OLDER WORKERS AND THEIR HUMAN RIGHTS IN THE WORKPLACE: CONSIDERATIONS OF AGING, DISABILITY AND CONTINUED EMPLOYMENT

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A. Introduction

> Currently, there are approximately 1.5 million older persons in Ontario. By the year 2021, Ontario will be home to three million people over the age of 65. As revealed in this Report, this significant and growing proportion of our province's population faces significant barriers because of ageism and age-based discrimination. There is an urgent need for action to eliminate ageism and age discrimination so that older persons can fully participate in our communities, enjoy the same rights afforded to others and can live their later years with dignity. A new approach to aging is needed, one that promotes the dignity and worth of older persons and ensures their independence, security, full-participation and self-fulfillment.
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> - from *Time For Action: Advancing the Rights of Older Persons in Ontario*- Final Report of the Ontario Human Rights Commission's Research and Consultation on Human Rights Issues Facing Older Ontarians

Anti-discrimination law and policy directed at the workplace attempts to create equity and balance. Respecting and recognising the dignity and worth of each individual worker and ensuring that workers are properly accommodated are not only a laudable goals in and of themselves, they are essential to facilitate the full and continued participation in the workplace of anyone seeking to engage in gainful employment.

In Ontario, the *Human Rights Code*[1] (the *Code*) provides a common standard against which we measure our success in ensuring equity. Discrimination in the workplace is generally prohibited on the basis of age and disability,[2] although mandatory retirement

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1 RSO 1990, c H.19 [*Code*]

2 *Ibid* s 5(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

Ibid s 10(1) "age" means an age that is 18 years or more;

"disability" means, (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, (b) a condition of mental impairment or a developmental disability, (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language, (d) a mental disorder, or (e) an injury or disability for which benefits were claimed or received under the insurance plan established under the Workplace Safety and Insurance Act, 1997.

was in the past seen as an acceptable form of age discrimination. Relatively recent changes in the rules around mandatory retirement are a prime example of our evolving views about what constitutes equitable practices. In the context of age discrimination, the prohibition against mandatory retirement requirements, which is the effect of these statutory changes,[3] acknowledges that mandatory retirement practices are discrimination on the basis of age and, more broadly, the prohibition is recognition of older workers' contribution to the labour force. However, the prohibition against mandatory retirement poses additional conceptual problems that require analytical and practical adjustments in both the workplace and in our human rights and labour laws. Workers remaining in the workforce longer than in previous generations can present unique and relatively unexplored complications and therefore unaddressed examples of the interrelationship between enumerated grounds of discrimination, particularly age and disability.

B. Older Workers Working Longer is a Fact of Life Now

Many factors result in workers continuing to work and choosing not to retire until later in life. Specifically, it is important to view the extension of our working lives within the context of changes in life expectancy, all within only a few generations.

> Over the fifty-five-year period between 1951 and 2006, life expectancy in Canada increased from 68.6 years to 80.8 years – an increase of 12.2 years, or 18 per cent... the numbers are even more dramatic when views from the perspective of expected number of years in retirement.[4] [emphasis added]

Many other factors than just a longer life expectancy contribute to a longer period in the labour force. For example, low rates of savings for retirement, the absence of coherent and comprehensive pension coverage and policies, the desire to continue to contribute through work and other related factors may all influence how long we either choose or have to work. However, it is becoming clear that traditional retirement ages (such as the so called "normal retirement age" of 65) and the systems of workplace organization and intergenerational equity based upon those ages no longer logically correspond to the demographics of the working population.

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3 Ending Mandatory Retirement Statute Law Amendment Act, 2005, SO 2005 c 29.
4 David Foot & Rosemary Venne, "The Long Goodbye: Age, Demographics, and Flexibility in Retirement" (2011) 38 Canadian Studies in Population 59 at 61.

With workers remaining in the workforce longer than in previous generations, the workplace is faced with questions related to older workers and possible age-related limitations, as well as how to manage the workplace within the ambit of existing anti-discrimination laws in Ontario and Canada. Anti-discrimination policies are not new to the labour and employment landscape. Both age related and disability related discrimination are already prohibited in the workplace.[5] However, the interrelationship between age, disability, and age-related limitations which are seen as part of the 'normal' or 'natural' aging process, as well as how society and our legal system conceptualize this interrelationship, has yet to be thoroughly explored in the jurisprudence.

C. Age and Disability in the Workplace

Age and disability as forms of discrimination can be and usually are viewed as creating distinct and separate contexts for the application of anti-discrimination laws within the workplace. Discrimination on the basis of disability in the workplace most frequently focuses on the concept of workplace accommodation and indeed, section 17 of the *Code*, for example, sets up specific requirements regarding such accommodation.[6]

Age, like other enumerated grounds such as sex and race, has no specialized requirement regarding accommodation. Instead, accommodation analysis for these grounds of discrimination occurs under section 11 of the *Code*[7] which, while very similar (but not identical in wording) to section 17, is less commonly applied in the workplace and is directed at systemic discrimination rather than individual accommodation.

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[5] See for example: *Code, supra* note 1 s 5(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability; and s.5(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

[6] *Code, supra* note 1 s 17(1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability; s.17(2) No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person 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; and 18(3) In determining for the purposes of subsection (2) whether there would be undue hardship, a tribunal or court shall consider any standards prescribed by the regulations.

[7] *Code, supra* note 1 s 11(1) 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, (a) the requirement, qualification or factor is reasonable and bona fide in the circumstances; or (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right; s.11(2) 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; and s.11(3) The Tribunal or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship.

Notwithstanding the clear directive in *Meoirin*[8] by the Supreme Court of Canada that all generally applicable policies must contain anti-discrimination measures so as to avoid disparate impact and systemic discrimination (which in turn, will of course ultimately impact the individual) conceptually the analysis used in section 11 is systemic not individualized and it still continues to be less well understood and less utilized in the workplace than section 17.

Research demonstrates that while employers will accommodate age-related disabilities, the failure to engage in an intersectional analysis of age and disability as related bases for discrimination creates a gap in protection for older workers who, due to age-related limitations which are not defined as "disabilities" under applicable legislation, are not recognized as requiring accommodation.[9]

D. Older Workers: How We View Them In Fact and In Law

Where age and disability intersect, issues arise associated with how an employer manages the workplace and what duties are owed to the employee by law. These duties and responsibilities are often confused and distorted by the dissociation and distinction between age and disability as grounds of discrimination.

i. How We See Older Workers

There is stigma, stereotyping and age-discrimination present in our society and in the workplace regarding older workers, irrespective of an analysis of disability as an additional marginalizing factor for older workers. Most predominantly, the perception of older workers focuses on a myth of lower productivity and lack of capacity to train.

Research demonstrates that, generally, employers view persons with disabilities as "less capable of meeting the organisation's demands."[10] The Supreme Court in *McKinney v University of Guelph*[11] had also made this type of generalized assumption regarding older employees and capacity and ability to work:

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8 *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (BCGSEU) (Meiorin Grievance)*, [1993] 3 SCR 3.
9 Julia Ann McMullin & Kim M Sheuy, "Ageing, Disability and Workplace Accommodations" (2006) 26 Ageing & Society 831 at 834.
10 *Ibid* at 832.
11 [1990] 3 SCR 229.

> It must not be overlooked, however, that there are important differences between age discrimination and some of the other grounds mentioned in s. 15(1). To begin with there is nothing inherent in most of the specified grounds of discrimination, e.g., race, colour, religion, national or ethnic origin, or sex that supports any general correlation between those characteristics and ability. But that is not the case with age. There is a general relationship between advancing age and declining ability.[12]

However, these assumptions regarding ability and competitiveness miss the important connection between ability and other necessary capacities. Competitiveness requires of us that we utilize all our capacities, including capacities such as institutional memory, experience, and more intangible qualities such as wisdom, patience and emotional and social intelligence which are arguable best garnered with age. Studies conducted relating age discrimination to productivity concerns found that "aging of the labour force should boost an economy's average productivity per worker, since the fact of population aging raises the proportion of workers with an accumulation of human capital from experience."[13] Further, there is no evidence that there is an association between age and labour productivity.[14]

ii. Human Rights Jurisprudence involving Older Workers

While some of the decisions involving the human rights of older workers contains the beginnings of nuanced and useful jurisprudential development of theories of aging in the workplace and the rights of older workers, the facts which underpin these cases illustrate all too clearly that this jurisprudence has yet to permeate workplaces generally. Caselaw which most tellingly demonstrates how the interrelationship between age and disability as played out in the workplace involves the perception of a disability in older workers, even where none is present.

A Human Rights Tribunal case from British Columbia highlights this perception. In *Comeau v Cote*[15] the applicant labourer was referred to a job site. The employer was concerned that the applicant had heart problems and that performing the work would pose a danger to himself. The Tribunal's analysis found that the applicant's age

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12 *Ibid* at 88.
13 Foot & Venne, *supra* note 4 at 64-65.
14 *Ibid* at 65.
15 [2003] BCHRTD No 32.

amplified the employer's perception of a possible disability: "Mr. Comeau's... perceived disability was amplified by the fact that he was a 63-year old man at the time."[16] There was no evidence to demonstrate that Mr. Comeau was unable to perform his duties safely due to his age or health.[17] This case demonstrates how age discrimination in the workplace can exacerbate perceptions of disability.

Similarly, a decision of the New Brunswick Board of Inquiry Under the Human Rights Act illustrates the perception that the 'normal' or 'natural' process of aging is associated with inherent limitations that are remedied by retirement and not accommodation. In *Way v New Brunswick (Department of Education)*[18] the applicant, a 65 year old bus driver, challenged the applicable mandatory retirement policy. Competing experts presented evidence relating to the crash rates of drivers over the age of 65, and both signaled to age-related conditions that may decrease the safety of older drivers. One expert's report stated: "[t]he additional demands beyond traditional driving that school bus drivers face are likely to be particularly challenging in the face of age-related conditions."[19] Another expert "opine[d] that the crash rate for older drivers is more likely due to age-associated medical conditions or symptoms, or perhaps the medications older drivers may use... rather than the normal aging process."[20] Thus, "secondary aging issues" such as reduced vision, loss of mental focus, medications and other factors, were discussed as heightening the risks associated with older persons driving vehicles.

The decision, however, did not fully engage in an analysis regarding this perception of age-related disabilities illustrated in the expert evidence, influencing the retirement policy, as it correlated to finding of age discrimination. The policy was discriminatory and unjustified on the basis of age alone.[21] The Board stated that it was "a rule that... extends a time worn stereotype about the value of aging workers."[22] While the Respondent's position inferred a perception that older employees presented a safety risk on the basis of stereotypical, generalized limitations associated with aging, and the

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16 *Ibid* at para 88.
17 *Ibid* at para 114.
18 [2011] NBHRBID No 1.
19 *Ibid* at para 35.
20 *Ibid* at 27.
21 Ibid at para 142.
22 *Ibid* at para 123.

Board acknowledged that the justification for the forced retirement policy was related to a perception of "secondary aging issues", discrimination on the basis of perceived disability was not a basis for the finding of discrimination.

The absence of an analyses regarding how age and disability are related and influence one another is common when one reviews the caselaw. It is most notable in cases where allegations of age and disability discrimination are bifurcated and treated discreetly as separate incidents of discrimination, each having their own initiating incident.

In *Vallee v Fairweather Inc*[23] the Tribunal found that the applicant had been discriminated against on the basis of age and disability. While this case is somewhat unusual in that the Respondent was deemed to waive its rights to participate in the hearing because it did not file a response, the Tribunal found that on a balance of probabilities these enumerated grounds were likely to have been a factor in the applicant's termination. The applicant was 58 years old and the company underwent restructuring. This restructuring made the applicant's working conditions difficult and she went on sick-leave for one year.[24] The employer's representative had made a comment that they would only hire "young, dumb, and good looking"[25] employees and that the applicant's taking of sick leave was "abandonment".[26] A more fulsome analysis may have occurred had the respondent participated in the proceedings. Nonetheless, it is of note that the Tribunal found age and disability discrimination on the basis of two comments relating to each ground: "young" and "abandonment". In inference only, because the decision does not provide conclusive background facts, it appears that the employee's age may have played a factor in her adaptability to the restructuring. However, there is no analysis of how the employee's age related to her sick leave because of the restructuring of the workplace. Had an analysis been conducted, a more nuanced picture of how age and age-related limitations intersect in changing work environments may have emerged. Further, this analysis may have raised better

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23 2012 HRTO 20
24 *Ibid* at para.6
25 *Ibid* at para.8
26 *Ibid* at para.12

questions about the employer's duty of accommodation of an employee who is having difficulties coping with workplace restructuring.

Preddie v Saint Elizabeth Health Care[27] is an example of where the Tribunal could also have engaged in a more detailed analysis of how age, rather than disability, could be accommodated as part of a systemic approach to aging in the workplace, similar to the duties of accommodation recognized in jurisprudence related to disability. The applicant had argued that the employer discriminated against her, partially on the basis of age, because the employer:

> knew or ought to have known that as an older person the applicant would not have been computer literate and that they needed to do more to accommodate the applicant when she had difficulty in completing her on-line computer assignments.[28]

The Tribunal dismissed the application on the basis that the applicant's argument was tantamount to arguing that requiring older employees to use computers is adverse discrimination contrary to section 11.[29] However, this paraphrasing of the applicant's argument obscures the central fact that training was not provided to this particular older worker and in obscuring this fact, any further analysis of *why* this training was not provided was not engaged in meaningfully. The Tribunal specifically refused to consider the accommodation argument because there was no finding of age discrimination under the *Code*.[30]

This case highlights one prevalent form of discrimination against older workers: the denial of additional training in order to carry out the job.

> [W]hen the productivity of senior workers is lower than that of younger workers, it is usually due to less access to training. Employers tend to discriminate against senior workers in the provision of training due to stereotypes about their inability to grasp new technology and prefer to train younger workers with whom they have a longer time to recoup their investments.[31]

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27 2011 HRTO 2098.
28 *Ibid* at para 12.
29 *Ibid* at para 26.
30 *Ibid.*
31 Pnina Alon-Shenker, "The Unequal Right to Age Equality: Towards a Dignified Lives Approach to Age Discrimination" (2012) 25 Can JJ & Jur 243 at para 11 (QL).

It is important to note that section 11 of the *Code* will permit age discrimination to occur in employment in certain cases. An employee can be discriminated against on the basis of age if it is demonstrated that the challenged requirement, qualification or factor is a *bona fide* occupational requirement or qualification. However, *bona fide* occupational requirement defences have been generally unsuccessful when related to age.

For example, in *Tearne v Windsor (City),*[32] the applicant received a conditional offer of employment as a rink attendant. He was obliged to undergo pre-employment testing which measured his heart rate during lifting activities; the applicant failed because his heart rate reached an "unacceptable" level at some points during the test. Expert evidence demonstrated that there is an "age-related" loss of strength endurance associated with the hearts of older persons. However, the employer was unsuccessful in arguing that the heart strength requirement was a *bona fide* occupational requirement. The employer's requirement amounted to what the Tribunal analogized as "absolute safety".[33] Expert evidence demonstrated that "older adults are routinely engaging in strength activities on a regular basis without associated incidents of fatality" and therefore the heart strength test imposed by the employer did not meet the test as enumerated in *Meiorin.*[34]

Further, an "absolute safety" *bona fide* occupational requirement defence also failed in *Way supra.* [35] This argument failed because as the Tribunal stated:

> The Board also observes that this 'standard of perfection' chosen, an absolute standard which applies to every school bus driver at age 65, compelling them to leave their job, is a rule that not only extends a time worn stereotype about the value of aging workers, but it also one imposed under a blanket prohibition, with a total absence of consideration for individual circumstances.[36]

The Tribunal could not find a link between safety in driving and a specific age at which safety is affected.[37] Therefore, the standard was not seen as *bona fide* and reasonably necessary to achieve the safety goals of the respondent.

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32 2011 HRTO 2294.
33 *Ibid* at para 127.
34 *Meiorin*, supra note 8.
35 *Way, supra* note 8.
36 *Ibid* al para129.
37 *Ibid* al para 118.

E. Conceptualizing Age, Disability and an Older Workforce in Human Rights Law

Traditional human rights language constructs definitions and societal understandings of protections and duties of employees and employers in the workplace. These definitions create employment regimes of equity and balance, and measures thereof, that promote the facilitation and utilization of workers' skills for continued meaningful participation in the labour force.

Yet, traditional human rights definitions play an active role in compartmentalizing our understanding of aging and disability and often prevent an intersectional analysis of those concepts within the workplace.

There are at least two, if not more, ways to conceptualize the situation of the older worker who needs workplace changes in order to continue meaningful gainful employment within current human rights analyses:

> 1. We can see the features and characteristics of growing older as disabilities which invoke disability accommodation rights under the provisions of the *Code*; and
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> 2. We can see the features and characteristics of growing older as a group of distinguishing and immutable characteristics[38] which define the identity of being an older person and therefore attract protection under provisions against direct and systemic discrimination under the *Code*.

i. Disability and Aging in the Workplace

Concepts of disability and their definitions in our human rights statutes and jurisprudence[39] do not encompass the intersectional and interrelated concept of "age". In Julie McMullin and Kim Shuey's paper "Aging, Disability and Workplace Accommodations" this disconnection is articulated:

> It is notable that no contemporary definitions of disability mention age, even though the relationship between age and disability is strong, and a person's age probably structures their perception of

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38 See *Whitler v Canada (Attorney General)*, [2011] 1 SCR 396 at para 33: In Andrews, [[1989] 1 SCR 143] it was held that s. 15(1) protected only against distinctions made on the basis of the enumerated grounds or grounds analogous to them. An analogous ground is one based on "a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity".

39 *Code, supra* note 1 s 10(1): "disability" means, (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, (b) a condition of mental impairment or a developmental disability, (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language, (d) a mental disorder, or (e) an injury or disability for which benefits were claimed or received under the insurance plan established under the Workplace Safety and Insurance Act, 1997.

> disability. The dissociation is likely to be a reflection of the influence of societal perceptions about the psychological aging process and what constitutes disability, and if the perception of the 'normal' experiences of aging as in a different category.[40]

Human rights discourse establishes and reinforces this dissociation of concepts of disability from concepts about age and aging, therefore resulting in gaps within our definition of the disability spectrum that are related to age.

Conversely, as is dealt with in the next section, the lack of deep understanding about what the physical and mental features of aging are,[41] and resistance to the idea that these characteristics legitimately attract anti-discrimination protection as well as generate their own accommodation requirements, all obscure a clear view of what is necessary to provide appropriate accommodation to an older workforce, without stigmatizing older workers and reinforcing prejudices.

Further, this dissociation of age and disability in legal discourse affects the perceptions of employees, as much as their employers. Simply put, traditional discourse separates concepts of disability and age and results in a lack of workplace configuration that respects the contributions of older workers and allows them to continue productively in employment.

> If a disability is not declared or recognized, workplace accommodations... are unlikely. Hence, if workers and their employers define a function limitation as part of a 'natural' or 'normal' aging process rather than a disability, [older workers] may not benefit from anti-discrimination legislation.[42]

Also, case law regarding discrimination on the basis of disability may preclude an evolution of an intersectional analysis which would include age and age-related *limitations* and *characteristics* under the concept of disability because such analysis does not meet the traditional definition of "disability" under the *Code*.

Ouimette v Lily Cups[43] is the leading case regarding the restriction on the definition of "disability". In *Ouimette*, the issue of whether the flu constituted a disability was

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40 McMullin & Sheuy, *supra* note 9 at 834.
41 As opposed to stereotypical views which essentialize the negative aspects of aging and ignore the positive.
42 McMullin & Sheuy, *supra* note 9 at 832.
43 (1990), 12 CHRR D/19.

considered. It was not found to be a disability within the meaning of the *Code* because it was a temporary illness and, more importantly, it was an illness from which virtually everyone could suffer and therefore it was felt that its inclusion as a form of disability under the *Code* would simply broaden the category of disability too greatly.

In *Mississauga (City) v ATU, Local 1572 (Tanner Grievance),*[44] Arbitrator Springate made the following comment:

> Whether a physical condition is temporary or permanent is logically one of several relevant consideration[s] when assessing whether it amounts to a disability under the Code. Also relevant is whether the condition is an ailment suffered by most people from time to time. Another consideration is the extent to which the condition interferes with a person's ability to participate fully in society.[45]

Our conceptualization of disability at this point in time severely impacts the potential evolution of the definition that would encompass an analysis of its relationship with age. "Age" and "aging" are things that are inevitably experienced by most people. Further, while some age-related disabilities may meet the definition of "disability" under the *Code*, age-related limitations or changes may not meet the criteria that it "interferes with a person's ability to participate fully in society." Many age-related limitations, characteristics or disabilities may only affect an older worker's performance in the workplace – or increase difficulty in performing certain tasks. Under this interpretation, it is unlikely that age-related limitations will be sufficiently disabling so as to be defined as a "disability". Therefore, it is important that a more sophisticated and informed intersectional analysis of age and age-related limitations and disability be embarked upon; without this analysis there will be a gap in protections for older workers and it will prohibit continued and full participation in the labour force.

ii. Age Discrimination *Simpliciter*: How We Understand "Aging" Affects How We Treat Older Workers Practically and Legally

Age discrimination *simpliciter* is most apparent when we look at age-related justifications for adverse employment consequences for older workers. Such justifications minimize and distort analyses of accommodation and a duty, both social

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44 [2005] OLAA No 286.
45 *Ibid* at para 28.

and legal, to encourage full and meaningful participation of older workers in the labour force. We need to take a good hard look at how our own views, prejudices and deeply held beliefs about what the characteristics of aging really are, and how they impact older workers. "Despite increasing prevalence and importance, especially in the workplace, a robust theory of age discrimination has yet to be developed."[46]

There is much work to be done in order to embark on a meaningful analysis of age discrimination as demonstrated in current leading theories which attempt to relate workplace protections for older workers with intergenerational equity and fairness. As discussed in Pnina Alon-Shenker's work "The Unequal Right to Age Equality: Towards a Dignified Lives Approach to Age Discrimination" one prevalent theory used to assess equality, and consequently discrimination, is the "Complete Lives Approach". The basic tenets of this theory are as follows:

> Each individual gets benefits and bears burdens at different life stages. Burdens at one time of life are compensated for by benefits at another time. Therefore, when measuring inequality, one should add up the benefits and burdens in each life and compare the sum total. When the complete lives of two individuals contain equal total share of resources, they are treated equally.[47]

As further discussed in the paper, this approach fails older workers because it justifies and minimizes failures to accommodate at specific points in their lives because overall, it is alleged they have experienced privileges and benefits at other points in their lives, presumably as younger workers, and because the disadvantages for older workers are allegedly inevitable for us all. "Mandatory retirement, for example, is not considered unjust age discrimination because sooner or later all age groups will have to face it."[48]

This complete lives approach had been the basis for denials of substantive equality rights in employment in our legal system for almost two decades. A prime example of this type of reasoning occurs in the mandatory retirement cases, particularly prior to the ending of mandatory retirement in Ontario and other provinces.

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46 Alon-Shenker, *supra* note 31 at para 1.
47 *Ibid* at 3.
48 *Ibid.*

The Supreme Court of Canada in *McKinney, supra,*[49] in upholding mandatory retirement policies, opined that the right to work of older workers is as important as not depriving younger workers the right to enter the labour market. As stated:

> [T]here is a significant correlation between those who retire and those who may be hired. Thus the young must be deprived of the opportunities to contribute to society through work in the universities as part of the cost of retaining those currently employed on an indefinite basis. The right to work, as this Court has stated, is important. But it is important for the young as well as the old. By this I am not suggesting that discrimination against the old is as such justifiable to alleviate the difficulties faced by the young. But from the standpoint of the university, and in turn of society, staff renewal is vital. Again, the fact that the young would suffer some measure of deprivation were mandatory retirement abolished would mean that students in turn would, to that extent, be deprived of younger faculty members and of the better mix of young and old that is a desirable feature of a teaching staff. The evidence indicates that there is at present a significant problem of an older teaching staff in universities.[50]

This analysis demonstrates the equation of intergenerational fairness and how the equality of older workers has been analysed within the legal system. Despite the change of statutory law ending mandatory retirement, these views continue to inform our analysis of age and the older worker.

It is also important to note that the unique issues that are presented with age discrimination are also entrenched and exacerbated by prevalent views that see age discrimination as less harmful than other forms of discrimination. "Age discrimination is often considered less harmful than other grounds of discrimination and is frequently regarded as permissible, legitimate or economically efficient."[51] For example, the Supreme Court's decision which shaped our legal view of discrimination against older workers with the imposition of mandatory retirement policies said itself: "there are important differences between age discrimination and some of the other grounds mentioned in s. 15(1) [of the Charter]."[52]

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49 *McKinney, supra* note 11.
50 *Ibid* at para 70.
51 Alon-Shenker, supra note 31 at 1.
52 *McKinney, supra* note 11 at para 88.

It is therefore not surprising that when an older worker cannot define an age-related limitation within the umbrella of "disability" as recognized in law under the *Code*, older workers find themselves in the gap created in protection within the workplace. A discourse regarding disability that does not include an analysis of how age and disability, and age-related disability and limitations, intersect, and defines age-related limitations as part of a "normal aging process" will be unlikely to attract a discrimination analysis or encourage workplace accommodation as a remedy to promote and encourage workplace participation of older workers.

The view that aging itself has natural characteristics which may or may not fall far enough along the spectrum between normal health and poor health so as to qualify as disabilities underpins our reluctance to see such characteristics as either disabilities attracting *Code* protection, or features of aging which are implicated in requirements, qualifications or factors that create workplace exclusions, restrictions or preferences which have a disparate and discriminatory impact upon older workers. This limbo, where an age-related limitation does not meet the definition of a disability and our reluctance to open our analysis to consideration of disparate impact, and thus attract *Code* protections, can result in workers being fearful of disclosing a limitation.

A definition of disability that fails to acknowledge the intersectional relationship to age results in disregarding age-related disruptions and reductions in certain capacities that effect employment because the limitation does may not be serious enough to qualify as a disability. As a result, employees are faced with a lack of accommodation because there is no legal duty of an employer to accommodate a limitation or characteristic that is not a disability as defined in law. In order to invoke the protections against adverse effects, discrimination as contained in section 11 though, we would need to (1) understand more about the normal features of aging and capacity; (2) understand how these features may interact with workplace policies, practices and expectations to the detriment of older workers; and (3) respond with systemic answers that address these features so as to prevent or redress discrimination.

F. The Result of Not Thinking This Through: Coerced and Involuntary Retirement Even in the Absence of Mandatory Retirement

The result of the disconnection and lack of intersectional analysis of how age and disability, and age-related limitations that do not fall far enough on the spectrum to be protected as a "disability", is a higher rate of involuntary retirement. Where age-related limitations are not accommodated because they are not "disabilities" under the *Code*, or because, even with the ending of mandatory retirement, our conceptualizations of age, aging and age-discrimination still find retirement the appropriate result; the result is that older workers are forced out of the labour force.

While human rights have made many steps forward in the field of workplace accommodation and disability, and therefore changed the workplace landscape to supporting disabled workers and maintaining employment, these steps have not yet explored how age, when thrown into the mix, distorts the accommodation analysis. This is best illustrated by the bold fact that persons who have multiple factors creating marginalization in the workplace are less likely to remain in the workforce.

> Canadian data shows that labour-force participation rates and employment status are influenced by the intersection of age and disability: older, disabled working-age adults have lower labour force participation rates and higher unemployment rates that either younger adults with disability or older adults without disability. [53]

Disability is the number one reason reported for why persons involuntarily retire.[54] McMullin and Sheuy's work describes the relationship of less visible age-related disabilities and limitations on the one hand, and subtle (or not so subtle) coercion into retirement, on the other.

> There is research evidence that employees with less visible disabilities, many of which are associated with aging, are encouraged or coerced to stop work rather than receive accommodations that allow their continued employment. Common expression in these situations include, 'if you can't do the job then get out', and 'if you're that sick, why don't you take an early retirement?'[55]

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53 McMullin & Sheuy, *supra* note 9 at 832
54 Margaret Denton, Jennifer Plenderleith & James Chowhan, "Retirement Decisions of People with Disabilities: Voluntary or Involuntary" (2010) QSEP Research Report No. 439 at 5.
55 McMullin & Sheuy, *supra* note 9 at834-35

The perception of some employers that the limitations of employees caused by the natural aging process are best rectified by early retirement is one compelling example of how the perception that age and disability are separate and distinct concepts of discrimination affect older workers and the workplace. While most employers would not simply say to disabled employees that they should no longer remain in the workplace, our perceptions of age and the appropriate response to the facts of aging seem to impose much less stringent requirements on employers. An employer is required to accommodate a disabled employee to the point of undue hardship. While the same is legally true for age-related disabilities, the social stigma and stereotypes associated with the aging process in the workforce often preclude accommodation of disability as the primary remedy and obscure the availability of a disparate impact analysis as an alternative source of a remedy.

While it is probably well-understood with the ending of mandatory retirement that coercing persons to retire is age discrimination, the interrelationship of the onset of a disability or limitation and this coercion is often missed or disregarded. Studies demonstrate that persons with age-related disabilities are most likely to be subjected to involuntary retirement. Studies also showed that persons most likely to involuntarily retire were those who experienced an on-set of a disability after the age of fifty-five.[56]

The above comments are not meant to imply that a malicious motive lies behind encouraging or forcing employees who have age-related limitations or disabilities to retire. For example, "managers might wish to avoid humiliating senior workers and embarrassing them when their work performance declines or appears to have declined and therefore prefer to use a mandatory retirement policy."[57] However, the mindset that age-related disabilities are best remedied by early retirement is demonstrative of the gap in our legal and social understanding of accommodation of age and the aging process in the workplace.

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56 *Denton*, *supra* note 54 at 7.
57 Alon-Shenker, *supra* note 31 at 12.

G. Conclusion

Absent a proper analysis of how age, disability and age-related disability intersects, especially in the workplace, there will be gaps in the protections and duties owed to older employees. These gaps practically result in: older workers not receiving accommodations to which they are entitled; employers not scrutinizing workplace practices and policies for their disparate impact upon older workers; and the coerced retirement of older workers. The intersectional relationship between age and disability requires a fulsome analysis of the 'normal' process of aging and how it relates to both age and disability discrimination in the workplace in order to truly understand how a diverse workplace can constructively and properly include older workers.