

“Age is Different”’: Revisiting the Contemporary Understanding of Age Discrimination in the Employment Setting

*Pnina Alon-Shenker**

The author argues that the current test for age discrimination in Canada, which is based on the Supreme Court of Canada’s decision in R. v. Kapp and which requires that discrimination be motivated by or perpetuate stereotyping or prejudice, has led adjudicators to fail to come to grips with wrongful ageism in the workplace. The fact that everyone ages, and that distinctions based on age may in the past have benefited the same people who are now harmed by those distinctions, has in the author’s view been given too much weight, thereby making discrimination against senior workers too easy to justify. She proposes that the legal test for age discrimination should focus on wrongs done in the present, and should not take account of any past or future benefits which may be attributed to a distinction drawn on the basis of age. On the basis of what the author calls the Dignified Lives Approach, she argues that an age-based distinction should be held to be discriminatory if it violates any of these five principles: people of all ages must be assessed on their merits, must be treated as equals, must have enough means to live lives of dignity, must be socially included, and must retain their autonomy. Using as examples four recent cases of alleged age-based discrimination in the employment context decided by Canadian courts and administrative tribunals, the author demonstrates how the Dignified Lives Approach would in her view be more sensitive to different types of age discrimination and would bring more just outcomes.

* Academic Director, Law & Business Clinic and Assistant Professor, Department of Law & Business, Ted Rogers School of Business Management, Ryerson University. The author would like to thank CLELJ Articles Editor Kevin Banks, two external referees and the CLELJ student editors for valuable comments on earlier drafts, and Annice Blair for excellent research assistance.

1. INTRODUCTION

Ageism is widespread in our society,¹ and is especially prevalent and problematic in the employment setting. Although there is only limited empirical evidence to support the claim that workers' productivity or job performance declines with chronological age,²

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- 1 The term "ageism" was coined in 1969 by Robert Butler, an American gerontologist, who defined it as a process of systematic stereotyping and discrimination against people because they are old ("Ageism: Another Form of Bigotry" (1969) 9 *The Gerontologist* 243). For a broader definition which captures discrimination against both old and young, see Bill Bytheway, *Ageism* (Buckingham: Open University Press, 1995) at 14:

Ageism is a set of beliefs originating in the biological variation between people and relating to the ageing process Ageism generates and reinforces a fear and denigration of the ageing process, and stereotyping presumptions regarding competence and the need for protection. In particular, ageism legitimates the use of chronological age to mark out classes of people who are systematically denied resources and opportunities that others enjoy, and who suffer the consequences of such denigration, ranging from well-meaning patronage to unambiguous vilification.

See also Ian Glover & Mohamed Branine, "Introduction" in Ian Glover & Mohamed Branine, eds, *Ageism in Work and Employment* (Aldershot: Ashgate, 2001) 3 at 4, who define ageism as "unconscionable prejudice and discrimination based on actual or perceived chronological age. It occurs whenever a person's age is erroneously deemed to be unsuitable for some reason or purpose. It can be used to the detriment of people of any age." A more current definition by the Ontario Human Rights Commission emphasizes the social dimension, defining ageism as a socially constructed way of thinking about senior people based on stereotypes, as shown by the "tendency to structure society based on an assumption that everyone is young, thereby failing to respond appropriately to the real needs of older persons" (Ontario Human Rights Commission, *Time for Action: Advancing Human Rights for Older Ontarians* (Toronto: Ontario Human Rights Commission, 2001) at 41, online: Ontario Human Rights Commission <<http://www.ohrc.on.ca>> [*Time for Action*]).

- 2 Martin Lyon Levine, *Age Discrimination and the Mandatory Retirement Controversy* (Baltimore: Johns Hopkins University Press, 1988) at 108-117; Glenn M McEvoy & Wayne F Cascio, "Cumulative Evidence of the Relationship between Employee Age and Job Performance" (1989) 74:1 *Journal of Applied Psychology* 11; Howard C Eglit, "The Age Discrimination in Employment Act at Thirty: Where It's Been, Where It Is Today, Where It's Going" (1997) 31 *U Rich L Rev* 579 at 679 [Eglit, "Age Discrimination"]; Morley Gunderson, "Age Discrimination in Employment in Canada" (2003) 21:3 *Contemporary Economic Policy* 318 at 325; Jonathan R Kesselman, "Challenging the Economic Assumptions of Mandatory Retirement" in C Terry Gillin, David MacGregor & Thomas R Klassen, eds, *Time's up! Mandatory Retirement in Canada* (Toronto: James Lorimer, 2005) 161 at 173.

age-related stereotypes continue to be used in workplace decision-making.³ Fewer training opportunities are available for senior workers;⁴ when they are dismissed,⁵ senior workers are unemployed for longer periods; and they are often coerced into early retirement.⁶

3 *Time for Action*, *supra* note 1; Ontario Human Rights Commission, *Discrimination and Age: Human Rights Issues Facing Older Persons in Ontario* (Toronto: Human Rights Commission, 2000) at 12-13, 16-18, online: Legislative Library of Ontario <<http://lois.ontla.on.ca>>; Ontario Human Rights Commission, *Policy on Discrimination Against Older People Because of Age* (Toronto: Ontario Human Rights Commission, 2002) at 12-19, online: Ontario Human Rights Commission <<http://www.ohrc.on.ca>> [*Policy on Discrimination*].

For evidence from the US, the UK and Australia, see Eglit, “Age Discrimination,” *supra* note 2; Lynne Bennington, “Age and Career Discrimination in the Recruitment Process: Has the Australian Legislation Failed?” in Mike Noon & Emmanuel Ogbonna, eds, *Equality, Diversity and Disadvantage in Employment* (Houndmills: Palgrave, 2001) 65; Sandra Fredman & Sarah Spencer, eds, *Age as an Equality Issue* (Oxford: Hart, 2003); Rachael Patterson, “The Eradication of Compulsory Retirement and Age Discrimination in the Australian Workplace: A Cause for Celebration and Concern” (2004) 3 *Elder L Review* 1; Geoffrey Wood, Adrian Wilkinson & Mark Harcourt, “Age Discrimination and Working Life – Perspectives and Contestations: A Review of the Contemporary Literature” (2008) 10:4 *International Journal of Management Reviews* 425.

4 *Aging and Employment Policies: Canada* (Paris: OECD Publishing, 2005) at 109-111, online: Organization for Economic Cooperation and Development <<http://www.oecd-ilibrary.org>>; Jungwee Park, “Job-Related Training of Older Workers” (2012) 24:2 *Perspectives on Labour and Income*, Statistics Canada Catalogue 25-001-X, online: <<http://www.statcan.gc.ca>>.

5 Despite the popularity of terms such as “older adults/persons” and “elderly,” I avoid them as much as possible because of their arguably negative connotation. Although I prefer the expression “people at an advanced age,” for the sake of convenience I use the term “seniors.” I should make it clear that I do not use it to suggest any workplace hierarchy. Nor do I limit it to people over 65; I intend it as a flexible term that includes any people at a more or less advanced age (even, for example, 45), who might experience ageism.

6 See Organization for Economic Cooperation and Development, *Ageing and Employment Policies: Live Longer, Work Longer* (Paris: OECD, 2006) at 34-39, online: <<http://www.oecd-ilibrary.org>>; Maria Heidkamp, Nicole Corre & Carl E Van Horn, “The ‘New Unemployables’: Older Job Seekers Struggle to Find Work During the Great Recession” (2010), Sloan Centre on Aging & Work at Boston College, Issue Brief 25, online: <http://www.bc.edu/content/dam/files/research_sites/agingandwork>; Susan Bisom-Rapp, Andrew D Frazer & Malcolm Sargeant, “Decent Work, Older Workers, and Vulnerability in the Economic Recession: A Comparative Study of Australia, the United Kingdom, and the United States” (2011) 15:1 *Employee Rts & Employment Pol’y J* 43 at 48-50; Ross Finnie & David Gray, “Labour-Force Participation of Older Displaced Workers in Canada: Should I Stay or Should I Go?” (2011) 15 *Institute for Research on Public Policy Study* at 19-20, online: <<http://www.irpp.org>>.

Those who do find a job at an advanced age often have to accept non-standard work.⁷

In this paper I argue that despite the increasing significance of age discrimination in an era of an aging workforce, our contemporary understanding of it is too narrow, with the result that Canadian workers have had little success in recent legal cases involving allegations of such discrimination. The paper examines some of those cases, and finds that they support two main conclusions. The first is that adjudicators often focus on comparing the treatment of a younger worker (or job applicant) and a senior one, and tend to find age discrimination only when some element of stereotyping or prejudice is identified. Even when age discrimination is acknowledged, it is often permitted if the younger worker (or job applicant) is expected to experience similar treatment when he or she grows old. The second conclusion is that age discrimination is generally considered less serious and harmful than other forms of discrimination, with the result that the right to age equality is often trumped by broader economic and social considerations.

This paper proposes a broader view of age discrimination based on what I call the Dignified Lives Approach, a theoretical framework I have developed elsewhere.⁸ The Dignified Lives Approach sees age equality as grounded in the ideas of equal concern and respect, and as requiring compliance with five substantive principles — the principles of individual assessment, equal influence, sufficiency, social inclusion, and autonomy. When an age-based distinction breaches any of those principles, there has been wrongful age discrimination. This paper attempts to illustrate the practical implications of the Dignified Lives Approach by using it to criticize some recent

7 For empirical evidence, see Katherine Marshall & Vincent Ferrao, “Participation of Older Workers” (2007) 8:8 Perspectives on Labour and Income, Statistics Canada Catalogue 75-001-XIE 5 at 8-9, online: <<http://statcan.gc.ca>>; Expert Panel on Older Workers, *Supporting and Engaging Older Workers in the New Economy* (Ottawa: Human Resources and Social Development Canada, 2008) at 6, online: Human Resources and Skills Development Canada <<http://www.hrsdc.gc.ca>>.

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

decisions on age discrimination. The analysis uncovers some of the myriad wrongs of age discrimination which might have been treated more seriously if adjudicators had taken a broader approach, and it shows how the Dignified Lives Approach would allow adjudicators to distinguish both direct and adverse-effect age discrimination from legitimate age-based distinctions resulting from acceptable tradeoffs by workplace actors.

The paper proceeds as follows. Section 2 considers the unique characteristics of age discrimination compared to other forms of discrimination, demonstrates how detrimental it can be to senior workers, and exposes the shortcomings of the contemporary legal understanding of it. Section 3 presents the Dignified Lives Approach as offering a broader understanding of age discrimination and a better way of illuminating its wrongs. Through the lens of this broader understanding, section 4 critically reviews four recent decisions which dismissed allegations of age discrimination in the workplace, and illustrates why adjudicators’ current approach to age distinctions in employment needs to change.

2. CHALLENGES TO THE IDENTIFICATION OF AGE-BASED DISCRIMINATION UNDER THE CURRENT FRAMEWORK

(a) The Contemporary Understanding of Age Discrimination

Age discrimination in employment is currently understood as a narrow legal concept. First, when assessing whether age-based distinctions amount to unlawful discrimination, the prevailing analysis centres on a comparison between senior and younger workers (or job applicants),⁹ rather than on the actual harm to those workers. Even when an age-based distinction is identified, it is often permitted if the younger worker is expected to bear the same burdens once he or

⁹ This is evident in each of the four decisions reviewed in section 4 below: *Chatham-Kent*, *infra* note 56 (comparing nurses over and under 65): *Decision No 512/06*, *infra* note 90 (comparing injured workers over and under 63): *Law v TVDSB*, *infra* note 112 (comparing retired teachers and new college graduates): and *Black & McDonald*, *infra* note 129 (comparing journeymen electricians over and under 50).

she grows old.¹⁰ Second, age discrimination is more likely to be identified when the distinction is clearly drawn on the basis of age (i.e. when the discrimination is direct rather than indirect).¹¹ Third, ageist stereotyping or prejudice is seen as an essential indicator of age discrimination.¹² Finally, because age discrimination is viewed as a less critical ground of discrimination, one which everyone will potentially experience at some point in their lives, its deleterious effects on individuals are often considered to be outweighed by broader social and economic gains.¹³ In this section I will first argue that discrimination against senior workers is serious and widespread, and that despite having characteristics not shared by other grounds of discrimination, it poses a major problem in our society. I will then seek to expose the shortcomings of the current understanding of such discrimination.

10 This approach to equality assessment, which has been called “Complete Lives Egalitarianism,” argues that burdens imposed on an individual at some points in time may be compensated for by benefits to the same individual at other points in time, and that whether any two people are treated equally should be assessed on the basis of their lifetime experience. See Dennis McKerlie, “Equality between Age-Groups” (1992) 21:3 *Phil Pub Affairs* 275; Alon-Shenker, “Unequal Right,” *supra* note 8 at 247-248. The Complete Lives Approach is especially evident in *Chatham-Kent*, *infra* note 56 (see text accompanying *infra* notes 74-75).

11 My argument is not that Canadian jurisprudence has totally failed to recognize adverse-effect discrimination on the basis of age, but that the decisions which do recognize it are often overlooked or undervalued. See e.g. *Law v TVDSB*, *infra* note 112 (especially text accompanying *infra* note 121). See also Pnina Alon-Shenker, “The Duty to Accommodate Senior Workers: Its Nature, Scope and Limitations” (2012) 38:1 *Queen’s LJ* 165, where I discuss examples from *Bastide v Canada Post Corp*, 2005 FC 1410 (available on CanLII), and *Riddell v IBM Canada*, 2009 HRTO 1454 (available on CanLII).

12 This is evident in all four decisions reviewed in section 4 below. See especially the text accompanying *infra* notes 97 and 100.

13 This is also evident in each of the four decisions reviewed in section 4 below (see especially the text accompanying *infra* notes 71, 76, 101). See also C Terry Gillin & Thomas R Klassen, “The Shifting Judicial Foundation of Legalized Age Discrimination” in Gillin, MacGregor & Klassen, *supra* note 2 at 45, who argue that in *McKinney v University of Guelph*, [1990] 3 SCR 229, 76 DLR (4th) 545 [*McKinney*], the Supreme Court of Canada used socio-economic considerations (which the courts had previously downplayed) to justify age discrimination, and that since then, such considerations have been widely treated as acceptable in age discrimination analysis.

(b) The Scope and Extent of Discrimination against Senior Workers

*Gosselin v. Quebec (Attorney-General)*¹⁴ involved a claim that (among other things) a Quebec welfare scheme breached the prohibition against age discrimination in section 15 of the *Canadian Charter of Rights and Freedoms*, in that it required applicants under 30 years of age to take part in certain training, community work or educational programs in order to obtain the same level of benefits as senior applicants, who did not have to participate in such programs. In dismissing the claim of age-based discrimination, Chief Justice McLachlin (for a majority of the Supreme Court of Canada) said that “age-based distinctions are a common and necessary way of ordering our society,”¹⁵ and that they “do not automatically evoke a context of pre-existing disadvantage suggesting discrimination and marginalization . . . in the way that other enumerated or analogous grounds might.”¹⁶ However, Chief Justice McLachlin stressed that age distinctions affecting senior people were different from those affecting young people. In her words:

Concerns about age-related discrimination typically relate to discrimination against people of advanced age who are presumed to lack abilities that they may in fact possess. Young people do not have a similar history of being undervalued.¹⁷

Chief Justice McLachlin is correct to emphasize the effects of age discrimination on senior people, in the light of empirical evidence confirming that such discrimination against them is severe and widespread.¹⁸ People of advanced age do represent a historically disadvantaged group,

14 2002 SCC 84, [2002] 4 SCR 429 [*Gosselin*].

15 *Ibid* at para 31. For example, the right to vote, hold a drivers’ licence or buy liquor is predicated on a degree of maturity or mental capacity which is very difficult to assess on an individual basis. For a discussion on the rights of children and young people, see Jonathan Herring, “Children’s Rights for Grown-Ups” in Fredman & Spencer, *supra* note 3, 145 at 159-161.

16 *Supra* note 14 at para 31.

17 *Ibid* at para 32. I do not suggest that age discrimination should be understood asymmetrically, to include discrimination against seniors only. Rather, the argument is a contextual one — i.e., that such discrimination is more common against seniors than against younger people.

18 See *supra* notes 3-7.

particularly in the workplace.¹⁹ Although seniors may not be a typical “minority group,”²⁰ and may even include privileged individuals,²¹ they have some central characteristics of minority groups such as identifiable physical characteristics and shared social and institutional expectations (including the expectation of retirement).²² They are often subject to negative stereotypes and they face discrimination in many spheres, including employment, health services and housing.²³

(c) The Unique Aspects of Age Discrimination

Age is indeed a unique ground of discrimination, for two main reasons. First, unlike certain personal characteristics (such as colour of skin, race or sex) which are immutable, age is constantly changing; all of us were once young, but will grow old. We all move through various stages of life and various age groups, and most of us will

19 Ageism as a political idea is only 40 to 50 years old. Age discrimination in employment has long existed, but has been recognized only since the 1960s. Bytheway, *supra* note 1 at 15; Bruce M Burchett, “Employment Discrimination” in Erdman B Palmore, Laurence Branch & Diana K Harris, eds, *Encyclopedia of Ageism* (New York: Haworth Pastoral Press, 2005) at 123; Howard Eglit, *Elders on Trial: Age and Ageism in the American Legal System* (Gainesville: University of Florida Press, 2004) at 24-27) [Eglit, *Elders on Trial*].

20 In gerontology, there is a debate on this matter. Gordon Streib opposes considering seniors as a minority group, while others (including Milton Barron and Jack and William Levin) argue that they share the main characteristics of minority groups. Jack Levin & William C Levin, *Ageism: Prejudice and Discrimination against the Elderly* (Belmont, Cal: Wadsworth, 1980) ch 3; Erdman B Palmore, *Ageism: Negative and Positive*, 2d ed (New York: Springer, 1999) at 8.

21 See e.g., Peter H Schuck, “The Graying of Civil Rights Law: The Age Discrimination Act of 1975” (1979) 89 Yale LJ 27; Peter H Schuck, “Age Discrimination Revisited” (1981) 57 Chicago-Kent L Rev 1029.

22 Society has expectations about proper behaviour at different ages (“age norms”), which are expressed in such familiar phrases “act your age” or “shouldn’t you be retired by now?” Age norms are enforced through various mechanisms of social control. Diana K Harris, “Age Norms” in Palmore, Branch & Harris, *supra* note 19 at 14. See also Maximiliane E Szinovacz, “Contexts and Pathways: Retirement as Institution, Process, and Experience” in Gary A Adams & Terry A Beehr, eds, *Retirement: Reasons, Processes and Results* (New York: Springer Publishing Company, 2003) 6.

23 See e.g. Palmore, *supra* note 20 at 20-27; *Time for Action*, *supra* note 1; and *Policy on Discrimination*, *supra* note 3.

become seniors at some point. There are, however, other protected characteristics (religion, for example) which are not wholly immutable and can change.²⁴ Nevertheless, although age changes constantly, it is immutable in the sense that it is unchangeable at any point in time. No one has any control over his or her age.

Second, age discrimination is different from most prohibited grounds of discrimination, insofar as the prohibition of those grounds is intended to prevent one group from discriminating against another discrete group. In the case of age discrimination, there is no clear distinction between discriminators and those who are discriminated against.²⁵ Mandatory retirement, for example, is portrayed as discrimination against ourselves, or our “future selves” rather than “against well defined *other* groups, whose oppression we may benefit from.”²⁶ Furthermore, in some circumstances both senior and younger employers may discriminate against senior workers.²⁷ The younger employees, who once discriminated against seniors, might themselves be discriminated against on the basis of age when they grow old.

It is often assumed that people are unlikely to discriminate against those in their own age group, or against their future selves,²⁸ and that since many employers and policy-makers are senior themselves, they

24 This requirement is sometimes recast as one of “constructive immutability” — a personal characteristic that is difficult to change or that one should not be required to change (see Dale Gibson, “Analogous Grounds of Discrimination under the Canadian Charter: Too Much Ado about Next to Nothing?” (1991) 29 *Alta L Rev* 772 at 786).

25 See Cliff Oswick & Patrice Rosenthal, “Towards a Relevant Theory of Age Discrimination in Employment” in Noon & Ogbonna, *supra* note 3 at 156.

26 Morley Gunderson & Douglas Hyatt, “Mandatory Retirement: Not as Simple as It Seems” in Gillin, MacGregor & Klassen, *supra* note 2, 139 at 146. See also *McKinney*, *supra* note 13 at 297, citing John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass: Harvard University Press, 1980) at 160 (“the fact that all of us once were young, and most expect one day to be fairly old, should neutralize whatever suspicion we might otherwise entertain respecting the multitude of laws . . . that comparatively advantage those between, say, 21 and 65 vis-à-vis those who are younger or older”).

27 Oswick & Rosenthal, *supra* note 25 at 158, 165.

28 As argued by McLachlin CJC, the fact that “ ‘[e]ach individual of any age has personally experienced all earlier ages and expects to experience the later ages’ . . . operates against the arbitrary marginalization of people in a particular age group.” *Gosselin*, *supra* note 14 at para 32.

are less likely to make ageist decisions affecting their own group.²⁹ In reality, however, senior workers are frequently discriminated against by managers of their own age.³⁰ The fact that managers may be seniors themselves, or will become seniors one day, can make their ageist decisions seem more legitimate.³¹ Furthermore, few people are willing to see themselves as old or potentially old.³² Fear of aging leads them to act in an indifferent, disrespectful or even hostile way toward seniors.³³ Justice L'Heureux-Dubé highlighted this point in *Dickason v. University of Alberta*: “Because, in our society, old age tends to be less associated with wisdom and tranquility and more with infirmity

29 Richard A Posner, for example, maintains that there is no “we-they” thinking in the treatment of senior workers because most employers and managers are senior people themselves and are unlikely to hold misconceptions about such workers. *Aging and Old Age* (Chicago: University of Chicago Press, 1995) at 320-321.

30 See e.g. Oswick & Rosenthal, *supra* note 25 (Australian empirical study which found that a large majority of managers and personnel officers considered age discrimination to be legitimate at least some of the time, even though most of those interviewed were at an advanced age).

31 *Ibid* at 165.

32 Many senior citizens refuse to identify themselves as old because of negative stereotypes and discrimination. Erdman B Palmore, “Age Denial” in Palmore, Branch & Harris, *supra* note 19 at 9; Betty Friedan, *The Fountain of Age* (New York: Simon & Schuster, 1993) at 31 and ch 1; Anna Kleinspehn-Ammerlahn, Dana Kotter-Grühn & Jacqui Smith, “Self-Perceptions of Aging: Do Subjective Age and Satisfaction with Aging Change during Old Age?” (2008) 63:3 *Journal of Gerontology: Psychological Science* 377, which revealed that senior people tended to feel 13 years younger than their chronological age and to think they looked about ten years younger than they were.

33 See Eglit, *Elders on Trial*, *supra* note 19 at 34-35; Bytheway, *supra* note 1 at 121-122; Simon de Beauvoir, *Old Age*, translated by Patrick O’Brian (Middlesex, UK: Penguin Books, 1977) at 599 (“the vast majority of mankind looks upon the coming of old age with sorrow or rebellion. It fills them with more aversion than death itself. And indeed, it is old age, rather than death, that is to be contrasted with life”). Some studies have found a correlation between death anxiety and ageist attitudes. As Levine has argued, “[i]t is possible that in the eyes of many individual employers, retirement — the end of active work life — may symbolically represent death,” with the result that employers would prefer an automatic policy of retirement at a fixed age to feeling guilty about selecting a particular employee for involuntary retirement (*supra* note 2 at 41, 134-135). See also Jeff Greenberg, Jeff Schimmel & Andy Martens, “Ageism: Denying the Face of the Future” in Todd D Nelson, ed, *Ageism: Stereotyping and Prejudice against Older Persons* (Cambridge, Mass: MIT Press, 2002) 27, who have suggested that age prejudice arises out of a fear of our own mortality.

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.”³⁴ Even though these deep psychological reactions are usually unintentional, they can still result in repression of senior people and in the denial of their rights.

(d) In Addition to Stereotyping and Prejudice, Age Discrimination Involves Serious Wrongs

As will be demonstrated below, the case law evinces a narrow understanding of age discrimination. Essentially, the prevailing view is that a distinction amounts to unlawful discrimination if it is clearly shown to arise because of age,³⁵ and is motivated by (or perpetuates) stereotyping or prejudice.³⁶ This understanding presents several difficulties. First, since age-based distinctions are socially constructed in our culture, in our educational and legal systems,³⁷ we tend to see them as an essential way of ordering our society³⁸ and therefore as permissible statistical generalizations rather than as a manifestation of stereotyping and prejudice.³⁹ Second, since age discrimination is less often motivated by hatred than by more complex feelings of reluctance and fear,⁴⁰ it might not fall within the narrow stereotyping/

34 *Dickason v University of Alberta*, [1992] 2 SCR 1103 at para 1173, 95 DLR (4th) 439 [emphasis added].

35 See e.g. text accompanying *infra* note 121.

36 See e.g. text accompanying *infra* note 97.

37 The way in which age discrimination is constructed in our culture is reflected in the often derogatory portrayal of old age in birthday cards, television programs, advertisements and movies, where it is usually an object of derogatory humour and ridicule. Sue Thompson, *Age Discrimination: Theory into Practice* (Dorset, UK: Russell House, 2005) at 8-10, 17; Bytheway, *supra* note 1 at 43, 63-72, 75-77; Eglit, *Elders on Trial*, *supra* note 19 at 10-12; Levine, *supra* note 2 at 125, 138-139; Latika Vasil & Hannelore Wass, “Portrayal of the Elderly in the Media” (1993) 19:1 *Educational Gerontology* 71.

38 See text accompanying *supra* note 15. See also Becca R Levy, “Unconscious Ageism” in Palmore, Branch & Harris, *supra* note 19 at 335-339; Becca R Levy & Mahzarin R Banaji, “Implicit Ageism” in Nelson, *supra* note 33 at 49.

39 In *McKinney*, *supra* note 13, for example, the Supreme Court justified accepting age 65 as a legitimate basis for allowing mandatory retirement on the assumption, among others, that “on average there is a decline in intellectual ability from the age of 60 onwards” (*ibid* at 654). See also Posner, *supra* note 29 at 320-324.

40 See text accompanying *supra* note 33.

prejudice definition of wrongful discrimination.⁴¹ Third, when age-based distinctions are motivated by ageist stereotypes, employers and governments can easily conceal that motivation by couching the distinctions in rational terms. For example, employers often argue that senior workers have been treated differently not because of their age, but because they were too expensive, overqualified, too close to retirement, or already in receipt of a pension.⁴²

Most importantly, even when age-based distinctions are not a product of stereotyping or prejudice, they can be as detrimental as other forms of discrimination and can lead to such wrongs as isolation, oppression and economic deprivation — wrongs which are so significant that they cannot be compensated for by previous benefits. The fact that a senior worker used to be young and privileged, and that younger workers will be subject to the same isolation or economic deprivation in the future, does not lessen these wrongs when they occur.

The narrow understanding of age discrimination as age-based distinctions which are motivated by or perpetuate stereotyping or prejudice is said to be supported by the holding of the Supreme Court of Canada in *R. v. Kapp* — namely, that the focus of the protection of equality rights under section 15(1) of the Canadian *Charter* “is on *preventing* governments from making distinctions based on enumerated or analogous grounds that have the effect of perpetuating disadvantage or prejudice or imposing disadvantage on the basis of stereotyping.”⁴³ However, these words need not be taken to mean that a disadvantage must be motivated by or perpetuate prejudice or stereotyping in order to be discriminatory. There may be other indicators of disadvantage, and other wrongs associated with it. This is true of any ground of discrimination,⁴⁴ and for the reasons given above, it is especially true of age discrimination.⁴⁵

41 This might be true for disability discrimination as well. Nevertheless, such discrimination is widely recognized as wrongful because legislation and case law stress the importance of individual assessment and accommodation of people with disabilities.

42 See e.g. *Policy on Discrimination*, *supra* note 3 at 14-16.

43 *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 at para 37 [emphasis in original], where the Supreme Court affirmed its section 15 analysis in *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 171, 56 DLR (4th) [Andrews]. See also *Withler v Canada (AG)*, 2011 SCC 12 at para 35.

44 See Sophia Moreau, “*R. v. Kapp*: New Directions for Section 15” (2008-2009) 40:2 *Ottawa L Rev* 283 at 285-292.

45 See text accompanying *supra* notes 38-42.

3. THE DIGNIFIED LIVES APPROACH AS AN ALTERNATIVE

The shortcomings of the prevalent legal understanding of age discrimination can be overcome by adopting a broader and more principled perspective. To that end, I have developed a theoretical framework called the Dignified Lives Approach for identifying and assessing instances of wrongful age discrimination.⁴⁶ A basic premise of this approach is that each individual must be treated with equal

46 Alon-Shenker, “Unequal Right,” *supra* note 8. My theoretical framework builds on the work of Sandra Fredman on age equality. Fredman identifies three main aims of equality: choice (or autonomy), dignity, and participative democracy (or social inclusion) (Sandra Fredman, “The Age of Equality” in Fredman & Spencer, *supra* note 3). My framework also builds on more general work by legal and philosophical scholars on the meaning of equality and on the wrongs of discrimination. See e.g. Elizabeth S Anderson, “What Is the Point of Equality?” (1999) 109:2 *Ethics* 287 (the ultimate concern of equality is to end oppression); Harry Frankfurt, *The Importance of What We Care About: Philosophical Essays* (Cambridge, UK: Cambridge University Press, 1988) at 134ff (the moral problem with inequality is that someone has too little, or less than enough); Donna Greschner, “The Purpose of Canadian Equality Rights” (2002) 6:2 *Rev Const Stud* 291 (the main purpose of equality is to protect the interest in belonging, and in having full membership in social, economic and political life); Sophia R Moreau, “The Wrongs of Unequal Treatment” (2004) 54:3 *UTLJ* 291 (unequal treatment is wrong when it is associated with stereotyping and prejudice, oppression and the denial of basic goods); John Rawls, *Justice as Fairness: A Restatement*, ed by Erin Kelly (Cambridge, Mass: Harvard University Press, 2001) at 130-131 (identifying several reasons for regulating social and economic inequalities, including hardship, hunger and oppression); Denise G Réaume, “Discrimination and Dignity” (2003) 63:3 *La L Rev* 645 [Réaume, “Discrimination and Dignity”] (articulating three forms of indignity associated with discrimination: prejudice, stereotyping and the exclusion from benefits significant to a life with dignity); Denise G Réaume, “Harm and Fault in Discrimination Law: The Transition from Intentional to Adverse Effect Discrimination” (2001) 2:1 *Theor Inq L* 349 (the harms of discrimination in the private sector are those that are motivated by stereotypes or prejudice, or deny a fair opportunity to participate in important activities and social institutions); T M Scanlon, *The Difficulty of Tolerance* (Cambridge, UK: Cambridge University Press, 2003) at 202ff (setting out five diverse reasons for eliminating inequality, including alleviation of suffering, prevention of unacceptable forms of power or domination, and elimination of stigmatizing differences in status); Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) (focusing on the concepts of domination and oppression).

concern and respect at any given time, and not just over his or her lifetime as a whole.⁴⁷

More specifically, the Dignified Lives Approach requires that each individual be treated in a manner that respects five substantive principles of equality: individual assessment, equal influence, sufficiency, social inclusion, and autonomy. According to the principle of *individual assessment*, one should judge and treat people as individuals on the basis of their own merits rather than on the basis of assumed traits. The principle of *equal influence* means that individuals must be allowed to have equal influence in certain social contexts. The principle of *sufficiency* requires that everyone have access to basic goods that allow for minimum conditions of living. The principle of *social inclusion* entails the right of individuals to be involved in communities and to participate meaningfully in social life. The principle of *autonomy* means that people should have control over their lives, and the capacity to make choices.⁴⁸

When a distinction violates any one of these principles, the affected individual suffers a wrong and the distinction becomes discriminatory. This can occur, for example, in the following circumstances: when the unequal treatment is motivated by ageist stereotyping or ageism; when it perpetuates the oppression of senior workers; when it denies them access to decent and adequate living conditions; when it excludes them from meaningful participation in social circles; or when it diminishes their autonomy and free choice.⁴⁹ Since the Dignified Lives Approach focuses on the situation of an individual at any given moment rather than over a lifetime, a breach of any of these principles cannot be offset by past or future benefits.⁵⁰

47 Underpinning the concept of equality is the idea of equal concern and respect, which is in turn derived from the Kantian notion that all individuals have the same unconditional intrinsic worth and should not be used instrumentally as a mere means to an end (Immanuel Kant, *Groundwork for the Metaphysics of Morals*, translated by James W Ellington (Indianapolis: Hackett, 1993) at 40-41). The Dignified Lives Approach translates this abstract idea into the five substantive principles outlined in this paper.

48 See Alon-Shenker "Unequal Right," *supra* note 8 at 259-279.

49 *Ibid* at 255. The analysis may apply to younger workers in some contexts and to senior people in other spheres.

50 *Ibid* at 253.

The fact that younger workers might suffer from the same wrong in the future does not diminish or justify a present wrong.

The broad view of age discrimination taken by the Dignified Lives Approach encompasses both direct and adverse-effect discrimination,⁵¹ thereby offering a better understanding of the multiple wrongs associated with discrimination against senior workers. It sees age discrimination as a systemic problem rather than as one to be dealt with only through individual complaints.⁵² The test now used by the courts for assessing a claim under section 15 of the *Charter*, which stresses that distinctions are discriminatory if they perpetuate disadvantage,⁵³ is reconcilable with the Dignified Lives Approach: disadvantage is exactly what the five principles of that approach are designed to prevent. However, even under the Dignified Lives Approach, age discrimination may be justified if this is necessary to fairly balance an individual’s right to age equality against the rights and interests of other people or against sufficiently compelling needs of society as a whole.⁵⁴

4. A CRITICAL REVIEW OF FOUR RECENT AGE DISCRIMINATION DECISIONS

This section reviews four recent age discrimination cases in the employment setting, and draws attention to the shortcomings of the current legal analysis of age discrimination.⁵⁵ The Dignified Lives Approach is then applied to each case to show how a broader understanding of age discrimination would have produced more just results.

51 *Ibid* at 257-258.

52 *Ibid* at 247.

53 *R v Kapp*, *supra* note 43.

54 See for example text accompanying *infra* notes 86-87.

55 The fact that the vast majority of cases never make it to adjudication might suggest that age discrimination is far more widespread than it is believed to be. See e.g. John Macnicol, *Age Discrimination: An Historical and Contemporary Analysis* (Cambridge, UK: Cambridge University Press, 2006) at 18-22 (in summarizing recent surveys in the US and Britain, Macnicol concludes that proving age discrimination is especially difficult where the discrimination is statistical, institutional and indirect). Some people respond fiercely to ageism, but others might be unwilling or unable to complain due to cultural conditioning, fear of job loss and the like. On different reactions to ageism, see Erdman B Palmore, “Responses to Ageism” in Palmore, Branch & Harris, *supra* note 19 at 261-264.

(a) **Decision 1: *Ontario Nurses' Association v. Chatham-Kent***

The first case was a grievance arbitration proceeding in which the Ontario Nurses' Association (ONA) challenged provisions of its collective agreement with the Municipality of Chatham-Kent that significantly reduced or eliminated the availability of employer-sponsored benefit and insurance plans to employees over the age of 65.⁵⁶ In reply, the municipality pointed out that age-based distinctions in employee "benefit, pension, superannuation, or group insurance plans" were explicitly codified as exceptions to the Ontario *Human Rights Code's*⁵⁷ general "right to equal treatment without discrimination on the basis of age."⁵⁸ The municipality also noted that the collective agreement was exempted from the general prohibition in the *Employment Standards Act, 2000 (ESA)* against age-based distinctions,⁵⁹ because the Regulation on Benefit Plans⁶⁰ excluded individuals over 65 from that prohibition and expressly permitted age-based distinctions in disability and insurance plans.⁶¹ ONA argued that the impugned provisions were unconstitutional because they violated section 15 of the *Charter*⁶² and could not be justified on a section 1 analysis.⁶³ The Attorney-General of Ontario intervened in the proceedings, and submitted that the provisions did not violate

56 *Ontario Nurses' Association v Chatham-Kent (Municipality of)* (2010), 88 CCPB 95, 202 LAC (4th) 1 [*Chatham-Kent*]. For example, nurses over 65 could claim a maximum of only 60 days' paid sick leave, while those under 65 were eligible for up to 119 days. Those over 65 could accumulate up to 60 days' sick leave, while those below 65 had no limit. Those over 65 were entitled to only \$5,000 in life insurance benefits, while those under 65 were entitled to twice their annual salary. Those over 65 were also denied long-term disability and accidental death and dismemberment coverage. See *ibid* at para 2.

57 RSO 1990, c H.19.

58 *Chatham-Kent*, *supra* note 56 at para 3. The age-based exceptions to the general rule against age discrimination can be found in the *Human Rights Code*, *supra* note 57, ss 25(2.1-2.3).

59 SO 2000, c 41.

60 O Reg 286/01.

61 *Chatham-Kent*, *supra* note 56 at para 3.

62 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

63 *Chatham-Kent*, *supra* note 56 at para 3.

section 15 because they did not perpetuate prejudice, disadvantage, or stereotyping.⁶⁴

Arbitrator Brian Etherington ruled that the provisions in question infringed section 15 of the *Charter*, but were justified under section 1. Applying the *Oakes* test,⁶⁵ he found that the parties’ objective of ending mandatory retirement without undermining the viability of employment benefit plans was pressing and substantial,⁶⁶ and that the statutory provisions allowing the parties to the agreement to select an age-differentiated benefits package was rationally connected to this objective.⁶⁷ On the minimal impairment part of the *Oakes* test, Arbitrator Etherington acknowledged that less restrictive legislative schemes had been implemented in some other provinces,⁶⁸ but he emphasized that the government was “not required to prove that it has adopted the absolutely least intrusive means possible of attaining its objective.”⁶⁹ He found that the exemption was reasonable, and gave employers, employees and insurers maximum flexibility “to adapt to the negative impacts” of ending mandatory retirement.⁷⁰ Finally, he ruled that the deleterious impact of the collective bargaining agreement on the grievors’ financial situation and on the retention of nurses did not outweigh the legislation’s beneficial effects.⁷¹

It is worth noting that Arbitrator Etherington placed “considerable weight” on the fact that “‘age is different’ from other prohibited grounds of discrimination.”⁷² He emphasized that “[u]nlike other grounds, being a given age is an attribute that is expected to be shared

64 *Ibid.*

65 *R v Oakes*, [1986] 1 SCR 103, 50 CR (3d) 1.

66 *Chatham-Kent*, *supra* note 56 at paras 117-120.

67 *Ibid* at para 121.

68 *Ibid* at paras 125, 127, 132. In “Alberta, BC and Newfoundland, the legislation allows distinctions in benefit plans only when the plans are ‘*bona fide*’ or ‘genuine’ or in ‘good faith.’ Other provinces like Manitoba (only allowing for a *bona fide* occupational requirement defence) or Quebec (only distinctions based on actuarial data) are even more restrictive of employer defences to policies which provide different benefits for older workers” (*ibid* at para 130).

69 *Ibid* at para 121.

70 *Ibid* at para 123.

71 *Ibid* at paras 135-136.

72 *Ibid* at para 137.

by everyone in the majority.”⁷³ Taking a “complete lives” perspective,⁷⁴ the arbitrator held that since the distinctions in question applied to all workers as they aged, the distinctions would not have deleterious effects and would allow the parties to focus on maximizing the total benefits received by employees over their working lives rather than on present benefits.⁷⁵ Finally, while he acknowledged that the two grievors would suffer some harm, he stated that concern with the age-based distinctions should give way to “due consideration [of] important social and economic practices and values,” such as “free collective bargaining to regulate workplace terms and conditions.”⁷⁶

Arbitrator Etherington’s award offered a contradictory narrative. Initially, he stated that the denial of benefits “perpetuates the notion that older workers are less valuable members of society, because it means that in effect workers who are aged 65 or older can be paid less compensation for the same work as younger workers.”⁷⁷ Nevertheless, he concluded, in upholding the impugned provisions, that “age is ‘different’ ” and that “age-based groups generally cannot be considered to be discrete and insular minorities requiring judicial supervision and protection under constitutional guarantees of equality.”⁷⁸

Applying the Dignified Lives Approach to Chatham-Kent

Under the Dignified Lives Approach, the provisions that were challenged in *Chatham-Kent* would be viewed as violating the principles of individual assessment, equal influence, and sufficiency. They would therefore be discriminatory, and in breach of section 15 of the *Charter*.

73 *Ibid.*

74 On the complete lives approach to equality assessment, see *supra* note 10.

75 *Chatham-Kent*, *supra* note 56 at para 140.

76 *Ibid* at para 142.

77 *Ibid* at para 104.

78 *Ibid* at para 139. Arbitrator Etherington also stated that “it is difficult to view the aging but numerous boomer generation as an age group that is lacking in political clout and thus unable to protect their interests in the democratic process used to form legislative policy for the regulation of the workplace and the employment relationship.” *Ibid.*

Those provisions violated the principle of individual assessment because they denied benefits to workers solely on the basis of age. The principle of individual assessment sees all persons as having unconditional intrinsic value, who are to be assessed on their own merits. In contrast, the impugned provisions unfairly categorized people according to their age, regardless of their other characteristics. It should not matter when most workers retire.⁷⁹ What should matter are the abilities and circumstances of an individual who chooses to work past age 65.

The impugned provisions also failed to respect the principle of equal influence. A senior worker and a younger colleague may do the same work but receive unequal benefits. While senior workers were allowed to continue on the job as long as they chose after the abolition of mandatory retirement, once they reached 65 they were denied the right to work under conditions which respected their equal worth, ostensibly because of the cost of extending the benefit plans in question to workers above that age. In reality, however, the cost of some of the plans accelerated well before workers reached 65,⁸⁰ and in other plans, the additional cost of covering workers above that age was insignificant. In sum, senior workers were marginalized and subordinated to the economic interests of employers.

In addition, the provisions compromised the principle of sufficiency, by limiting senior workers' access to basic goods which are essential to personal dignity. Arbitrator Etherington recognized that the grievors “have clearly suffered a loss of income protection security and financial security for their families that is provided to their younger co-workers,” and that “the legislation places all workers who choose to remain in the workplace past age 64 at risk of similar losses due to discriminatory treatment in the negotiation of benefit and

79 Canadian workers have increasingly expressed a wish to continue working past 65. See e.g. Gandalf Group, “Consumerology Report: Retirement” (November 2010), online: The Bensimon <<http://www.consumerology.ca>>; *Rethink Retirement: 2008 Survey of Canadians' Preparedness for Life after Work*, online: Desjardin Financial Security, <<http://www.dsf-dfs.com>>.

80 *Chatham-Kent*, *supra* note 56 at para 125 (“the cost curve of providing employment benefits and group insurance plans, showing that the cost becomes higher as workers enter their late 40’s and 50’s, and increases on a steeper curve when employees enter their 60’s”).

insurance policies.”⁸¹ Protecting access to basic goods is especially important for the growing number of Canadians who choose to continue working because they cannot afford to retire.⁸² The law should recognize that the aging population is disproportionately vulnerable to reductions in employment benefits.

While the award in *Chatham-Kent* acknowledged the deleterious impact of the provisions in question on the grievors,⁸³ and on other senior workers, this factor was given little weight in the section 1 analysis. Two factors that were given more weight were the freedom of the parties to agree on the terms of their collective agreement and the economic burden that the abolition of mandatory retirement might impose upon employers.⁸⁴ The Dignified Lives Approach does not see economic considerations as an adequate justification for a

81 *Ibid* at para 136. He also wrote (*ibid* at para 106):

[M]any of the workers who choose to work past age 64 will do so because they need to do so to ensure the ongoing economic security of themselves and their loved ones. This may be particularly the case for women who have entered or returned to the workforce later in life after raising a family and do not have significant pension entitlements waiting for them upon retirement. For these workers, the loss or reduction of benefits like long-term disability (LTD), sick leave and life insurance may have an even greater impact than on younger workers because they may be subject to more health problems associated with aging and may find such benefits are not available to them if they seek them as individuals outside of a group insurance plan.

82 See e.g. Michael C Wolfson, “Projecting the Adequacy of Canadians’ Retirement Income: Current Prospects and Possible Reform Options” (2011) No 17 Institute for Research on Public Policy, online: <<http://www.irpp.org>>. This study projects that around half of Canadians born between 1945 and 1970, with average career earnings of \$35,000 to \$80,000, are likely to experience at least a 25 per cent decline in their standard of living by age 70. The Government of Canada has recently introduced changes which will gradually increase the age of eligibility for the OAS pension and the Guaranteed Income Supplement (GIS) from 65 to 67 between 2023 and 2029. This erosion of the social safety net might accelerate the need to work longer.

83 The grievors’ decision to work longer was influenced by their limited pension entitlement at age 65. See *Chatham-Kent*, *supra* note 56 at paras 8 and 14.

84 Arbitrator Etherington accepted ONA’s argument that the value of free collective bargaining cannot by itself justify the infringement of *Charter* rights. However, he held that “the importance of free collective bargaining . . . is clearly a relevant and significant factor to be weighed against the detrimental effects of the legislation” (*ibid* at para 143).

blanket exemption permitting discrimination against senior workers,⁸⁵ nor does it consider that past or future benefits can adequately compensate present wrongs. It is important to note in this context that the impugned provisions are not limited to benefits obtained through collective bargaining or to unionized workplaces. Essentially, they gave employers in any workplace the freedom to discriminate against senior workers in various benefit plans. Therefore, they should not have been deemed justifiable under section 1 of the *Charter*.

The Dignified Lives Approach, however, recognizes the costs associated with aging workers, and the fact that some social benefits are designed with a person’s whole career or life in mind. Thus, an employer may justify the use of age-based distinctions in the provision of benefits on a case-by-case basis, and in some circumstances economic or social considerations may trump the right to age equality. However, those considerations must be compelling, they must be supported by sufficient evidence, and there must be no less intrusive ways of dealing with them. Reliance on such considerations is more justifiable in the context of a collective agreement than in the case of unilateral employer action;⁸⁶ collective agreements do, after all, involve tradeoffs and compromises, both within a union and between the union and the employer. The parties to collective bargaining are nonetheless under an obligation to refrain from discrimination,⁸⁷ and only tradeoffs which create *bona fide* distinctions should be allowed.

Were the challenged provisions in the collective agreement between ONA and the municipality justified? This is essentially a

85 *Ibid* at para 106.

86 Indeed, in another case, Arbitrator Etherington ruled that despite the same statutory provisions, allowing employers to discriminate in the provision of benefits against workers above 65, the employer was not entitled to deny benefits to workers over 65 because those benefits were listed in the collective agreement as being available to “all employees.” See *Canadian Union of Public Employees, London Civic Employees, Local 107 v London (City of)*, [2010] OLAA No 347 (QL).

87 In Ontario, for example, in addition to the general prohibition of discrimination in the *Human Rights Code*, the *Labour Relations Act*, SO 1995, c 1, Sch A, says (in s 54): “A collective agreement must not discriminate against any person if the discrimination is contrary to the *Human Rights Code* or the *Canadian Charter of Rights and Freedoms*.”

matter of evidence, and no categorical answer can be given here. The particular solution adopted by the parties (which, for example, gave workers over age 65 short-term disability benefits but no long-term disability benefits) may have been reasonable and proportionate in light of the cost of some of the plans.⁸⁸ ONA did, however, submit evidence that the benefit plans in question could have been made available to workers up to age 69, and even 71, at a minimal cost if that cost were spread over all members of the plan.⁸⁹

**(b) Decision 2: Workplace Safety and Insurance Appeals
Tribunal Decision No. 512/06**

In this case, a 63-year-old worker fell and injured his head in a workplace accident. He was granted loss of earnings (LOE) benefits under the Ontario *Workplace Safety and Insurance Act* (WSIA), but they were terminated once he reached the employer's mandatory retirement age of 65.⁹⁰ He challenged the constitutionality of section 43(1)(c) of the WSIA, which permits a two-year limit on LOE benefits in the case of workers who suffered workplace injuries when they

88 Arbitrator Etherington concluded that the benefits that were differentiated by age in the particular collective agreement were "almost entirely limited to those which have a demonstrably strong correlation between age and cost" (*Chatham-Kent*, *supra* note 56 at para 147).

89 ONA argued that "the plans were available from the employer's insurer to provide life insurance, LTD, and sick leave to age 69 and could be available to age 71 at an increased cost for coverage for the grievors and any other workers who chose to work past age 64 . . . [T]he cost of providing the same health benefits to the two grievors, with LTD capped at age 71 (but excluding sick leave coverage), would not undermine the current benefits as it would cost 'only' \$479 per month more than it costs for workers aged under 65. Further, when the cost was spread over the entire plan membership of 1,155 workers, it would result in an increase per member of less than \$5 per year. On sick leave it submits that the evidence of the experts was that the cost of providing the same sick leave benefit to workers over the age of 64 would be similar to the cost of providing it to workers slightly younger than 65" (*ibid* at para 128).

90 *Decision No 512/06*, 2011 ONWSIAT 2525 (available on CanLII) at para 146 [*Decision No 512/06*].

were age 63 or above.⁹¹ The worker contended that the provision offended the *Charter* because it drew a distinction on the basis of age, a prohibited ground under section 15(1), and because it perpetuated the stereotype that senior workers with disabilities “are no longer useful members of the labour force.”⁹² He also argued that the distinction could not be justified under section 1.⁹³ The Attorney-General intervened, maintaining that the distinctions in question did not amount to discrimination since LOE benefits “cannot be for life and should be replaced by retirement income benefits at an age reflecting typical retirement.”⁹⁴

The Workplace Safety and Insurance Appeals Tribunal (WSIAT) held that the impugned provision did not violate section 15 of the *Charter*.⁹⁵ Applying the *Kapp* test,⁹⁶ the WSIAT first considered whether the provision created a distinction based on an enumerated or analogous ground, and then whether it created a disadvantage by perpetuating prejudice or stereotyping.⁹⁷ The majority took the view that the legislation operated primarily as an insurance scheme,⁹⁸ and

91 SO 1997, c 16, Sch A. See also Saskatchewan *Workers' Compensation Act* 1979, SS 1979, c W-17.1, s 68(2) (which denies loss of earnings benefits to workers over the age of 65 and substitutes substantially lower annuity benefits); and New Brunswick *Workers' Compensation Act*, RSNB 1973, c W-13, s 38.2(5) (which terminates the payment of long-term compensation benefits once an injured worker reaches age 65). The Saskatchewan Court of Queen's Bench ruled that s 68(2) violated s 15(1) of the *Charter* yet was justified under s 1, because creating a distinction between lost earning benefits and retirement benefits was a reasonable and rational objective and the means used by the Act were proportionate (see *Zaretski v Saskatchewan (Workers' Compensation Board)*, [1997] 8 WWR 422, 148 DLR (4th) 745 [Zaretski], aff'd 168 Sask R 57 (CA), [1999] 3 WWR 322, leave to appeal to SCC refused, File No 26727 (28 January 1999)). In *Laronde v New Brunswick (Workplace Health, Safety and Compensation Commission)*, 2007 NBCA 10, 312 NBR (2d) 173 [Laronde], the New Brunswick Court of Appeal ruled that s 32.8(5) did not violate s 15(1) because it neither impaired the human dignity of those over 65 nor marginalized senior workers on the basis of age.

92 *Decision No 512/06*, *supra* note 90 at para 50.

93 *Ibid* at para 53.

94 *Ibid* at para 59.

95 *Ibid* at para 146.

96 *R v Kapp*, *supra* note 43.

97 *Decision No 512/06*, *supra* note 90 at para 44.

98 *Ibid* at para 96.

held that while it did create a distinction on the basis of age,⁹⁹ that distinction did not amount to discrimination. Emphasizing the fact that most workers do retire before age 65, the WSIAT held that the provision was not based on either prejudice or stereotyping.¹⁰⁰ Broader social and economic considerations were held to defeat senior workers' age equality rights, as the two-year limitation was found to be "effective in meeting the actual needs of the group as a whole and [was] consistent with the overarching aims of the legislation [which was intended to provide] loss of earnings benefits 'flowing from the injury' in a 'financially responsible and accountable manner.'" ¹⁰¹

The minority opinion took a different view, holding that the legislation operated not only as an insurance scheme for employers but also as a benefits scheme for injured workers.¹⁰² The minority saw the distinction as being discriminatory because it failed "to take into account the claimant's already disadvantaged position within Canadian society as a senior worker resulting in substantially different treatment . . . on the basis of age . . . thereby perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society."¹⁰³ Citing the legislative schemes in British Columbia and Alberta, the minority noted that "there are less arbitrary means to measure a worker's entitlement to [LOE] benefits after age 65 . . . while still relying on the presumption that most workers retire at age 65 and limiting open-ended entitlement."¹⁰⁴ It went on to hold that the provision had not been shown to be justified under section 1 of the *Charter*, because it was arbitrary and did not minimally impair the right of the affected workers to LOE benefits.¹⁰⁵

99 *Ibid* at para 123. ("The section limits loss of earnings benefits to those aged 63 years and older to a maximum of two years. Younger workers do not face the same time limitation.")

100 *Ibid* at paras 141-145. Interestingly enough, the employer and employee representatives on the Tribunal wrote the majority decision. It was the Vice-Chair, A.V.G. Silipo, who wrote the dissenting opinion.

101 *Ibid* at para 146.

102 *Ibid* at para 201.

103 *Ibid* at para 212.

104 *Ibid* at para 214.

105 *Ibid* at para 220.

Applying the Dignified Lives Approach to Decision No. 512/06

According to the Dignified Lives Approach, limiting benefits solely on the basis of age is discriminatory and in breach of section 15 of the *Charter*. It contravenes both the principle of individual assessment and the principle of sufficiency. The impugned *WSIA* provision in *Decision No. 512/06* did not respect the first principle, individual assessment, because it ignored the personal circumstances of injured workers who intended to work past age 65. It assumed that those workers were incapable of participating actively in the labour market. Even if the denial of benefits was based on accurate-on-average generalizations, it took no account of the individual traits and circumstances of those who might have continued working past 65 had they not been injured. By implying that all senior workers were less capable than younger workers, it reinforced negative assumptions about senior workers’ ability to contribute to society. In British Columbia and Alberta, by contrast, senior workers are entitled to a higher level of benefits where the evidence establishes that they would have continued to work if they had not been injured. These examples show that it would have been feasible in Ontario as well to make LOE benefits available through individualized assessment.¹⁰⁶

In *Withler v. Canada (Attorney-General)*,¹⁰⁷ the Supreme Court of Canada dismissed a *Charter* challenge to a similar age-based benefit provision. In that case, widows of deceased plan members challenged the constitutionality of two statutes that reduced their federal supplementary death benefits by 10 percent for each year by which their husbands were older than 60 and 65 respectively when they died. The Court upheld the statutes in question without imposing any burden on the government to show that individual assessment was not feasible.

106 For example, individual assessments, such as those required in British Columbia “may be difficult to make but are not impossible” (*ibid* at para 215). Moreover, “Alberta will pay wage loss benefits beyond age 65, if there is satisfactory evidence that the worker would have continued to work past that age. In British Columbia, a worker 63 years or older when injured generally receives two years of LOE benefits. However, if the Board is satisfied that the worker would have continued working past that point, the Board pays benefits to the date it determines the worker would have retired” (*ibid* at para 118).

107 *Supra* note 43.

Relying on the *Kapp* test,¹⁰⁸ the Court in *Withler* reasoned that although the provisions in question drew a distinction on the basis of age, they were not discriminatory because *overall* they met the actual needs of the claimants. The Court looked at the supplementary death benefit plan in the context of other pensions and benefits to which the surviving spouses were entitled, and concluded that it corresponded to their needs. Under the Dignified Lives Approach, this consideration might have supported a finding that the provisions were justified under section 1 of the *Charter*, but they would nonetheless be considered discriminatory and in violation of section 15. In both *Decision No. 512/06* and *Withler*, the principle of individual assessment would have prompted a fairer analysis of the individual claimants' needs, and would have avoided the use of generalizations.

The impugned provision in *Decision No. 512/06* also failed to respect the principle of sufficiency. It limited injured senior workers' entitlements, and drastically lowered their potential income. While an injured worker should not expect to be compensated at the pre-injury level for the rest of his or her life, the provision in question reduced the alternative benefits available to those who were 65 or more to such a degree as to risk pushing them into poverty.¹⁰⁹ That risk is compounded by the growing inadequacy of private forms of

108 *R v Kapp, ibid.*

109 The Saskatchewan provision applied in *Zaretski* mandated for a move at age 65 from loss of earning benefits and permanent or partial disability benefits to a guaranteed supplement pension (annuity), with greatly reduced benefits — for the particular claimant, from \$1,403 a month to about \$70 a month (*supra* note 91 at paras 14-17). Similarly in *Laronde*, the Court recognized that the immediate effect of the impugned legislation was that injured workers over 65 had less money to live on (*ibid* at para 24), but it chose not to consider the specific facts of the case. Before *Laronde* reached age 65, he received about \$1,500 per month (from provincial workers compensation, the Canada Pension Plan, and Canada Pension Plan disability payments) and a one-time payment of \$6,800. When he reached 65, the workers' compensation benefit ended and he received a one-time annuity of \$6,437 and a monthly payment of \$1,262 from CPP and OAS (*supra* note 91 at para 3). The Court concluded that the overall economic impact was not substantial: “[T]here is no evidence that the termination of benefits forces injured workers into a situation where they are living at or below the poverty line As well, there is no evidence surrounding the extent to which Canada Pension and Old Age security benefits are unable to provide a modicum of financial support for retired persons.” *Ibid* at para 32.

retirement income support and the erosion of the social safety net in Canada.¹¹⁰

In sum, the *WSIA*'s two-year limit on LOE benefits for employees injured at age 63 or older violated the Dignified Lives Approach and was therefore discriminatory. As for whether the discrimination could be justified under section 1 of the *Charter*, it is true that distinguishing between LOE benefits and retirement benefits was a legitimate objective; injured workers cannot reasonably be given lifetime compensation at the pre-injury level. Since most workers retire by age 65, there was also a rational connection between the objective and the chosen mechanism of ending LOE benefits to injured workers when they reach that age. The particular mechanism, however, was disproportionate in its failure to allow consideration of how long the particular worker would have stayed on the job but for the injury. It is telling that Alberta and British Columbia have found less rigid ways to distinguish between working life and post-working life, and allow case-by-case consideration of whether individual employees intended to continue working.¹¹¹

(c) Decision 3: *Law v. Thames Valley District School Board*

In the third case, the Thames Valley District School Board (TVDSB) adopted a policy by 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 policy did not apply to non-retired teachers who wanted to work on an occasional basis. Judith Law, a retiree, was denied occasional work because she was not certified in any of those areas. In a complaint to the Ontario Human Rights Tribunal, she alleged that the policy discriminated against retired teachers on the basis of age.¹¹² The TVDSB argued that since new permanent teachers were primarily hired from the occasional list,¹¹³ applying the policy to non-retired occasional teachers would limit the pool of applicants for permanent positions and might

110 See *supra* note 82.

111 See text accompanying *supra* note 106.

112 *Law v Thames Valley District School Board*, 2011 HRTO 953 (available on CanLII) [*Law v TVDSB*].

113 *Ibid* at para 14.

have the effect of excluding “a new graduate who could potentially become a stellar permanent teacher.”¹¹⁴

The Tribunal dismissed Law’s application, holding that the policy drew a distinction not on the basis of age but on the basis of which individuals were likely to become permanent teachers in the future.¹¹⁵ Noting the relevance of the section 15 analysis to discrimination claims brought under human rights legislation, the Tribunal applied the *Kapp* test.¹¹⁶ In the Tribunal’s view, while the policy did put retired teachers at a disadvantage in comparison to new graduates,¹¹⁷ the distinction which it made was not between senior teachers and younger ones¹¹⁸ — rather, it was between a class of applicants that was already receiving pensions, and a class that was eligible for permanent positions.¹¹⁹ The Tribunal noted that other groups of senior teachers — such as part-time permanent teachers, teachers transferring from other jurisdictions, and new graduates receiving pensions from past employment — were not subject to the certification requirement.¹²⁰ This implies that in order to establish a *prima facie* case of age discrimination, an applicant would be required to show that the policy affected *all* senior workers. Moreover, the Tribunal explicitly held that in order for a claim to be made out, the distinction must be shown to arise, “at least in part, because of a prohibited ground of discrimination,” even though the case was one of alleged adverse-effect discrimination, and not direct discrimination — a point discussed further in the next section.¹²¹

Applying the Dignified Lives Approach to Thames Valley District School Board

Although the distinction drawn by the TVDSB policy between retired and non-retired teachers may have been age-neutral on its

114 *Ibid* at para 47.

115 *Ibid* at para 54.

116 *R v Kapp, supra* note 43.

117 *Law v TVDSB, supra* note 112 at para 36.

118 *Ibid* at para 41.

119 *Ibid* at para 45.

120 *Ibid* at paras 42-44.

121 *Ibid* at para 53.

face, the only individuals adversely affected by it were those who had worked long enough to retire — in other words, senior workers. To establish a claim of adverse-effect age discrimination, a claimant need not show that a distinction is based on a prohibited ground, but rather that it has a disproportionate detrimental impact on members of a protected group (in this case, senior workers). When the TVDSB’s policy is seen through the lens of the Dignified Lives Approach, its detrimental impact on senior workers is manifested in its breach of the principles of social inclusion and autonomy; it should, accordingly, be characterized as discriminatory.

Even if the policy in question was not motivated by stereotyping or prejudice, it did perpetuate disadvantage. First, it offended the Dignified Lives principle of social inclusion. Requiring special qualifications from retired teachers excluded seniors from the group of working occasional teachers, denied them the right to exercise their capabilities, precluded them from realizing their choices, and may even have forced them to relocate or to abandon teaching altogether.¹²² By impacting their social ties and social status, the policy weakened their ability to pursue active social lives.¹²³ On the evidence, it adversely affected the many retired teachers who wanted to be on the occasional list,¹²⁴ and who had generally been on it before the policy was adopted.¹²⁵

The policy also failed to respect the Dignified Lives principle of autonomy because it restricted the exercise of senior teachers’ free will.¹²⁶ It did not stop senior teachers from looking for jobs elsewhere, but like other senior workers, they may well have found it difficult to re-enter the labour market.¹²⁷ The additional certification

122 The applicant testified that she did not look for any alternative jobs because she was interested only in teaching, and only in the London area (*ibid* at para 23).

123 On the importance of work, see *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 368, [1987] 3 WWR 577, *per* Dickson CJC.

124 Around 40 percent of retired teachers had applied to be on the occasional list (*Law v TVDSB*, *supra* note 112 at para 13).

125 *Ibid*.

126 As Réaume has argued, “[r]espect for autonomy is part of respect for the inherent worth of persons. Control over the major determinants of how one’s life goes is part of what gives one’s existence meaning and value” (“Discrimination and Dignity,” *supra* note 46 at 689).

127 See *supra* note 6.

requirements may have created a vocational dead-end for many of them, forcing them into full retirement. In short, their choices were narrowed, and some of them were precluded from remaining in active employment despite their good health and long life expectancy.

Even if the policy was discriminatory, it could still have been justifiable under the Dignified Lives Approach if its rationale was sufficiently compelling. For example, if its purpose of helping new teachers to obtain permanent positions¹²⁸ was demonstrably reasonable and justifiable on a *bona fide* occupational requirement analysis, this might have legitimized the infringement of the right of senior workers to age equality.

(d) Decision 4: *International Brotherhood of Electrical Workers, Local 353 v. Black & McDonald*

In the fourth case to be reviewed here,¹²⁹ the Ontario Labour Relations Board (OLRB) was asked to consider whether the prohibition of discrimination on the basis of age in the province's *Human Rights Code* was violated by a collective agreement clause which provided that "[w]here five (5) or more Journeymen are employed, every fifth (5th) Journeyman shall be fifty (50) years of age or older." The International Brotherhood of Electrical Workers (IBEW) brought a grievance claiming that the employer's layoff of a journeyman electrician who was over the age of 50 contravened that clause. The employer responded that the clause was void because it drew a distinction on the basis of age which benefitted one group at the expense of another, contrary to the *Code*. Upholding the employer's position, the OLRB concluded that the clause was inconsistent with the *Code*, and dismissed the grievance. Although the purpose of the clause was to protect senior workers who often found it harder to obtain other jobs,¹³⁰ the OLRB was not convinced that journeymen over age 50 were a disadvantaged group. Nor did the OLRB accept the

128 See text accompanying *supra* notes 113-114.

129 2010 CanLII 58144 (Ont LRB) [*Black & McDonald*].

130 *Ibid* at para 18. The IBEW referred to statements by the Supreme Court of Canada in *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 which recognized the increasing difficulty faced by senior workers in finding and maintaining a job. The IBEW also filed detailed statistical evidence to prove that journeymen electricians over 50 encountered such difficulty (*Black & McDonald, supra* note 129 at para 20).

union’s argument that the clause was protected under section 14(1) of the *Code*, which permits “the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity.”¹³¹

Applying the *Kapp* test,¹³² the OLRB did not examine the distinction to see if it was discriminatory, but simply stated that “[s]ince that clause provides for preferential treatment on the basis of age, the journeymen electricians . . . do not receive equal treatment with respect to employment without discrimination.”¹³³ The OLRB saw no basis for accepting the IBEW’s argument that journeymen electricians over age 50 were a disadvantaged group, and it held that the assertion that senior workers had more difficulty finding and holding jobs than younger workers merely invoked stereotypes. Essentially, the OLRB advocated treating senior workers like younger workers.¹³⁴ Citing an Ontario Human Rights Commission policy, the Board said that “[a]ge, including assumptions based on stereotypes about age, should not be a factor in decisions about lay-off or termination.”¹³⁵ Finally, in rejecting the claim that the distinction in question represented a “special program” under section 14(1) of the *Code*, the OLRB held that the IBEW had not succeeded in demonstrating a “rational connection between [the] restrictions in eligibility and the purpose of the special program itself.”¹³⁶

It is interesting that the OLRB came to a different conclusion in an earlier case decided in 1990, when it applied the older *Andrews* test¹³⁷ to the same collective agreement provision.¹³⁸ At that time, the

131 *Ibid* at para 18.

132 *Ibid* at para 14.

133 *Ibid* at para 16.

134 *Ibid* at paras 27-28.

135 *Policy on Discrimination, supra* note 3 at 13, cited in *Black & McDonald, supra* note 129 at para 27.

136 *Ibid* at para 37. Specifically, the reasons for choosing the age of 50, and for choosing journeymen rather than apprentices, were not clear (*ibid* at para 36).

137 *Andrews, supra* note 43.

138 *International Brotherhood of Electrical Workers, Local 1739 v Gilmar Electric Inc.*, [1990] OLRB Rep (January) 20 (available on CanLII) [*Gilmar Electric*]. The employer argued that the IBEW had disintitiled itself to certification in that workplace by signing a collective agreement which was discriminatory because it favoured electricians over 50 (the same agreement that was challenged in *Black & McDonald, supra* note 129).

Board held that “not every distinction or differentiation between the treatment of groups or individuals amounts to ‘discrimination.’”¹³⁹ It stressed that no harm was done to the younger workers, and said:

The purpose and effect of the provisions are not motivated by any malice or based on any invidious reasons There is no evidence to suggest that the provisions have caused any adverse or improper effects.¹⁴⁰

Applying the Dignified Lives Approach to Black & McDonald

The impugned clause in the IBEW collective agreement breached none of the principles of the Dignified Lives Approach. It was not intended to stereotype young workers or to perpetuate prejudice against them, nor did it have those effects. It did not deny them decent conditions of living, exclude them from social life, or reduce their autonomy. It was simply designed to help senior workers find or keep jobs. On the Dignified Lives Approach, it was therefore not discriminatory.

Even if the OLRB was correct in finding the clause to be discriminatory, it should have held that it was justified under section 14 of the Ontario *Human Rights Code* as part of a special program to benefit senior workers. By finding that senior workers were not a disadvantaged group and that it would merely perpetuate stereotypes to see them as such, the OLRB may have acknowledged that ageist stereotypes were false. However, treating senior workers exactly like younger workers ignores their specific circumstances and needs, and furthers mere formal equality at the expense of substantive equality. At the same time, it may have been true that in arguing for the special program exemption, the IBEW failed to provide a convincing explanation of why a minimum age of 50 had been chosen, and why the clause in question applied only to journeymen and not to apprentices.¹⁴¹

139 *Gilmar Electric*, *supra* note 138 at para 13.

140 *Ibid* at para 15.

141 See *Black & McDonald*, *supra* note 129 at para 36.

5. CONCLUSION

Although age is different from other grounds of discrimination, it can result in significant harms such as the isolation, oppression and economic deprivation of senior workers. Age-based distinctions should not be permitted when they breach one or more of the Dignified Lives Approach’s five substantive principles of equality, which are in turn based on the notions of equal concern and respect. When any one of those principles is not respected, a wrong is done that cannot be compensated by past or future benefits to the particular individual.

Through a review of four recent age discrimination cases, this paper has sought to illustrate how the current understanding of age discrimination is too narrow. The current focus on comparing the treatment of young workers and senior workers, and on treating prejudice and stereotyping as the essential indicators of discrimination, unduly limits the advancement of equality. Applying the broader understanding of age discrimination embodied in the Dignified Lives Approach would better protect senior workers from the negative effects of ageism.