.”<sup>18</sup> Findings released from their longitudinal study generally confirm that “job duration tended to be longer the older a worker was when starting the job.”<sup>19</sup>

Many more prejudices are linked to assumptions about aging and the impact on overall physical and mental health. Here is another list enumerated in a piece in *Forbes* on age discrimination in the workplace. Older workers are:

- Rigid and stuck in their ways.
- Poor or failing [in] health. Medical issues impact attendance and productivity.
- Afraid of new technologies.
- Slower to learn new concepts. Slow to change.
- Years of highly developed opinions; unwillingness to hear new ideas.
- Expensive. They demand higher wages.
- Poor investment because they won’t be staying with the company for long enough to get a return on investment with their training.
- Physically slow moving. Low energy. Unable to sustain long hours if required.
- Risk adverse.<sup>20</sup>

## **B. Research on Aging: Health Issues that May Emerge as We Age**

As the Ontario Human Rights Commission writes, “aging is a highly individual experience, and it is not possible to generalize about the skills and abilities of a person based on age, any more than it is possible to make assumptions about someone based on any other aspect of their identity.”<sup>21</sup> Human rights law exists in part to protect people from such assumptions. That said, research tells us that some health conditions are more common to older adults than younger adults. They include<sup>22</sup>:

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- 18 Cited in Leslie Taylor, “Older workers more loyal to employers” in *Inc.*, September 13, 2006, online: <http://www.inc.com/news/articles/200609/employees.html>
- 19 United States Department of Labor, Bureau of Labor Statistics, Number of Jobs Held, Labor Market Activity, and Earnings Growth Among the Youngest Baby Boomers: Results from a Longitudinal Survey Summary (Economic News Release), March 31, 2015, online: <http://www.bls.gov/news.release/nlsoy.nr0.htm>
- 20 Sherri Edward, Age Discrimination in the Workplace: Is it Ageism Or Your Attitude? *Forbes*, March 2, 2011, online: <http://www.forbes.com/sites/moneywisewomen/2011/03/02/age-discrimination-in-the-workplace-is-it-ageism-or-your-attitude/>
- 21 Ontario Human Rights Commission, Ageism and age discrimination (fact sheet), online: <http://www.ohrc.on.ca/en/ageism-and-age-discrimination-fact-sheet>
- 22 Beth Loy, *Accommodation and Compliance Series: Employees who are Aging*, 2013, online: <http://askjan.org/media/aging.html>.

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- arthritis;
- diabetes;
- osteoporosis;
- dementia;
- hypertension.

Here are some other health changes often associated with age<sup>23</sup>:

- **Changes in maximum muscular strength and range of joint movement:** In general, people lose 15 to 20% of their strength from the ages of 20 to 60 ... Older employees may be able to perform the same tasks as a younger worker, but they may be working closer to their maximum level on a regular basis. The musculoskeletal system weakens over time, resulting in a decreased capacity for load-bearing work ... As we age, the body loses some “range of motion” and flexibility. People may be used to certain range of movements at one task or workstation. Being less flexible or able to reach could cause problems in some unpredictable situations that require unusual movements.
- **Cardiovascular and respiratory systems:** The ability of the heart, lungs and circulatory system to carry oxygen decreases. Between the age of 30 and 65, the functional breathing capacity can reduce by 40%. These changes can affect the ability to do extended heavy physical labour, [and] reduce the body’s ability to adjust to hot and cold conditions.
- **Regulation of posture and balance:** In general, people may find it harder to maintain good posture and balance. When seated or standing still, this may not be a problem. However, accidents that happen because someone loses their balance do happen more often with age. Work that requires precise adjustments, strong muscular effort (including lifting and carrying), joint movements at extreme angles, or those done on a slippery or unstable surface, will be affected by poorer posture. Unexpected bumps or shocks may cause a more serious problem than with a younger worker.
- **Sleep regulation:** As we age, our body is not able to regulate sleep as well as it used to. How long a person sleeps, and how well they sleep, can additionally be disrupted by changing work hours or by light and noise. The impact on employees is especially a concern for older shift or night workers. They might need more recovery time between shifts or extended workdays. Use of shift rotations that are the least disruptive to sleep patterns are preferred.
- **Thermoregulation (body temperature):** Our bodies are less able to maintain internal temperatures as well as less able to adjust to changes in external temperature or due to physical activity. This change means that older workers may find heat or cold more difficult to deal with than when they were younger. It also means that if they are doing hard manual labour, they may get overheated more easily.
- **Vision:** Vision changes with age. We will notice we cannot see or read from certain distances as well as we used to. This reduction in the “amplitude of accommodation” (the ability to see or adjust focus in certain distance ranges) is normally corrected with prescription glasses. Changes also occur in the peripheral visual field (how well you can see in the areas to the side of you, that you’re not directly looking at), visual acuity (how exact, clear, and “unfuzzy” things appear), depth perception (how far away things seem), and resistance to glare, and light

transmission. These changes are normally not noticed by a person unless there is poor lighting or there are sources of glare. Someone might also notice that they can't see as well when they're reading something when text size is small, or when there is poor contrast between the text and the background. Brighter lighting (that is suitable for the task) and well laid-out documents that avoid small print are important.

- **Auditory (hearing):** Hearing also changes. We may not be able to hear as well at higher frequencies (high pitch sounds). Most often, this change is noticed as the inability to listen to a particular voice or sound in a noisy environment. As well, people who work with a lot of background or noise may have difficulty hearing verbal instructions.

Age is a very personal experience and we do not all age at the same rate. Poverty, immigration, disability, addiction and other personal factors, many of which are linked to protected grounds under the *Human Rights Code*, can have a significant impact on how quickly our bodies or our minds age. Many older employees will not experience health related declines that impact on their ability to perform their work; however, for many, the aging process does have an impact. Like much of elder law there is an interdisciplinary quality to exploring legal issues connected to aging, and there is often a need to engage with social science and medical research on age-related health issues in order to appreciate the full picture. An awareness of physiological changes typically associated with aging will enhance our capacity to identify an issue that has potentially given rise to age or disability discrimination (or both) for an older worker.

#### **IV. Human Rights Legislation in Canada: The Statutory Landscape**

One respect in which the treatment of age discrimination is different from other grounds is that human rights codes do not provide for a blanket prohibition. Rather, the language is tempered by exceptions that are nuanced differently in the various human rights statutes across the country. Although increasingly human rights decision-making, especially at the Human Rights Tribunal, is informed by decisions from across the country, these distinctions in the statutory protections accorded to individuals vis-à-vis age discrimination can be important to understand when relying on decisions from other jurisdictions.

*Age range:* In some jurisdictions there are no limitations on the age range (Federal, New Brunswick, Northwest Territories, Nova Scotia, Nunavut, Quebec, Prince Edward Island, Yukon). In other jurisdictions, protection is limited to adults over a particular age (Alberta, Manitoba, Ontario, Saskatchewan). BC falls into this second group limiting protection to adults over age 19. In Newfoundland and Labrador the age range limit varies depending on the context.

*Contracts and benefits:* Discrimination is generally prohibited in some jurisdictions (Manitoba, Nunavut, Ontario, Saskatchewan, Yukon). In other jurisdictions, limitations apply. In BC, age discrimination is permitted in contracts that pertain to premiums and benefits under employee insurance plans. This is also true of Saskatchewan and Manitoba.

*Tenancy:* Age discrimination is prohibited in most jurisdictions. In Saskatchewan and Newfoundland and Labrador the language of "accommodation" is used instead. A number of jurisdictions, such as BC, include a limitation permitting rental accommodation to be limited to people over the age of 55, essentially permitting older adult housing (also Ontario, Nova Scotia, New Brunswick).

**Harassment:** Age-related harassment is specifically prohibited in some jurisdictions (Federal, Manitoba, Ontario, Quebec, Nova Scotia, Newfoundland and Labrador, Yukon, Northwest Territories, Nunavut). In BC, the Code is silent on harassment with respect to any ground.

The above differences are summarized in a table at Figure 1.

In terms of employment, the BC Code states:

**Discrimination in employment**

13(1) A person must not

- (a) refuse to employ or refuse to continue to employ a person, or
- (b) discriminate against a person regarding employment or any term or condition of employment

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

However, the provision does “not apply with respect to a refusal, limitation, specification or preference based on a *bona fide* occupational requirement.” A *bona fide* occupational requirement can be linked to age. For example, although mandatory requirement is generally prohibited under the framework of the Code, mandatory retirement provisions of collective agreements have been upheld in some contexts, such as in a number of decisions involving suppression fire fighters, who are generally required to retire at age 60.<sup>24</sup>

There is not a huge body of case law on age discrimination in employment and very few cases exploring whether health-related issues of a worker linked to aging might give rise to age discrimination. This paper will focus on a snapshot of cases where age discrimination was not found, but which illustrate the types of fact scenarios that may present opportunities for raising age discrimination arguments.<sup>25</sup>

## V. Disability v. Age-Related Health Needs—Exploring the Distinction

With respect to whether Ms. Holowaychuk has a physical disability, the respondents argued that she does not: she is not confined to a wheelchair, and the medical information does not establish a disability. The respondents argued that all the evidence established was that Ms. Holowaychuk was subject to the normal aches, pains, and limitations of old age.

*Mahoney obo Holowaychuk v. The Owners, Strata Plan #NW332 and others*, 2008 BCHRT 274 at para. 83

Depending on the facts of a particular person’s situation, it is conceivable that the conditions described in section II.B. could give rise to a disability within the meaning of the BC *Human Rights Code*. However, it is also true that even without diagnosis or identification of a particular disease

24 See, for example, *Gill v. Hamilton Professional Firefighters Assn*, [2012] O.H.R.T.D. No. 1484 and *Estey v. London (City)*, 2008 HRTO 412.

25 For a recent summary of jurisprudence on age discrimination in the workplace see Heather Hettiarachchi’s paper, “Human Rights Issues in Relation to the Aging Workforce” (Human Rights Conference 2014, CLEBC).

or disability, older workers can experience a decline in health that impacts their work. Although the issue has not yet been tested in human rights jurisprudence, these age-related needs may trigger the protection of the *Human Rights Code* under the grounds of age.

Is an office worker being terminated for slower typing? Is this a result of the onset of arthritis—is the diagnosis sufficient to meet a definition of disability? If not, is her experience age discrimination and should her change in abilities be accommodated by the employer? Is an older labourer tiring more easily or over heating and requiring more frequent breaks, and finding it increasingly difficult to maintain alertness and productivity on night shifts? The latter scenario may not point to discrimination based on disability, but it may present a need for accommodation grounded in age discrimination. Could this situation trigger a right to accommodation in the form of an exemption from a regular rotation that includes night shifts? As far as human rights jurisprudence is concerned, this is untested territory.

The respondent’s argument in the *Holowaychuk* decision excerpted above was rejected. The case concerned a 91-year old woman living independently in her condo who had filed a complaint with the BC Human Rights Tribunal alleging discrimination on the basis of physical disability when the Strata Council refused to install an accessible ramp to provide access to the elevators. At tribunal, Mrs. Holowaychuk provided medical information that indicated that she suffered from a number of conditions, including congestive heart failure, degenerative disc disease, and osteoarthritis, as well as witness descriptions of the challenges Mrs. Holowaychuk faced negotiating stairs with her walker.

There may, at times, be a fine line between health circumstances that suggest discrimination based on disability versus age. The same facts may give rise to circumstances that could be framed as age or disability discrimination, or an intersectionality of grounds, when the worker is an older person with a significant impairment or disease. Although not a workplace discrimination case, the arguments raised in *Holowaychuk* illustrate this dynamic well. Based on the evidence the tribunal concluded that Mrs. Holowaychuk did have a disability, noting (at para. 84) that the respondent’s argument was “remarkable,” but “entirely unpersuasive” and “not consistent with the Tribunal’s case law on the issue of disability, or the purposes of the Code.”

The case raises the question of whether there is an important conceptual distinction between some of the physical illnesses or impairments associated with age and the meaning of disability. Neither age nor disability is defined in the Code, but there exists robust jurisprudence upon which to draw in establishing whether or not a person has experienced discrimination based on physical or mental disability. In *Holowaychuk*, the tribunal relied on *Edgell v. Board of School Trustees, School District No. 11 (Trail)*, November 26, 1996 (B.C.C.H.R.) and *Morris v. B.C. Rail*, 2003 BCHRT 14. In *Edgell*, the BC Council of Human Rights stated (at para. 27) that “the concept of physical disability, for human rights purposes, generally indicates a physiological state that is involuntary, has some degree of permanence, and impairs the person’s ability, in some measure, to carry out the normal functions of life.” In *Morris*, the tribunal stated (at para. 214):

... in assessing whether an individual has a physical or mental disability within the meaning of s. 13 of the Code, the Tribunal must consider the individual’s physical or mental impairment, if any; the functional limitations, if any, which result from that impairment; and the social, legislative, or other response to that impairment and/or limitations. The focus is on this third aspect, which is to be assessed in light of the concepts of human dignity, respect and the right to equality ...

Each of these characterizations is entirely age neutral. Thus, the case raises the questions of:

- What is the conceptual relationship between age discrimination and disability discrimination?

- Could employers have a duty to accommodate age-related impairments, illnesses or diseases of older workers that may fall short of the definition of disability? Could the age discrimination lens in a sense offer a strategy for expanding protection afforded to older workers?
- How old would a worker have to be to trigger the availability of an age discrimination argument?

By way of establishing undue hardship, one of the arguments raised by the respondents was that the building in question was just one of hundreds or thousands where older people live, and which may require an accessibility upgrade, thus potentially opening up a “Pandora’s Box.” In the final analysis, the tribunal member found that undue hardship was not established. However, the respondent’s prediction may be correct to some extent: an aging population will likely mean more human rights cases involving older complainants, presenting strategic questions about when and how to raise an age discrimination argument.

## VI. Finding the Age Discrimination Argument

### A. Scenario I: Age and Training

While it is clear in human rights law that employers have a duty to accommodate the disabilities of young and older workers alike, it is less clear from the case law whether employers have a duty to accommodate the age-related needs of older workers that fall short of a disability.<sup>26</sup> In the past, much of the focus on age discrimination has been around mandatory retirement and direct discrimination in employment. Parallels between disability discrimination and age discrimination raise the issue of whether an older worker may have a right to accommodation of some of the age-related impairments or declines associated with aging that may fall short of presenting a disability.

Consider *Riddell v. IBM Canada*, 2009 HRTO 1454 (CanLII). John Riddell worked for the employer for 33 years and was dismissed at age 59. He was offered early retirement on multiple occasions and declined. The business and industry had changed over the years of his employment, and in his final years of work with IBM Mr. Riddell was employed in a variety of positions, with the employer finding his job performance not satisfactory each time. Mr. Riddell was offered training which he undertook, but told the employer the work was complex and he needed more time to get competent in the new areas. Mr. Riddell, who was unrepresented, filed a complaint alleging age discrimination. The employer argued that Mr. Riddell’s performance had been monitored and he was terminated for poor performance; he had been targeted for early retirement as well not due to age but rather due to poor performance.

Based on a review of the case the facts do not present the ideal circumstances for leveraging an age discrimination argument, but the dynamics of the case, involving the retraining of a 59-year old man in a high tech industry dominated by much younger workers, suggest circumstances where equality might require differential treatment in order to insure fairness. Pnina Alon-Shenker argues that this complaint was unsuccessful in part because it was, erroneously, treated as a form of direct age discrimination, and that viewed through a lens of adverse impact discrimination age-related barriers are more apparent. She writes:

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26 Pnina Alon-Shenker, “The Duty to Accommodate Seniors Workers: Its Nature, Scope and Limitations,” *Queen’s Law Journal*, 2012 (38) 165-208 at 181.

The Tribunal seems to have treated the complaint as solely one of direct age discrimination. Interestingly, it is noted that no other seniors workers were employed in similar positions, and that all of Riddell's colleagues were "half his age". 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, which may not have been sufficient or suitable given his age-related needs. Indeed he argued 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".<sup>27</sup>

## **B. Scenario 2: Age Discrimination Buried Beneath Another Distinction**

One of the challenges of age discrimination being tempered within legislation with so many distinctions and exceptions, and a history of rationalizing distinctions based on age as a familiar and necessary way of organizing society, is that problematic distinctions based may get obscured, especially when they are connected to retirement regimes.

Consider *Law v. Thames Valley District School Board*, 2011 HRTO 953. In this case, the school board had adopted a policy according to which retired teachers who wanted to return to work as occasional teachers were required to be certified in French, special education, music or technology (the teaching areas where there was the greatest need for teachers at the primary level). Roughly 40% of retired teachers applied to be on the list. The policy did not apply to non-retired teachers who wanted to be on the occasional teacher list. Based on the eligibility requirements for receiving a pension under the collective agreement, which included age and years of work, retired teachers were necessarily older adults—based on the collective agreement formula they would have to be at least 50. Judith Law was a retired primary school teacher who applied to be an occasional teacher following retirement. Her application was denied because she was not certified in any of those four areas, and she filed a complaint to the Ontario Human Rights Tribunal alleging discrimination based on age.

Ms. Law alleged discrimination on the ground of age because retired teachers, who were necessarily older, were being treated differently from new graduates who were, in comparison, generally young. The School Board argued that since the new permanent teachers were primarily hired from the occasional list, applying the policy to non-retired occasional teachers would limit the pool of applicants for permanent positions and might have an effect of excluding excellent new graduates.

The tribunal dismissed Law's application. They held that policy created a distinction that caused disadvantage; however, they found that the policy drew a distinction not based on age but rather based on which individuals were eligible to become permanent teachers in the future. They noted that older workers were not prevented from being on the occasional list: teachers can be of any age and the policy does not affect them unless they retire. While the policy did put retired teachers at a disadvantage in comparison to new graduates, the distinction it made was not between senior teachers and younger ones, but rather between those receiving pensions and those who would be eligible for permanent positions in the future.

The problem with this analysis is that it suggests that a distinction between retired and non-retired teachers does not offend the Code because, in a sense, it is not direct discrimination. Retirement is not an age-neutral phenomenon and the tribunal member appears to recognize that the policy at issue was a distinction that would negatively affect older workers in particular. This approach to

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<sup>27</sup> *Ibid.*, at 198.

analysis sets the bar very high and is potentially at odds with the expansive approach to discrimination in recent years recognizing adverse impacts. It is one thing to justify the policy as bone fides but entirely more problematic to suggest that discrimination against retirees is not a form of age discrimination.

## VII. The Older Worker and Inclusive Workplace Design

A funny thing is happening on the way to retirement for America's baby boomer population. Rather than going quietly off into the sunset, older workers are actively looking for options to keep working.

Kathleen Christiansen and Marcie Pitt-Catsouphes,  
*Accommodating Older Workers Needs for Flexible Work Options*<sup>28</sup>

From a human rights perspective, the opposite of discrimination is inclusion. The aging of our workforce raises questions about inclusive workplace design from an aging standpoint. Whether the motivation is legal (avoiding liability for age discrimination), economic (maintaining a robust workforce and economic growth in spite of demographics), or supportive (changing practices in order to address the needs and desires of older workers), some of the same strategic may be effective. Although for many older workers who wish to stay in the workplace after age 65 the dismantling of mandatory retirement represents a huge victory, it is only just the beginning in terms of making workplaces inclusive for older people.

A key theme that emerged from the consultations of the Canadian Expert Panel on Older Workers was a desire for options linked to flexibility and choice, such as workplace flexibility, part-time options and phased-in retirement.<sup>29</sup>

***Flexibility and part-time work:*** Older workers, especially seniors, may wish to stay in the work place but desire shifts in how they work that support their other personal goals and health and family caregiving challenges. Workplace flexibility denotes adaptations to workplace rules, such as opportunities to change work hours or location, telecommuting and part-time options, what allow a worker to shape the work arrangements around other personal or professional needs. Such arrangements are commended for supporting workers and employers to craft creative solutions to balancing work and other goals that are tailored to the reality of a particular employee. As the Expert Panel writes:

A large proportion of older workers have non-standard forms of employment. These types of work arrangements can afford older individuals a significant degree of flexibility in their lives. Older workers can better manage the balance between work and family, and retired workers can re-enter the labour market, participate at a level they choose, supplement their retirement income and be involved in meaningful work.<sup>30</sup>

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28 Kathleen Christiansen and Marcie Pitt-Catsouphes, "Accommodating Older Workers Needs for Flexible Work Options," in *Ivy Business Journal: Improving the Practice of Management*, 2005, online: <http://iveybusinessjournal.com/topics/the-workplace/accommodating-older-workers-needs-for-flexible-work-options#.VElj0vnF9GU>].

29 Expert Panel, *supra*, n. 2, at 30.

30 Expert Panel, *supra*, n. 2, at 6.

***Phased in retirement:*** Retirement is not an easy or welcome transition for some, especially given the extreme contrast between full-time work and full-retirement. Many older workers desire a more gradual approach to retirement, which can be supportive of knowledge transfer across generations. As an example, Coast Mountain Bus Company has a practice of rehiring retired workers to drive their smaller community buses and offering them a more flexible work schedule on these routes.<sup>31</sup> Some infrastructural change will likely be required to support phased-in retirement in some sectors. For example, it has been suggested that as part of supporting phased-in retirement changes to the CCP regime will be required in terms of work cessation rules and the ability to contribute employment earnings after starting to draw pension income.<sup>32</sup>

***Accommodating challenges associated with aging:*** As discussed above, older workers may experience age-related health issues. This may require some accommodation, change in work rules, in order to support staff to perform at their best. From an occupational health perspective<sup>33</sup>:

- It could mean a change in the type of injuries workers experience or are at risk of: while younger workers tend to get more eye or hand injuries, older workers, who have a more lengthy work history, report a greater number of back injuries.
- It could mean accommodation of more lengthy recovery times: while older workers report fewer accidents, their injuries are often more severe and their bodies take longer to heal.
- It may mean more repetitive strain type injuries: a older worker may experience a longer period of time at the same types of tasks.

In recent years, ergonomics, occupational therapy, and other disciplines have been used to support workers with disabilities to stay in the workplace. In an era where there are a greater percentage of workers over age 55, as well as workers in their 60s, this knowledge and other expertise linked to our understanding of aging can be invoked to develop workplaces that are more inclusive of older workers.

Although there is much fear mongering around the impact of an aging population, there are tremendous benefits to having a greater number of experienced older workers in a workplace. As one writer puts it:

The culture and values of the older workers are significant assets for the companies that choose to attract and retain them. These values include commitment and loyalty to the employer, fewer sick days, reduced injuries, and enhanced length of service. Companies need to recognize older workers' importance in the workforce and their changing roles in their fields.<sup>34</sup>

Targeting older workers for support may be challenging: it can be an awkward conversation suggesting someone is “getting older.” A better strategy may be thinking about overall inclusive design while valuing older workers, both personally and collectively, for what they bring to the workplace. Employers who are cited as good employers for older workers by both the Sloan

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31 *Ibid.* at 43.

32 *Ibid.* at 45.

33 Canadian Centre for Occupational Health and Safety, Aging Workers, online: [http://www.ccohs.ca/oshanswers/psychosocial/aging\\_workers.html#\\_1\\_3](http://www.ccohs.ca/oshanswers/psychosocial/aging_workers.html#_1_3)

34 Lance S. Perry, *supra*, n. 1.

Center on Aging and Work at Boston College and AARP emphasize “intergenerational strategies” – universal strategies that aim to please and retain younger and older workers alike, such as flexible working.<sup>35</sup>

### VIII. Conclusion

Because, in our society, old age tends to be less associated with wisdom and tranquility and more with infirmity and dependence, we fear it. We may be more likely to discriminate against elderly people, in a futile attempt to distance ourselves from what will inevitably occur to each one of us.

Justice L’Heureux-Dubé, *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103 at para. 1173

It is worth admitting: talking about age and older workers is a dangerous, slippery business. I find myself dancing around generalizations—pointing out ageism in resisting some assumptions; reinforcing other generalizations in order to encourage inclusive design practices. It’s tricky. I also think it is important to underscore that delaying retirement is not desirable for many people, especially for those who have not had the privilege of finding work they enjoy. Some people long for the day they turn 65, rest and draw on a hard-earned pension; for some people in low-income communities, living to age 65 is an accomplishment and Old Age Security is a dream.

As Gwen Brodsky writes with respect to people with disabilities, “the duty to accommodate is about creating an inclusive society, and about the positive obligation of service providers and others governed by human rights legislation to make adjustments to rules and practices necessary to achieve the goal of inclusion.”<sup>36</sup> However, discrimination based on disability is in some sense different from age discrimination, even though the barriers to participation in the workplace can be similar. Uniquely, aging is an experience we all share, and if we are fortunate, aging tends to creep up on us. We are not suddenly an “older person,” leaping overnight into this new conceptual category. Although older people may, as L’Heureux-Dubé points out, represent a historically disadvantaged group, the notion of “older” represents a fluid, ever-changing group. It is a relative concept. Brodsky writes that “the history and present-day reality of many people with disabilities is one of exclusion and marginalization.”<sup>37</sup> This may be true of the collective history of older adults; but it is not so true of individuals who experience age discrimination. Rather, aging may bring each of us into a new realm of vulnerability.

In the absence of greater emphasis on inclusive design, more significant efforts to resist pervasive ageist attitudes that suggest older workers are more costly and less productive, and enhanced recognition of some of the challenges associated with aging that may give rise to discrimination, everyone has the potential to experience age discrimination—though social and economic privilege can insulate us from the negative impacts of many exclusive practices. That said, older workers dealing with health issues and other challenges to full participation in the workplace may be

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35 Steven Greenhouse, “The Age Premium: Retaining Older Workers,” *The New York Times* (May 12, 2014), online: [http://www.nytimes.com/2014/05/15/business/retirementspecial/the-age-premium-retaining-older-workers.html?\\_r=0](http://www.nytimes.com/2014/05/15/business/retirementspecial/the-age-premium-retaining-older-workers.html?_r=0)

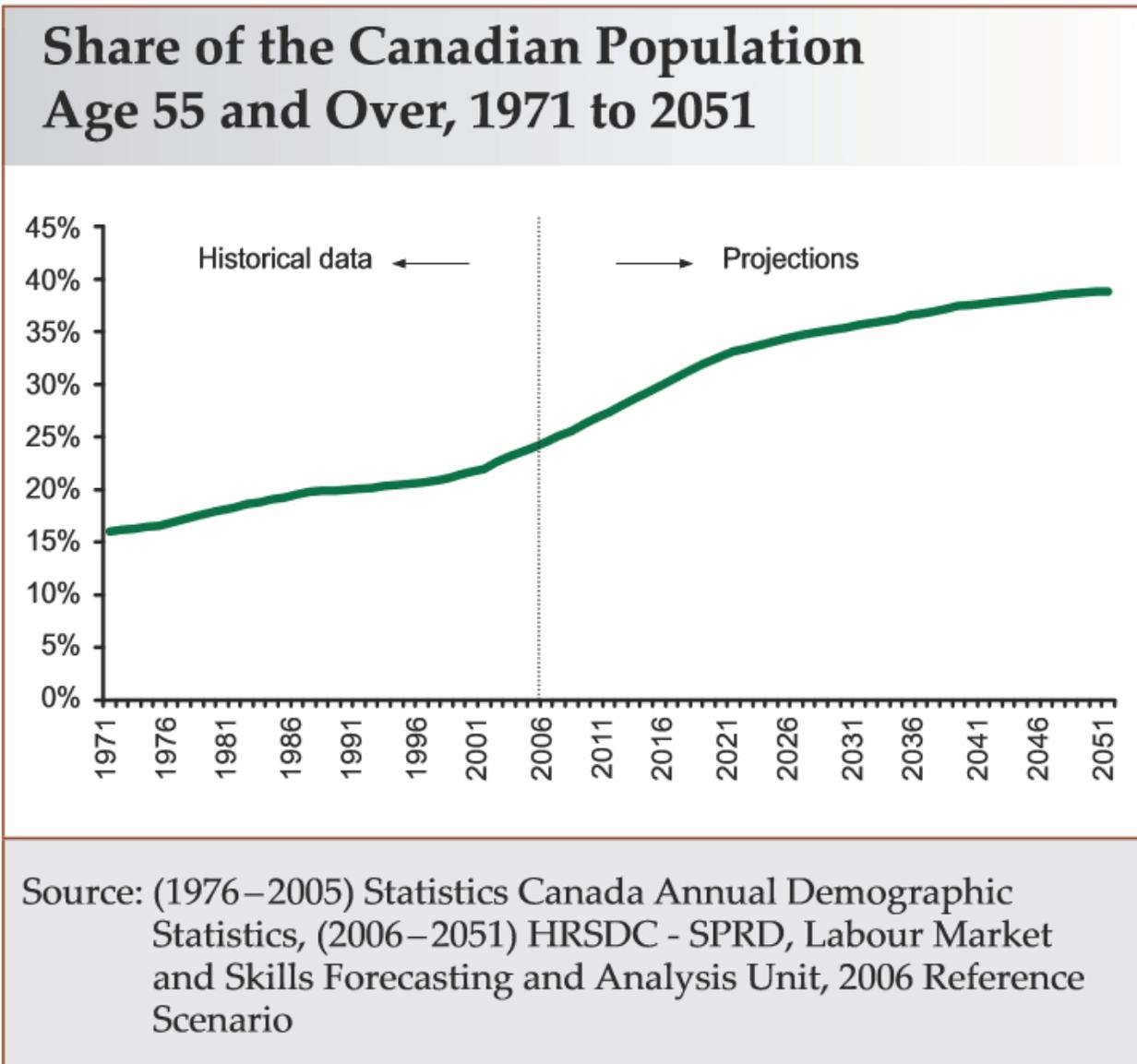
36 Gwen Brodsky, “Moore v. British Columbia: Supreme Court of Canada Keeps the Duty to Accommodate Strong,” *Journal of Law and Equality* (2013) 10, 85-92 at 85.

37 Brodsky, *ibid.*, at 86, relying on *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 56.

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reluctant to frame their experience as age discrimination. Ageist attitudes are fairly culturally systemic in Canada: older workers may face negative treatment as well as adverse impact discrimination but not identify themselves as an older person (yet)—age is not really a category people embrace in a world where youth and beauty are idealized and anti-aging strategies are promoted as unequivocally desirable. Hopefully we lie at the precipice of a cultural shift toward seeing value in aging, and the greater presence of older workers, and all the benefits they bring to workplace culture and work quality, will help us to see the light. In the meantime, in terms of employment law and human rights practice, we are trailblazers: we need to learn to see age discrimination where previously it may have been invisible to us or obscured by other grounds we understand better.

**IX. Figure I: Share of the Canadian Population Age 55 and Over, 1971 to 2051**



## X. Figure 2: Legislated Age-related Discrimination Protection in Canada

	Federal	British Columbia	Alberta	Saskatchewan	Manitoba	Ontario	Québec	Newfoundland and Labrador	Nova Scotia	New Brunswick	P.E.I.	Yukon	N.W.T.	Nunavut
<b>Employment</b>														
General	●	●	●	●	●	●	●	●	●	●	●	●	●	●
Advertisement	●	○ <sup>1</sup>	●	●	●	●		●	●	●	●	○ <sup>7</sup>	●	●
Union Membership	●	●	●	●	●	●	●	●	●	●	●	●	●	●
<b>Provisions</b>														
Goods	●				●	●	●	●				●	●	●
Services	●	●		●	● <sup>2</sup>	●	●	●	●	●	●	●	●	●
Facilities	●	●		●	●	●	○ <sup>3</sup>	●	●	●	●	●	●	●
Accommodation	●	●		●	●	●		●	●	●	●	○ <sup>8</sup>	●	●
<b>Other</b>														
Tenancies	●	○ <sup>4</sup>		○ <sup>4</sup>	●	○ <sup>5</sup>		○ <sup>4</sup>	○ <sup>5</sup>	●	●	●	●	●
Property Sales				○ <sup>4</sup>	●	○ <sup>5</sup>			●	●	●	●		●
Contracts				○ <sup>6</sup>	○ <sup>6</sup>	○ <sup>6</sup>	○ <sup>6</sup>	●				●		○ <sup>6</sup>
Harassment	●				●	●	●		●			●	●	●
Publication	●	●	●	●	●	●	●	●	●	●			●	●

<sup>1</sup> Does not prohibit the disclosure of age in employment applications, but prohibits expressing age preference in job advertisements.

<sup>2</sup> Expressly includes, in addition to services, any right, license, benefit, program, or privilege available to the public.

<sup>3</sup> Does not expressly prohibit discrimination in access to facilities, but instead “access to public transport or public places”.

<sup>4</sup> Expressly provides exceptions allowing the restricting of housing for older adults of 55 years or older only.

<sup>5</sup> Statute unclear; may include discrimination protection under the heading of “accommodation”.

<sup>6</sup> Expressly provides exceptions for various types of insurance contracts.

<sup>7</sup> Statute unclear; Act prohibits discrimination “in connection with any aspect of...application for employment,” which may include employment advertisements.

<sup>8</sup> Statute unclear; may include discrimination protection under the prohibition against discrimination “in connection with occupancy, possession, lease...of property offered to the public.”