

The Disability Accommodation Gap in Canadian Workplaces: What Does It Mean for Law, Policy, and an Aging Population?

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The “accommodation gap” refers to the shortfall between those accommodations which persons with disabilities require in order to work, and those workplace accommodations which they actually receive. This paper argues that the accommodation gap raises important issues for policy-makers in Canada, given the growing participation of older workers in the labour market and the fact that the incidence of disability increases with age. Such issues include the loss of productivity, higher poverty rates, increased cost of social programs, and failure to achieve the goals of human rights legislation. Using the results of an extensive analysis of data obtained from Statistics Canada’s 2006 Participation and Activity Limitation Survey, the authors inquire into three questions: (1) Is there a workplace accommodation gap in Canada, and if there is, how big is it and whom does it affect? (2) Is it associated with age or aging, and therefore likely to be aggravated by the aging of the Canadian population? (3) Are its causes likely to elude complaint-driven enforcement of human rights law because they are systemic? In answering these questions, the study finds that a large number of Canadians (about 35%) do not receive accommodations they need to work productively, or at all. Furthermore, the results show that the older the worker and the more severe his or her disability, the greater the accommodation gap. The authors suggest that this finding supports the view that employers’ decisions on whether to provide accommodation are influenced by economic considerations, stereotypes about the link between age and disability, the fact that certain types of accommodation may conflict with workplace culture, and other factors. Finally, the paper contends that the enforcement mechanism currently in place is probably inadequate to deal with the accommodation gap, in view of the systemic nature of many of its causes. The authors set out a number of alternative options which may be more effective in closing the accommodation gap, and propose that those options be considered as part of a comprehensive policy review.

1. INTRODUCTION

In coming years, a growing proportion of Canadian workers who have disabilities will want or need to continue working. Canadians are aging, and are staying at work longer. In 2006, 13% were over 64, and that figure is expected to exceed 25% by 2036.¹ Labour force participation rates of those

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over 55 have climbed steeply and steadily since 2000.² The key reasons for this are durable. They include the aging of the cohort of women who entered the labour force in large numbers in the 1970s and 1980s, a growing desire among older persons to remain active, and financial need due to inadequate retirement savings.³ Not surprisingly, however, the incidence of disability among employed Canadians increases with age, from just over 3% of those between 20 and 24 to over 12% of those from 60 to 64.⁴ If many of these persons with disabilities (PWD) are to overcome activity limitations and work productively, employers will have to design, adapt and manage workplaces appropriately. In short, the aging workforce will need accommodation.

Yet there are already widespread accommodation shortfalls in Canadian workplaces. Using data from Statistics Canada's *2006 Participation and Activity Limitation Survey* (PALS), we find that 35% of PWD say they are not receiving accommodations they need in order to work. We then show that widespread employee reports of such shortfalls are consistent with previous research which finds that the employment opportunities of PWD are negatively influenced by information gaps, stereotyping, economic incentives and workplace cultural resistance, and suggests that such influences are likely to interact with perceptions of aging in ways that deepen the disadvantage of older workers with disabilities. More specifically, the fact that a worker is aging stands to aggravate both the stereotyping of anticipated work performance and the employer's economic disincentives to accommodate. Using a regression analysis, we investigate the determinants of accommodation shortfalls in Canada. Our analysis yields the results one would expect: age interacted with the severity of a disability reduces the

1 Statistics Canada, *Some facts about the demographic and ethnocultural composition of the population* (25 January 2008), online: <<http://www.statcan.gc.ca/pub/91-003-x/2007001/4129904-eng.htm>>.

2 See Michael Wolfson, "Population Aging – Demo Doom or Apocalypse No?" (presentation delivered at the Centre for Law in the Contemporary Workplace, Shades of Grey: Law and Aging in the Contemporary Workplace Conference, 29 April 2012) at 8, online: <[http://law.queensu.ca/lawResearch/clcw/events/2012conferenceonaging/speakerpresentations/Michael Wolfson.pdf](http://law.queensu.ca/lawResearch/clcw/events/2012conferenceonaging/speakerpresentations/Michael%20Wolfson.pdf)>.

3 *Ibid* on the effects of the aging of the female cohort. See Jungwee Park, "Retirement, Health and Employment Among Those 55 Plus," 23:1 Perspectives on Labour and Income, Statistics Canada Catalogue No 75-001-X (Ottawa: StatCan, 31 January 2011) at 10 on the role of financial considerations and the desire to remain active. On the inadequacy of retirement savings, see Michael C Wolfson, "Projecting the Adequacy of Canadians' Retirement Incomes: Current Prospects and Possible Reform Options" (Montreal: Institute for Research on Public Policy, April 2011), IRRP Study No 17, online: <www.irpp.org>.

4 See below, Table 2.

likelihood of accommodation, and so do a series of factors associated with employer cost considerations.

Accommodation shortfalls can contribute to significant social and economic problems, denying people the opportunity to realize their potential, depriving the economy of productive workers, leaving people in poverty, and significantly increasing the cost of social programs. Moreover, as we will argue, our current legal and policy apparatus appears ill-suited to address them. Canadian policy-makers need to rethink how to deal with the accommodation gap.

In Part 2 of this paper, we set out the policy issues at stake. We canvass the labour market disadvantages experienced by persons with disabilities, the public policy problems that result from those disadvantages, how the accommodation gap worsens those problems, and how the Canadian policy apparatus is inadequate to the task of closing the gap. In Part 3 we present a statistical portrait of the relationship between age and disability in the Canadian labour market, and of the incidence of accommodation shortfalls. In Part 4, through a review of the relevant literature and through an econometric analysis, we seek to identify the causes of those shortfalls. Part 5 argues that current Canadian policy structures are unlikely to respond adequately to the complex mix of factors that appear to lie at the root of the accommodation gap, and canvasses alternatives that policy-makers could usefully consider. Part 6 summarizes our conclusions.

Throughout this paper we use the term “accommodation” to refer specifically to adaptations in the work environment that must be made if workers with disabilities are to do their jobs productively and have equal opportunity for advancement. We do not imply that all such accommodations are legally required under human rights law’s duty to accommodate, which for good reasons is limited to measures that do not cause undue hardship to the employer. Our concern is with a potentially broader set of accommodations that might be provided. Many of them may already be legally required, but we have no way of precisely estimating the extent to which that is true.

2. WHY WORKPLACE ACCOMMODATION SHOULD MATTER TO POLICY-MAKERS

(a) Labour Market Disadvantages Faced by Persons with Disabilities

PWD face a host of disadvantages in the Canadian labour market. They are much less likely to obtain employment, as is reflected in both their employment rate (the percentage of the overall population that is employed) and their unemployment rate (the percentage of the overall population that is in the labour force but unable to find employment). In 2006, the employment rate for PWD in

Canada stood at 51%, compared to 75% for other people.⁵ Among the unemployed, PWD are substantially over-represented in the groups that are chronically unemployed and always unemployed.⁶ Older workers with disabilities who become unemployed face additional challenges. Long-term unemployment among workers over 45 in Canada has tended to be much higher than for younger workers, for reasons which include lower labour market mobility, lower education levels, non-transferable skills, and age discrimination.⁷

PWD who do have jobs are more much more likely than other workers to earn less and to face career progression limits.⁸ They are less mobile in the labour market, and those who experience the onset of a continuing disability fall behind other workers in earnings,⁹ despite the older average age of those with disabilities. This earnings effect is primarily a composite of lower wages and a drop in the number of hours worked.¹⁰

The lower earnings of PWD are attributable in part to the response of employers to the mere fact of the disability, probably more through hiring decisions than through overt pay discrimination. After controlling for the effect of various wage-determining characteristics, including productivity, Gunderson finds that the annual earnings of PWD are 25.6% lower than those of persons with no

5 See Statistics Canada, *Labour Force Status for Adults 15 to 64, by age group, 2001 and 2006* (StatCan, 24 July 2008), online: <<http://www.statcan.gc.ca/pub/89-628-x/2008008/t/5201163-eng.htm>> (authors' calculations based upon these data). Organization for Economic Cooperation and Development, *Sickness, Disability and Work: Breaking the Barriers – A Synthesis of Findings Across OECD Countries* (France: OECD Publishing, 2010) at 53 [*Breaking the Barriers – Synthesis*]. The OECD reports that PWD in Canada were more than 1.5 times as likely to be unemployed.

6 We calculated, in doing the profile set out on Part 3 below, that PWD constitute 7.13% of the employed population, 11.23% of the unemployed, and 32% of those not in the labour force or retired. Bradley Brooks, *Chronic Unemployment: A Statistical Profile* (Ottawa: StatCan, 2005).

7 Vincent Dubé, “Sidelined in the Labour Market,” 5:4 *Perspectives on Labour and Income*, Statistics Canada Catalogue No 75-001-XIE (Ottawa: StatCan, April 2004) at 7-8, online: <<http://www.statcan.gc.ca/pub/75-001-x/10404/6844-eng.pdf>>.

8 Aron Spector, “Examining the effects of onset of an on-going disability on labour market attachment, job retention and career progression” (Presentation delivered at CARWH 2010 Conference, Worker Health in a Changing World of Work, 28 May 2010), online: <<http://carwh2010.iwh.on.ca/program/sat/1115/12/232>>. Spector finds, in an analysis of Canadian longitudinal data over a series of five-year periods, that PWD were less likely to move into a management position (8%, in contrast to 12% of the control group) and were more likely to have moved down the management hierarchy (12% versus 9%).

9 *Ibid* at 21.

10 *Ibid* at 25-26.

disability.¹¹ Some of this gap is likely due to the tendency of PWD to work fewer hours over the course of a year. However, a series of studies of *wage* levels in the United States find a disability pay gap of about 20 to 30 percent, and most but not all of those studies attribute the greater part of the gap to discrimination (defined as differentiation in pay between disabled persons and non-disabled persons with the same wage-determining characteristics).¹² This implies that, in the U.S., lower earnings of PWD are not simply a function of lower hours worked; the same may well be true in Canada.

These disadvantages, taken together, result in very high levels of poverty among PWD. Hatfield found that 26.1% of PWD had persistent low income, compared to 3.4% for people who did not fall into any of the five most vulnerable groups in Canadian society.¹³ The OECD reports that Canada has one of the highest rates of poverty for PWD in the industrialized world, mainly as a result of low employment rates and relatively ungenerous income support programs for unemployed persons and those not in the workforce.¹⁴ When PWD do fall below the low income threshold, they are likely to fall

11 Morley Gunderson, *Disability-based Pay Gap Analysis Based on the 2006 Participation and Activity Limitation Survey* (2011) [unpublished, archived with authors] at 19.

12 *Ibid* at ii. It is difficult to determine exactly how much of the pay gap is due to discrimination and how much to unobserved productivity differences. Some studies attempt to separate the two by using control variables that measure functional limitations in normal daily activities (not necessarily work limitations), and attributing residual differences to discrimination. See e.g., Marjorie Baldwin & William Johnson “Labor Market Discrimination against Men with Disabilities” (1994) 29:1 *Journal of Human Resources* 1; William Johnson & James Lambrinos, “Wage Discrimination against Handicapped Men and Women” (1985) 20:2 *Journal of Human Resources* 264. Critics have argued that these controls are not sufficient to capture productivity effects of disabilities, and instead use PWD who report no work limitations as controls, based on the assumption that people with non-work-limiting disabilities have the same productivity as people without disabilities. These studies tend to find a much smaller residual attributable to discrimination. Thomas DeLeire, “Changes in Wage Discrimination against People with Disabilities: 1984-93” (2001) 36:1 *Journal of Human Resources*.145; MK Jones, “Is there employment discrimination against the disabled?” (July 2006) 92:1 *Economics Letters* 32. This approach can in turn be criticized on the ground that it is unlikely that PWD without work limitations experience the same level of discrimination as those who have such limitations. See William M Rodgers, ed, *Handbook on the Economics of Discrimination* (Northampton, MA: Edward Elgar Publishing, 2006) at 147. For a general discussion, see Gunderson, *supra* note 11, and Melanie Jones, “Disability and the Labour Market: A Review of the Empirical Evidence” (January 2008) 35:5 *Journal of Economic Studies* 405.

13 The other four groups, in addition to PWD, were unattached individuals aged 45 to 64, recent immigrants, lone parents, and aboriginals living off reserve. Michael Hatfield, “Vulnerability to Persistent Low Income” (2004) 7:2 *Horizons* 19.

14 Organization for Economic Cooperation and Development, *Sickness, Disability and Work: Breaking the Barriers – Canada: Opportunities for Collaboration* (Paris: OECD Publishing, 2010), at Table 1.7 [*Breaking the Barriers – Canada*].

farther below it.¹⁵ The risk of poverty is also much higher among employed PWD than among other employed people.¹⁶

(b) Policy Implications

These labour market disadvantages raise important policy issues. In an affluent society, high rates of poverty are arguably a serious injustice in themselves. Among PWD, they pose particular problems for health policy. Poverty is one of the strongest correlates of poor health,¹⁷ and unemployment may also aggravate health problems.¹⁸

For economic policy, it is a matter of concern that potentially productive workers are being lost to the market at a time of slowing labour supply growth and projected labour shortages, or are in jobs that do not make full use of their skills and experience.¹⁹ Diminished employment opportunities for PWD also raise questions about how to make better use of the funds spent on our relatively large income support programs for disabled workers. In 2007, Canada's public expenditures on disability sickness programs were probably more than half again as much as on unemployment benefits, and total public and private expenditures on disability benefits were about \$25 billion, about 80% of which was public and 20% private.²⁰ Better opportunities for paid employment for PWD would allow some of these expenditures to be redirected more productively.

Perhaps most fundamentally, our human rights statutes aspire, in the words of the *Canadian Human Rights Act*,

to give effect . . . to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on . . . disability²¹

15 Canada, Canadian Human Rights Commission, *Report on Equality Rights of People with Disabilities* (July 2012) at 30, online: <http://www.chrc-ccdp.ca/pdf/reports/repdp_rdepad-eng.pdf>.

16 Gunderson, *supra* note 11 at Table 1 found that the incidence of low income among employed PWD between 20 and 64 was more than 32% higher than for persons without disabilities.

17 Evelyn Forget, "The Town with No Poverty: The Health Effects of a Canadian Guaranteed Annual Income Field Experiment" (2011) 37:3 *Canadian Public Policy* 283.

18 Canadian Public Health Association, Discussion Paper, "The Health Impact of Unemployment" (1996), online: <http://www.cpha.ca/uploads/resolutions/1996-dp1_e.pdf>.

19 See Canada, Human Resources Development Canada, *Knowledge Matters: Skills and Learning for Canadians* (Hull, PQ: 2002) at section 1.

20 *Breaking the Barriers – Canada*, *supra* note 14 at Table 2.1.

21 *Canadian Human Rights Act*, RSC 1985, c H-6, s 2.

To this end, human rights statutes oblige public and private institutions to accommodate PWD by removing obstacles to their social and economic inclusion.²² Equal opportunity at work, understood as the absence of unnecessary barriers to workforce participation and career development, is a bedrock policy objective of the Canadian political order. As we will try to clarify below, not all disadvantages suffered by PWD in the workplace constitute violations of human rights legislation, and there are important limits to what that legislation can and should require of employers. But to the extent that current policies do not remove the disadvantages that could reasonably be removed, they reflect a failure to reach the goals of human rights law.

(c) The Role of Employment Accommodation

Of the multiple causes of workplace disadvantage for PWD, many lie outside the workplace. PWD tend, on the whole, to have lower levels of education, in part because of barriers to access.²³ Canadian income support systems and other social programs create a disincentive to work by completely cutting off program entitlements above quite low employment income thresholds, rather than gradually phasing them out as employment income rises.²⁴ Lack of accessible transportation in much of the country limits the ability of PWD to travel to potential jobs. Research in the United States finds that PWD often have less social capital in the form of networks that can help them find employment, and the same is likely to be true here.²⁵ People who have been out of the workforce, among whom PWD are disproportionately represented, are more likely to lack “job readiness” skills —

22 The duty to accommodate in human rights law thus partially responds to the “social model” of disability. See generally Ravi Malhotra, “The implications of the social model of disablement for the legal regulation of the modern workplace in Canada and the United States” (2009) 33 *Man LJ* 1. Canada has endorsed that model by ratifying the *United Nations Convention on the Rights of Persons with Disabilities*, A/RES/61/106, UNGA, 2007, online: <<http://www.unhcr.org/refworld/docid/45f973632.html>>.

23 Gunderson, *supra* note 11 at 9.

24 John Stapleton, Stephanie Procyk & Lindsay Kochen, *What Stops Us from Working?* (2011), online: <http://www.camh.ca/en/hospital/about_camh/influencing_public_policy/Documents/ODSP%20Report%20final.pdf>.

25 L Nishii, B Rubineau & S. Bruyère, “Organizational Practices To Increase Employment Opportunities for People with Disabilities: The Power of Social Networks” (Presentation to AAFES, 22 September 2011) [on file with authors].

hard skills such as training in current work methods, and soft skills such as interviewing and resumé writing.²⁶

Yet it is clear that what goes on in the workplace also plays an important role in creating or perpetuating labour market disadvantage. Discrimination in hiring and pay is an important example, to which we will return below. Decisions by employers to grant or deny such accommodations as modified work schedules, modified duties, or assistive or adaptive technology often determine whether PWD can obtain or remain in productive employment or advance in their careers. The vast majority of PWD report that if they have suitable accommodations, they are able and willing to work full time.²⁷ Accommodation directly improves job retention by PWD,²⁸ and makes it less likely that workers whose disabilities were caused by recurrent injuries will leave employment for health reasons.²⁹ PWD who do not receive needed accommodations may have to take jobs that do not make full use of their skills and experience.³⁰ In 2006, 48% of working-age PWD in Canada required some form of accommodation to work. However, the need for accommodation was associated with lack of employment: 59% percent of unemployed PWD required accommodations, but only 40% of employed PWD.³¹

As indicated below, a substantial percentage of employees who report that they need accommodations in order to work are not receiving some or all of them, and that is probably also true of accommodations needed for career progression. As Gunderson hypothesizes with respect to pay

26 See e.g., M Kulkarni & ML Lengnick-Hall, “Socialization of people with disabilities in the workplace” (2011) 50:4 *Human Resource Management* 521.

27 Four out of five respondents to a survey by the Canadian Abilities Foundation said that they could do full-time work with suitable workplace accommodations. Even among respondents with a severe disability, only 27% reported that their disability prevented them from working full time if such accommodations were made. See Canadian Abilities Foundation, *Neglected or Hidden: Connecting Employers and People with Disabilities in Canada* (Toronto: 2004) at 3, online: <<http://digitalcommons.ilr.cornell.edu/gladnetcollect/289>> [*Neglected or Hidden*].

28 Janalee Morris-Wales, *Literature Review on Job Retention and Career Progression for Persons with Disabilities in Canada and Internationally* (2010) at 19, online: <<http://disabilitystudies.ca/wp-content/uploads/2010/08/Job-Retention-and-Career-Progression-Among-People-with-Disabilities-Final-Report.htm>>.

29 Michele Campolieti, “State Dependence, Accommodations, and the Postinjury Employment of Disabled Workers” (2007) 46:3 *Industrial Relations: A Journal of Economy and Society* 636, (finding that employer accommodation can reduce the conditional probability of leaving employment for health reasons by 33%).

30 Economists call this “skills mismatch.” While there are no published studies on skills mismatch for PWD in Canada, Jones and Sloane document its existence in the United Kingdom. Melanie K Jones & Peter J Sloane, “Disability and Skill Mismatch” (2010) 86 *Economic Record* 101.

31 Authors’ calculations, based on Statistics Canada, *2006 Participation and Activity Limitation Survey: Disability in Canada*, 89-628-XWE No 2 (2007) [PALS 2006].

discrimination,³² if PWD come to believe that their labour market opportunities are diminished by the unavailability of accommodation, they will probably be less likely to invest in education and other measures that could well help them to succeed. For many reasons, therefore, the extent to which employers give workers with disabilities the accommodations they need in order to work is an important matter of public policy.

(d) Is the Canadian Policy Apparatus Adequate?

Canadian governments use a range of policy tools to foster workplace accommodation. Workers' compensation laws require employers to put back to work employees with an injury or illness arising from employment, and many workers' compensation agencies provide case management services that monitor and support employers in carrying out that duty.³³ In addition, a range of federal and provincial programs fund employment support services for PWD,³⁴ generally provided by non-governmental, not-for-profit social service agencies. Some agencies work with employers to facilitate accommodations, but often face funding constraints that limit their ability to deal with accommodation issues.³⁵ Quebec has implemented a temporary wage subsidy program — Action emploi — to help the long-term unemployed reconnect to the labour market.³⁶ Such programs may enable some PWD to find jobs that would otherwise lie beyond their reach.

However, the only measure universally available to Canadian employees with disabilities is the employer duty to accommodate under human rights law. Human rights codes across the country

32 Gunderson, *supra* note 11 at i.

33 *Workers Compensation Act*, CCSM c W200, s 49.3; *Workers' Compensation Act*, RSNB 1973, c W-13, s 42.1; *Workplace Health, Safety and Compensation Act*, RSNL 1990, c W-11, ss 89-89.4; *Workers' Compensation Act*, SNS 1994-95, c 10, ss 89-101.; *Workplace Safety and Insurance Act*, 1997, SO 1997, c 16, s 41; *Workers' Compensation Act*, RSPEI 1988, c W-7.1, ss 86.1-86.12; *Act Respecting Industrial Accidents and Occupational Diseases*, RSQ c A-3.001, ss 32, 234 & 251; *Workers' Compensation Act*, SY 2008, c 12, s 41. See also *Canada Labour Standards Regulations*, CRC, c 986, s 34, and *Canada Labour Code*, RSC 1985, c L-2, s 239.1.

34 See e.g., "Federal Opportunities Fund for Persons with Disabilities," online: <<http://www.servicecanada.gc.ca/eng/of/>>; Employment and Social Development Canada, "Labour Market Agreements for Persons with Disabilities," online: <http://www.hrsdc.gc.ca/eng/jobs/training_agreements/lma_disabilities/index.shtml>.

35 See Ontario Disability Employment Network, *Submission to the Social Assistance Review Commission* (revised 21 June 2012), online: <<http://www.odnetwork.com/category/government-issues>>.

36 On the impact of Action emploi, see Guy Lacroix, *Assessing the Impact of a Wage Subsidy for Single Parents on Social Assistance* (Montreal: Centre interuniversitaire de recherche en analyse des organisations, 2010).

prohibit disability discrimination in employment. The Ontario *Human Rights Code*, for example, gives every person “a right to equal treatment with respect to employment without discrimination” on the basis of various prohibited grounds, including physical or mental disability.³⁷ This right protects not only against direct or intentional discrimination, but also against indirect discrimination, i.e. an adverse impact resulting from a facially neutral practice or standard unless the standard is a *bona fide* occupational requirement or BFOR.³⁸ A BFOR is a requirement which the employer has adopted for a purpose rationally connected to the performance of the job, and which is honestly believed to be (and in fact is) reasonably necessary to that purpose.³⁹ The employer must demonstrate that it would be impossible, without incurring undue hardship, to accommodate individual employees sharing the claimant’s characteristics.⁴⁰ The duty to accommodate flows directly from the right to equal treatment without discrimination, and ends at the point of the imposition of undue hardship on the employer.

There are good reasons to believe that human rights law’s reach is insufficient to ensure that Canadians with disabilities receive needed accommodation at work. Determining whether a human rights statute has been violated can be very complex and therefore time-consuming and expensive.⁴¹ Relatively few workers are likely to have the financial and emotional resources to pursue a complaint, particularly where discrimination occurs at the point of hire, as the hiring and pay gap studies reviewed below suggest it often does. Relatively few non-unionized employees are willing to challenge their employer by bringing a complaint during the life of the employment relationship, for fear of reprisals of various types.⁴²

37 RSO 1990, c H.19, s 5.

38 *Ontario (Human Rights Commission) v Simpsons Sears Ltd*, [1985] 2 SCR 536.

39 *British Columbia (Public Service Employee Relations Commission) v British Columbia Government Service Employees Union*, [1999] 3 SCR 3 [Meiorin].

40 *Ibid* at para 54.

41 A range of factors must be considered in determining whether accommodation has to be provided, including the employee’s physical and mental abilities, potential effects on health and safety, “financial cost, disruption of a collective agreement, problems of morale of other employees, [and] interchangeability of work force and facilities.” *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*, [1990] 2 SCR 489, 72 DLR (4th) 417 at 439. For a good discussion of the difficulties that such complex factors pose for the adjudication of human rights claims, see Jean R Stemlight, “In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis” (2004) 78 *Tulane L Rev* 1401.

42 See Federal Labour Standards Review Commission, *Fairness At Work: Labour Standards for the 21st Century* (Ottawa: HRSDC, 2006) at chap 9, section 2A, noting that “that 92% of all complaints under Part III were filed by workers who were no longer employed in the same workplace. This striking statistic suggests that some workers are so concerned that they will be fired that they abandon their statutory rights.” See also Ian R Mackenzie, “Legal Rights for Persons with Disabilities in

Two major public reviews of human rights enforcement, in Ontario in 1992 and in the federal jurisdiction in 2001, concluded that the complaint-driven model was an outdated and ineffective way of addressing forms of discrimination that are systemic — that is, embedded in pervasive economic incentives, or in cultural stereotypes or workplace norms, rather than being individual acts of prejudice.⁴³ As will be shown in Part 4 below, this conclusion is particularly apt in the case of disability discrimination at work. Both of those reports went on to recommend other options (most of which were not implemented), as did the OECD in a recent report on Canada’s approach to integrating PWD into the workforce.⁴⁴ We return to those options in Part 5.

All of this suggests the need for further information on three key questions:

- (1) Is there a workplace accommodation gap in Canada, and if there is, how big is it and whom does it affect?
- (2) Is it associated with age or aging, and therefore likely to be aggravated by the aging of the Canadian population?
- (3) Are its causes likely to elude complaint-driven enforcement of human rights law because they are systemic?

We take up these questions in Parts 3 and 4.

(3) THE ACCOMMODATION SHORTFALL IN CANADA

In this part of the paper, we analyze data from Statistics Canada’s *2006 Participation and Activity Limitation Survey* (PALS) in order to profile the extent to which disabled workers require accommodations in the workplace but do not receive them. We also briefly describe the relationship of these variables to worker age and to other major variables likely to influence workplace outcomes.⁴⁵

Canada: Can the Impasse Be Resolved?” (1997) 29 Ottawa L Rev 152 at 177, and Catherine R Albiston, “Mobilizing Employment Rights in the Workplace” in Laura Beth Nielson & Robert L Nelson, eds, *Handbook of Employment Discrimination Research* (New York: Springer, 2008) 301 at 304.

43 Ontario Human Rights Code Review Task Force, *Achieving Equality* (Toronto: Ontario Ministry of Citizenship, 1992); Canadian Human Rights Act Review Panel, *Report of the Canadian Human Rights Review Panel* (Canadian Human Rights Commission, 2001), online: <<http://www.chrc-ccdp.ca/default-eng.aspx>>.

44 See the recommendations contained in *Breaking the Barriers – Synthesis*, *supra* note 5.

45 Further detailed results are available from the authors.

The PALS is a voluntary survey of persons who reported, in the Canada Census, that there was at least one activity limitation in their household.⁴⁶ It asks workers about a detailed list of types of limitations, and about types of accommodations required and whether they have been provided.⁴⁷ Our analysis employed the public use version of this data set (the Public Use Microdata Files, or PUMF), and was done at the national level.⁴⁸ It focused on employed individuals over the age of 15. The “employed” sample size was 36,565, and the sub-sample of employed PWD had 5,531 observations.⁴⁹

Disability (i.e., activity limitation) is self-reported in the PALS, as is whether a worker requires an accommodation and actually receives it. Thus, there may be some reporting bias that overstates the accommodation shortfall.⁵⁰ We are nonetheless confident that the size of the actual gap is in the range that our findings suggest.⁵¹

(a) The Incidence of Disability and Disability Severity by Age Group

We profiled the distribution of PWD by age within the workforce, by distribution of age groups within the population of PWD in the workforce, and by incidence of various disabilities by age within the workforce.⁵² Here we summarize the key features of these profiles.

The distribution of PWD in the overall population is heavily skewed toward the older age groups. In the 15 to 34-year-old group, the incidence of at least one identified disability in the

46 See PALS 2006, *supra* note 31 at 2.

47 Detailed definitions for the relevant variables identified in the PALS are available on request from the authors, for the types of limitations experienced, the severity of the limitation, and the accommodations required and received.

48 In the PUMF file provinces cannot be identified, in order to protect the confidentiality of individual survey respondents (See PALS 2006, *supra* note 31 at 7). The PALS weight has been used for all calculations.

49 Statistics Canada provides weights to enable the estimation of total population sizes from sample sizes. The sample size for employed PWD was further reduced because of missing values for some variables used in the analysis.

50 This bias in reporting of a disability would be analogous to the reporting bias that has been documented in relation to medical conditions. See e.g. Michael Baker, Mark Stabile & Catherine Deri, “What Do Self-Reported, Objective, Measures of Health Measure?” (Autumn 2004) 39:4 *Journal of Human Resources* 1067; J Currie & BC Madrian, “Health, Health Insurance and the Labor Market” in Orley Ashenfelter & David Card, eds, *Handbook of Labor Economics*, vol 3C (New York: Elsevier Science, 1999). Although we expect the accommodation shortfall to be overstated, the survey contains no employer-reported data, or other information, that would permit us to test for the any reporting bias.

51 The sample selection bias discussed in note 54, *infra*, can be expected to result in understatement of any accommodation gap, a tendency running in the opposite direction to any tendency of employees to overstate it.

52 Detailed figures are available from the authors.

population is only about 3 to 4%. It increases with age, reaching about 5.5% at 35 to 39, about 12.5% at 60 to 64, and about 19% at 70 and older. The incidence of hearing, seeing, communication, mobility, agility, and pain limitations all increase by age over the 15 to 74-year age span. Within the population of disabled employees, the distribution is also skewed towards older age groups.

Approximately 27% of disabled employees are between 15 and 39, and 60% are between 40 and 59.⁵³

Hearing, mobility and agility limitations all increase steadily with age. Interestingly, however, the incidence of agility, pain and sight limitations falls after age 60, perhaps reflecting selective attrition of older disabled workers from paid employment. Such attrition might in turn reflect voluntary retirement choices of employees, or a growing unwillingness of employers to accommodate employees as they age, or both — a matter to which we will return below. By contrast, the incidence of communication and speech disabilities among employed PWD generally declines with age, even though it increases in the general population. This may suggest selective attrition at an earlier age.

(b) The Incidence of Accommodations Required and Received

We analyzed the incidence of accommodation for the segment of the labour force that is employed, measured as the incidence of employed workers receiving all, some or none of the accommodations reported as needed to work. We also examined various factors which may be associated with that incidence.⁵⁴

Approximately 40% of disabled employees reported requiring at least one type of accommodation, with about half of those needing more than one. The most commonly needed accommodations were job re-design, modified working time, ergonomic changes, and special chairs or back support. About 83% of disabled workers identified as requiring an accommodation received at least one type (about 17% did not receive any),⁵⁵ but only about 65% received all needed accommodations.⁵⁶

53 Detailed results for the profile of the incidence of disability by age are available from the authors.

54 Since we are analyzing the sub-sample of “employed disabled” workers, we do not include those who could not get hired and thus remain unemployed, or who have left the labour force because of their disability. This may result in some sample selection bias, as it excludes those who leave employment or remain unemployed because they do not receive accommodation. We are in essence measuring the likelihood that a worker will receive needed accommodations, given that he or she has been hired.

55 The incidence of specific types of accommodations identified as required by disabled employees, and of the types provided by employers, is available from the authors upon request.

56 This finding is consistent with recently published figures in Kim M Shuey & Emily Jovic, “Disability Accommodation in Nonstandard and Precarious Employment Arrangements” (2013) 40

The incidence of accommodation varies with a range of worker and employer variables that could reflect the cost of accommodation, the willingness of employers to pay for it, or the employer return on investment in accommodation. Among those variables are the following:

Educational attainment. The incidence of provision of all required accommodations increases with educational attainment.

Income level. The incidence of provision of all required accommodations is lower among low income earners.

Permanent employment. The incidence of provision of all required accommodations is considerably higher for those with a permanent job.

Unionization. The incidence of provision of all required accommodations is slightly higher for unionized workers.

Severity of limitation. For workers with a severe limitation, all required accommodations are provided for roughly 52%, compared to 74% for those with a mild or moderate limitation.

Duration of Limitation. As this variable increases, the incidence of all accommodations being provided decreases.⁵⁷

TABLE 1
Incidence of the Provision of Accommodation by Selected Characteristics
among the Disabled, 2006

Sex	Male	Female	Total	
All Accommodations Provided	64.13	66.59	65.48	
At Least One Accommodation Not Provided	35.87	33.41	34.52	
Urban/Rural	Rural	Urban	Total	
All Accommodations Provided	57.39	67.32	65.48	
At Least One Accommodation Not Provided	42.61	32.68	34.52	
Mother Tongue English	No	Yes	Total	
All Accommodations Provided	59.66	67.97	65.48	
At Least One Accommodation Not Provided	40.34	32.03	34.52	

Mother Tongue French	No	Yes	Total	
All Accommodations Provided	67.08	56.93	65.48	
At Least One Accommodation Not Provided	32.92	43.07	34.52	
Mother Tongue Other	No	Yes	Total	
All Accommodations Provided	65.93	62.71	65.48	
At Least One Accommodation Not Provided	34.07	37.29	34.52	
Education	HS or Less	Trade or College	University	Total
All Accommodations Provided	65.94	62.80	70.11	65.48
At Least One Accommodation Not Provided	34.06	37.20	29.89	34.52
Marital Status	Not Married	Married	Total	
All Accommodations Provided	66.42	64.99	65.54	
At Least One Accommodation Not Provided	33.58	35.01	34.46	
Low Income after Tax	No	Yes	Total	
All Accommodations Provided	65.84	60.73	65.14	
At Least One Accommodation Not Provided	34.16	39.27	34.86	
Permanent Job	No	Yes	Total	
All Accommodations Provided	56.78	66.17	65.22	
At Least One Accommodation Not Provided	43.22	33.83	34.78	
Represented by a Union	No	Yes	Total	
All Accommodations Provided	62.60	68.28	65.01	
At Least One Accommodation Not Provided	37.4	31.72	34.99	

TABLE 2
Incidence of the Provision of Accommodation by Severity and Duration of Disability
among the Disabled, 2006

Panel A: Limitation Severity	Mild to Moderate		Severe to Very Severe					Total
All Accommodations Provided	73.87		51.55					65.48
At Least One Accommodation Not Provided	26.13		48.45					34.52
Panel B: Limitation Duration	0	Less Than 1 Year	1 to 2 Years	2 to 4 Years	5 to 9 Years	10 to 19 Years	20+ Years	Total
All Accommodations Provided	74.74	72.92	62.86	69.93	71.92	69.15	55.70	65.48
At Least One Accommodation Not Provided	25.26	27.08	37.14	30.07	28.08	30.85	44.30	34.52

In addition, the incidence of accommodation varies according to where the onset of the limitation occurred. Roughly 76% of disabled workers received all required accommodations if it occurred while with their present employer, compared to 52% if it occurred with a previous employer.⁵⁸

In contrast, the likelihood of accommodation has a more equivocal relationship to age. The incidence of all accommodations being provided tends to decline with age up to about age 35 to 39, but generally increases at higher ages. Lack of at least one accommodation tends to increase up to the middle working years, and then declines. The activity limitations that increase most with age (agility and mobility limitations, and pain) tend to have the highest incidence of provision of all required accommodations. This pattern may reflect the association of age with variables that tend to increase the likelihood of accommodation, such as higher income, permanent employment status, unionization, or long service (which is in turn associated with the onset of disability with the present employer). It may

⁵⁸ Detailed results on all findings set out in the paragraph are available from the authors.

also reflect selective attrition from the employed workforce over age 60, due to retirement or to employer decisions not to accommodate for reasons associated with age.

Our descriptive analysis therefore suggests that while age may play a role in the extent of provision of accommodations, any such role is likely to be the result of a complex set of interactions with other variables.

4. WHY PWD DO NOT RECEIVE ACCOMMODATION, AND WHAT AGE HAS TO DO WITH IT

In this part of the paper, we analyze the determinants of the accommodation shortfall and the likely interactions of age with those determinants. First we review the literature shedding light on the determinants of accommodation, then we offer an econometric analysis of the determinants of the shortfall.

(a) Five Reasons Why Workers May Not Receive Disability Accommodations

Our analysis of the literature leads us to identify five distinct but often overlapping reasons why an employer might not provide an accommodation that a PWD needs to work. There is evidence suggesting that four of the five — all but the first — interact with age in important ways.

(i) No Accommodation Will Make the Employee Sufficiently Productive

Sometimes, no accommodation would prevent the PWD from being significantly less productive (i.e., unable to meet the quality and quantity standards required of all employees) in any job that the employer could offer. There are no studies that would help us determine how often this happens.

(ii) Lack of Information

An employer may not know that the employee has a disability, or what the employee needs, or how those needs can be met. An employee may be unwilling to disclose a disability for fear of being stigmatized or discriminated against by co-workers, managers or others. Or, the employee may not see his or her activity limitation as a disability. Even where the disability is known, the appropriate responses may be far from obvious without further information. Medical assessments may have to be obtained and interpreted, and a range of technical and administrative solutions explored. Smaller employers, especially those without human resources staff, may be particularly likely to misperceive

the true extent of a disability, the alternatives available for accommodating it, or the costs and benefits of accommodation.

Lack of trust may also interfere with an employer's efforts to ascertain the extent of a disability and the activity limitations it brings.⁵⁹ Case studies and small-scale surveys in Canada, and more extensive quantitative data from the U.S., show that a culture of acceptance and employee involvement facilitates the open communication needed for effective accommodation.⁶⁰ Smaller workplaces, and workplaces with a strong spirit of collaboration, may be more likely to foster the trust needed for such communication.⁶¹ If there is substantial union-management animosity, it can hamper return-to-work efforts for PWD.⁶²

We have no systematic data on how often Canadian employers lack the information they need to accommodate their employees. Some small-scale survey evidence suggests that many small and medium-sized employers perceive a need for technical assistance.⁶³ The fact that the U.S. Department of Labor has for more than 25 years maintained its Job Accommodation Network, a free advisory service available to employers of all sizes providing access to expert consultants on workplace accommodation, also suggests an ongoing need for such help.⁶⁴

On the worker side, we do know that certain information problems are more pronounced among older workers. Those who perceive age as the cause of their activity limitations are less likely to report a need for workplace accommodation,⁶⁵ perhaps because (as McMullin and Shuey suggest) they do not equate aging with acquiring a disability but see it merely as "getting old," or because they are more likely to fear losing their jobs or work responsibilities if their activity limitations become known.⁶⁶

59 K Williams-Whitt & D Taras, "Disability and the Performance Paradox: Can Social Capital Bridge the Divide?" (2010) 48:3 *British Journal of Industrial Relations* 534.

60 Kelly Williams-Witt, "Impediments to Disability Accommodation" (2007) 62 *RI* 405; Deborah M Balsler, "Predictors of Workplace Accommodations for Employees with Mobility-Related Disabilities" (2007) 39 *Administration & Society* 656; R Gewurtz & B Kirsh "Disruption, disbelief and resistance: A meta-synthesis of disability in the Workplace" (2009) 34:1 *Work* 33.

61 R Lysaght, T Krupa & A Gregory, *Accommodations in the Workplace for Employees with Disabilities* (20 March 2012) [unpublished report on file with authors] at 32.

62 Williams-Witt, *supra* note 60 at 421.

63 Lysaght, Krupa & Gregory, *supra* note 61 at 20, report that 55% of employers identified technical assistance as an idea with merit.

64 See Job Accommodation Network, *Comprehensive List of JAN Publications*, online: <<http://askjan.org/pubsandres/list.htm>>.

65 Julie Ann McMullin & Kim M Shuey "Ageing, Disability and Workplace Accommodations" (2006) 26 *Ageing and Society* 831 at 841-844.

66 *Ibid.*

(iii) *Prejudice and Stereotyping*

The limited evidence on attitudes towards PWD suggests that many Canadians at times feel awkward around them, and that some disabilities (particularly mental illness) are especially likely to cause discomfort.⁶⁷ There is no reason to think that employers and managers are immune from this. Customer prejudice may lead employers to remove PWD from interaction with the public, and employee prejudices may create an aversion to working alongside them. Economic theory suggests that much of this discrimination should not survive in a competitive market. Non-prejudiced employers are supposed to gain an advantage over their prejudiced competitors by being willing to hire lower-cost but equally productive workers.⁶⁸ There is evidence that market forces do operate in this way in practice,⁶⁹ and that for many employers there is often a good business case for accommodating PWD.⁷⁰

Nonetheless, employers may at times have economically rational reasons for yielding to prejudices against PWD.⁷¹ First, discrimination can be profit-maximizing if it is due to customer rather

67 Michael J Prince, *Pride and Prejudice: The Ambivalence of Canadian Attitudes toward Disability and Inclusion* (Toronto: Institute for Research on Inclusion and Society, York University, 2009).

68 Gary Becker, *The Economics of Discrimination* (Chicago: University of Chicago Press, 1957); James Heckman, "Detecting Discrimination" (Spring 1998) 12:2 *Journal of Economic Perspectives* 101.

69 Gunderson, *supra* note 11 refers to several papers which offer such evidence.

70 Two surveys of employers indicate that large majorities of those who had decided to accommodate employees reported direct and indirect benefits: retaining a valued employee, increasing the employee's productivity, saving the cost of training a new employee, improving colleague interaction, and increasing overall morale and productivity. See Helen A Schartz, DJ Hendricks & Peter Blanck, "Workplace accommodations: evidence based outcomes" (2006) 27:4 *Work* at 345; and Beth Loy, "Workplace Accommodations: Low Cost, High Impact" (2011) *Job Accommodation Network, Office of Disability and Employment Policy (US)*, online: <<http://askjan.org/media/lowcosthighimpact.html>>. Even at the level of direct benefits and costs, the balance is positive for many employers. One study reported that 61% of responding employers estimated the direct benefits of having provided accommodation at more than \$1,000. The mean estimated benefit was \$11,335 and the median was \$1,000, indicating that the direct payoff was very large in a few cases and relatively small in most. Tatiana I Solovieva, Denetta L Dowler & Richard T Walls, "Employer benefits from making workplace accommodations" (January 2011) 4:1 *Disability and Health Journal* 39. These studies of course only capture the experience of employers who do make accommodations and cannot be generalized to all employers, many of whom may face very different cost-benefit structures.

71 See generally, Kenneth J Arrow, "What Has Economics To Say about Discrimination?" (Spring 1998) 12:2 *Journal of Economic Perspectives* 91; Marjorie L Baldwin & William G Johnson, "A critical review of studies of discrimination against workers with disabilities" in William M Rodgers III,

than employer prejudice. Second, employers may discriminate if they lack accurate information on employee qualifications, which may be costly to obtain, and if the employer concludes that a group characteristic is probative enough to provide a useful proxy for such information.⁷² Third, as most PWD are older adults, their employers may have a degree of monopsony power over them because of their restricted mobility, limited capacity to acquire new skills, and high job search costs. The employer may thus be able to pay them less without incurring a competitive disadvantage in the labour market.⁷³ Fourth, it may require a costly investment of management effort to counter stereotyped views of PWD in the workplace, to change hiring and other practices that reflect such views, and to convince co-workers and managers that accommodation is simply non-discrimination rather than “special treatment.” This sketch of the economic incentives for and against accommodation indicate that those incentives which tend to erode discrimination may often operate only in the long run, if at all. They are less likely to operate where the employer’s business model is based not on improving human capital but on low labour costs, so that attracting and retaining the most talented workforce is not a prime motivation.

There are relatively few empirical studies addressing prejudice and stereotyping in employer accommodation decisions. The available evidence from U.S.-based studies indicates that prejudicial stereotypes play a role in the aggregate. One study found that employees who had a health condition that was typically more subject to discrimination were less likely to be accommodated.⁷⁴ Another found that managers were less willing to accommodate employees who were perceived to be “at fault” by having caused their own disability.⁷⁵

Those findings are supported by considerable evidence that many employers have acted on stereotyped views of PWD in aspects of the employment relationship other than accommodation. Most

ed, *Handbook on the Economics of Discrimination* (Northampton, MA: Edward Elgar Publishing, 2006) 119.

72 Edmund S Phelps, “The Statistical Theory of Racism and Sexism” (September 1972) 62:4 *American Economic Review* 659. This tendency may be accentuated by the fact that many employers have little experience in assessing the productivity of PWD, and the great diversity of disabilities means that even experienced employers may have difficulty assessing the productivity of people with different limitations in the context of different jobs. See Baldwin & Johnson, *supra* note 71 at 125.

73 Gunderson, *supra* note 11 at 3; Baldwin & Johnson, *supra* note 71 at 125.

74 Thomas N Chirikos, “Will the costs of accommodating workers with disabilities remain low?” (1999) 17:1 *Behavioral Sciences & the Law* 93 at 104.

75 Anna T Florey & Harrison David “Responses to Informal Accommodation Requests from Employees with Disabilities: Multistudy Evidence on Willingness to Comply” (2000) 43:2 *Academy of Management Journal* 224 at 230.

of this evidence takes one of two forms. First, as noted above, researchers have documented a significant disability pay gap that cannot be attributed to productivity or other wage-determining characteristics. The wage gap has been found to increase markedly with the visibility of the disability, with the extent of customer interaction required in the job, and with types of disabilities (such as mental illness or disfigurement) that have more social stigma.⁷⁶

Second, studies of how employers evaluate the employability of PWD reveal that prejudices and stereotypes may be quite widespread. One set of studies infers the presence of discrimination in hiring decisions from differences in evaluation scores that cannot be accounted for by qualifications or experience. These studies examine how employers, after reviewing real or hypothetical resumé, rate the employability of people with and without disabilities, or how they respond to unsolicited job applications from the two groups. Even after standard controls for job qualifications and experience, the studies find that evaluations of PWD tend to be lower.⁷⁷ Another set of studies directly observes employer attitudes toward hiring PWD. These studies find fears that PWD may lack knowledge, skills and abilities, may be unable to do physically demanding tasks, may require costly accommodations, may create safety problems, may sue for discrimination, may hurt co-worker morale, and may negatively affect consumer attitudes.⁷⁸ The type and severity of employees' or job applicants'

76 Gunderson, *supra* note 11 at 25; Marjorie Baldwin & William Johnson, "Labor Market Discrimination against Men with Disabilities in the Year of the ADA" (2000) 66: Southern Economic Journal 548; William Johnson & James Lambrinos, "The Effect of Prejudice on the Wages of Disabled Workers" (1987) 15:3 Policy Studies Journal 571; David Salkever & Marisa Domino, "Within Group 'Structural' Tests of Labor Market Discrimination: A Study of Persons with Disabilities" (1997) National Bureau of Economic Research Working Paper 5931.

77 See J Bricout & KJ Bentley, "Disability status and perceptions of employability by employers" (2000) 24:2 Social Work Research 87; James E Bordieri & David E Drehmer, "Hiring Decisions for Disabled Workers: Looking at the Cause" (1986) 16:3 Journal of Applied Social Psychology 197; Jean-François Ravaud, Béatrice Madiot & Isabelle Ville, "Discrimination towards people with disabilities seeking employment" (1992) 35:8 Social Science & Medicine 951; and James E Bordieri, David E Drehmer & W Darrell Tayler "Work Life for Employees with Disabilities: Recommendations for Promotion" (1997) 40:3 Rehabilitation Counseling Bulletin 181.

78 See *Neglected or Hidden*, *supra* note 27; HS Kaye, LH Jans & Erica C Jones, "Why Don't Employers Hire and Retain Workers with Disabilities?" (2011) 21:4 Journal of Occupational Rehabilitation 526; VA Johnson, R Greenwood & KF Schriener, "Work Performance and Work Personality: Employer Concerns about Workers with Disabilities" (1988) 32:1 Rehabilitation Counseling Bulletin 50; and DR Fuqua, M Rathburn & EM Gade "A comparison of employer attitudes toward the worker problems of eight types of disabilities" (1984) 15 Vocational Evaluation and Work Adjustment Bulletin 40. A number of studies have also reported that employers do not have negative conceptions or attitudes toward hiring PWD. See Brigida Hernandez, Christopher Keys & Fabricio Balcazar, "Employer Attitudes towards Workers with Disabilities and their ADA Employment Rights:

disabilities are found to affect how employers perceive their employability. In particular, employers are more concerned about intellectual or psychiatric disabilities than physical disabilities.⁷⁹ Qualitative studies of the employment experiences of PWD have tended to support the inference of frequent labour market discrimination.⁸⁰

A number of these generalizations are likely to be inaccurate and therefore to amount to prejudicial stereotyping. More specifically, there appears to be no evidence that employing PWD generally creates safety problems.⁸¹ The studies discussed immediately above suggest that employers often discount the qualifications of PWD. Other studies have shown that there are few substantive differences in performance or productivity between non-disabled workers and disabled workers who can complete assigned tasks.⁸² (The ability to complete assigned tasks may of course depend on accommodation.) Studies of accommodation costs suggest that the direct costs are usually very low.⁸³ The concerns of customers and the morale problems of other employees, if not based on actual or likely performance problems, must similarly be based on prejudicial stereotyping. It is interesting to note that

A Literature Review” (2000) 66:4 *Journal of Rehabilitation* 4, examining this contradiction and finding that the difference can be attributed to how attitudes are defined. Studies were more likely to have positive findings if they measured general attitudes towards PWD, while studies that resulted in more negative results framed attitudes based on specific issues regarding employing PWD.

79 See Fuqua, Rathburn & Gade, *supra* note 78; TL Scheid, “Employment of individuals with mental disabilities: business response to the ADA’s challenge” (1999) 17:1 *Behavioral Sciences & the Law* 73; Edward Diksa & E Sally Rogers, “Employer Concerns about Hiring Persons with Psychiatric Disability: Results of the Employer Attitude Questionnaire” (1996) 40:1 *Rehabilitation Counseling Bulletin* 31.

80 For a literature review and study done in Canada, see M Shier, JR Graham & ME Jones, “Barriers to employment as experienced by disabled people: A qualitative analysis in Calgary and Regina, Canada” (2009) 24:1 *Disability & Society* 63.

81 In fact one U.S.-based study found that employing PWD did not significantly affect workers’ compensation claims, and did not pose a safety risk in the workplace. PD Blanck, *The Americans with Disability Act and the Emerging Workforce: Employment of People with Mental Retardation* (Washington, DC: American Association of Mental Retardation, 1998).

82 See Williams-Witt, *supra* note 60 at 536-537 and sources discussed therein; Brigida Hernandez & Katherine MacDonald, “Exploring the Costs and Benefits of Workers with Disabilities” (2010) 76:3 *Journal of Rehabilitation* 15.

83 There is relatively little evidence on the cost of accommodation in Canada. One survey of PWD found that estimated annual workplace accommodation costs were under \$1,500 for almost all workers who have a disability, with 52% estimating that the cost of the needed accommodations would be less than \$500 per year. See *Neglected or Hidden*, *supra* note 27 at 3. These findings are broadly consistent with a number of U.S. studies. See DJ Hendricks, Linda C Batiste & Anne Hirsh, “Cost and Effectiveness of Accommodations in the Workplace: Preliminary Results of a Nationwide Study” (2005) 25:4 *Disability Studies Quarterly*; Solovieva, Dowler & Walls, *supra* note 70. But see Chirikos, *supra* note 74.

employers who had previously employed PWD tended to have more positive attitudes toward hiring them, and fewer concerns about their performance.⁸⁴

Against that background, it is possible to make sense of findings that aging, but not age, reduces the likelihood of accommodation. A Canadian study found that age alone was not a statistically significant determinant of receiving accommodation,⁸⁵ and that once older workers had identified a need for accommodation, they were less likely to report that they did not receive it, possibly because of greater length of service associated with greater skills and experience.⁸⁶ However, the same study found that older workers requiring an accommodation were twice as likely to receive it if they attributed their disability to a cause other than aging.⁸⁷ This suggests that age negatively affects the likelihood of accommodation through its association with the aging process. The perception that an employee with a disability is aging may aggravate the potential for stereotyping that employee as having declining abilities or as posing an increased risk of future costs, safety problems or negative customer response. As discussed immediately below, it may also affect employer expectations of the level of return on an investment in accommodation.

(iv) *Cost of Accommodation*

All other things being equal, labour cost minimization improves profitability. As noted above, the actual cost of accommodations is often very small, but in a non-negligible minority of cases they will impose significant marginal costs on an employer,⁸⁸ especially where they are specific to only one employee. Direct costs may include the costs of evaluating the employee's needs and buying assistive technology. Indirect costs may include the management effort required to change workplace attitudes and practices. Where the cost of accommodations exceeds the cost of replacing an employee who needs them to work productively, the employer will have an incentive not to provide them, especially for employees who are relatively low in job-specific skills and other forms of human capital. The negative

84 See e.g. Diksa & Rogers, *supra* note 79; Kaye, Jans & Jones, *supra* note 78.

85 Michelle Campolieti, "Disability Insurance Benefits and Labor Supply: Some Additional Evidence" (2004) 22:4 *Journal of Labor Economics* 863.

86 McMullin & Shuey, *supra* note 65 at 844.

87 *Ibid* at 841.

88 In the one available recent study on accommodation costs in Canada, 16% of PWD surveyed said that they anticipated annual costs of accommodation in excess of \$1,500. In a few cases, the costs will be much higher. In a small survey of U.S. employers, Solovieva, Dowler & Walls, *supra* note 70 at 43, found that for the 18% who indicated a non-zero annual cost of accommodation, the mean annual cost was \$14,628 and the median \$2,000. This implies that in a small minority of cases, annual costs will be quite high.

incentive should be weaker where a one-time investment in accommodation is likely to be amortized over a long job tenure, or where the cost is negligible in relation to total compensation.

Uncertainty about potential additional future costs may also contribute to employer reluctance to accommodate, particularly at the point of hire, where the employee's skills, abilities and work ethic are less known to the employer. In hiring or retaining a disabled employee, an employer may see itself as assuming the risk of large direct or indirect costs of future accommodation and the risk of a failed employment relationship, which can bring lost productivity, termination and recruitment costs, and harm to morale among other employees. If an employer considers these costs to be high enough, even a small risk that they will materialize may matter at the margins, especially at the hiring stage in competitive labour markets.

There is considerable empirical evidence that cost factors do affect willingness to accommodate. Statistical studies based in the U.S. have found that the provision of accommodations varies negatively with their probable cost.⁸⁹ Very severe disability, which is likely to be associated with high cost, has been shown in U.S. and Canadian studies to make accommodation less likely.⁹⁰ Factors indicating that the employer will get a return on an investment in accommodation appear to increase the likelihood of that investment. More specifically, U.S. studies find that full-time, permanent employees are significantly more likely to receive such substantial accommodations as physical alterations to the workplace or equipment,⁹¹ and that more productive employees are more likely to be accommodated.⁹² Canadian studies have also found that workers in non-standard or precarious employment are more

89 Florey & David, *supra* note 75 at 225; Chirikos, *supra* note 74 at 96; Thomas N Chirikos, "Employer Accommodation of Older Workers with Disabilities: Some Empirical Evidence and Policy Lessons" in PD Blanck, ed, *Employment, Disability, and the Americans with Disabilities Act* (Evanston: Northwestern University Press, 2000) 228 at 242-243; and Richard V Burkhauser, Maximilian D Schmeiser & Robert R Weathers II, "The Importance of Anti-Discrimination and Workers' Compensation Laws on the Provision of Workplace Accommodations Following the Onset of Disability" (2012) 65:1 *Indus & Lab Rel Rev* 101.

90 PWD who reported having a "mild" condition were more likely to have their accommodation needs met than those with a "very severe" condition. McMullin & Shuey, *supra* note 65 at 841. Campolieti found that employers were more likely to accommodate employees who had not lost a significant amount of the physical ability to do their pre-injury jobs. Michele Campolieti, "The Correlates of Accommodations for Permanently Disabled Workers" (2004) 43:3 *Industrial Relations: A Journal of Economy and Society* 546.

91 Deborah B Balser, "Predictors of Workplace Accommodation for Employees with Mobility-Related Disabilities" (2007) 39:5 *Administration & Society* 656 at 671.

92 Florey & David, *supra* note 75 at 230; Chirikos, *supra* note 74 at 102.

likely to have unmet accommodation needs,⁹³ and that workers who had a university education⁹⁴ or had vocational training before a disabling accident, and who returned to work with the same employer, were more likely to be accommodated,⁹⁵ as were employees of higher socio-economic status.⁹⁶ In Canada, employees who experience disability onset from a workplace accident are more likely to receive accommodation from the accident employer than from a subsequent employer, probably in part because they have firm-specific skills.⁹⁷ Employees with high social capital within a firm (good relationships with colleagues and supervisors) are more likely to be accommodated.⁹⁸

Perceptions of aging may interact in important ways with cost considerations. An employer may see a significant one-time investment in accommodation as less likely to yield a positive return if the employee is likely to retire soon, or if the employer perceives the aging process as inevitably aggravating a disability and leading to a further decline in health. These considerations may be particularly influential where an older PWD seeks new employment.

(v) *Commitment to Rules, Standards, Practices or Norms with Adverse Impacts*

Most employers maintain more or less formal policies and rules aimed at an efficient and consistently administered workplace. Human rights commission records provide myriad examples, including visual acuity standards, drug testing policies, and performance evaluation systems, that penalize absences for illness.⁹⁹ Despite their valid business purpose, such formal norms may adversely affect the ability of PWD to continue working. By definition, failing to adapt these norms to the conditions of PWD amounts to a lack of accommodation that impairs employment and career prospects.¹⁰⁰

Less visible but equally problematic for PWD can be informal rules and practices governing what is appropriate conduct and who is considered to be a full contributor in the workplace. One study

93 Shuey & Jovic, *supra* note 56 at 190-191.

94 McMullin & Shuey, *supra* note 65 at 841-842. Campolieti, *supra* note 90 at 562, however, found no effect for education level, including university education.

95 *Ibid* at 548.

96 McMullin & Shuey, *supra* note 65 at 841. See also Shuey & Jovic, *supra* note 56 at 190-191.

97 See Campolieti, *supra* note 90 at 563-564.

98 Lysaght, Krupa & Gregory, *supra* note 61 at 33; Williams-Whitt & Taras, *supra* note 59.

99 Annette Nierobisz & Charles Theroux, *Disability Complaints Submitted to the Canadian Human Rights Commission: An Analysis of Systemic Barriers Reported by Complainants* (2009) [on file with authors].

100 It should be noted, however, that if such accommodation would impose an undue hardship on the employer, failing to provide it would not be illegal.

of difficult accommodation cases in Canada documented how managers and co-workers treated recurring absences as a sign of lack of commitment: over time, employees who were often absent as a result of a disability tended to become less trusted as team members, in some instances losing the “social capital” they had previously accumulated through good performance.¹⁰¹ These kinds of informal expectations may be particularly problematic for older workers with disabilities, who may (for example) need flexible schedules in order to cope with fatigue.

Both formal and informal workplace norms may be resistant to change because they embody bureaucratic judgments about work requirements or reflect workplace culture. As it does with regard to stereotyping, economic theory assumes that a competitive labour market will over time provide incentives to alter such rules and practices, and to accommodate PWD in order to attract and retain the best available workforce. Again, however, there may be countervailing incentives. The costs of changing rules and practices may be significant, and as noted above, employers may have monopsony power which enables them to retain highly qualified PWD notwithstanding a lack of career advancement prospects.¹⁰² There is no empirical evidence that would allow us to estimate the prevalence of such rules and practices, but it is noteworthy that their adverse impacts have grounded many complaints to the Canadian Human Rights Commission which have led to Commission-approved settlements.¹⁰³

Thus, although it may at times be impossible to satisfactorily accommodate PWD, the literature also indicates that lack of information, stereotyped views, economic incentive structures, and workplace cultural and institutional norms often contribute to the accommodation gap. The effect of those factors appears to be aggravated by perceptions of the aging process which make older workers less likely to disclose their disabilities, and make employers less likely to accommodate disabilities which they see as attributable to aging.

(b) Econometric Analysis of Determinants of the Accommodation Gap

Our analysis complements that of McMullin and Shuey, who used 2001 PALS data to empirically study the determinants of unmet accommodation needs of older workers in Canada. Using

101 Williams-Witt & Taras, *supra* note 59 at 551.

102 See sources cited in note 73, *supra*.

103 See Nierobisz & Theroux, *supra* note 99 at 11 (documenting 133 such complaints between 1997 and 2006).

2006 PALS data, we have taken a closer look at the factors that potentially determine accommodation shortfall, using regression analysis to estimate the relative importance of several of those factors.¹⁰⁴

(i) *Our Hypotheses*

We formulated several hypotheses about the causes of the accommodation shortfall, based on a number of factors reviewed above: the need for information, the profile of the incidence of limitations, the profile of the shortfall, and the existing empirical research literature.

(A) ROLE OF PERCEPTIONS OF AGING

Previous studies lead us to expect that stereotypes of disability and aging play a role in the observed aggregate accommodation shortfall. From the work of McMullin and Shuey, we expect that employees will be less likely to be accommodated where their disabilities are attributed to “getting old” and therefore to becoming less vigorous and productive. We explore this hypothesis by interacting age with disability severity.

(B) SYSTEMIC FACTORS

We expect that the higher the cost of an accommodation, the less likely it becomes that it will be provided. The PALS does not give direct measures of such costs, but it does have information on proxies for them, which we expect to provide useful insights. The severity of a disability is one such proxy that we look at, although it is probably only a very crude one.¹⁰⁵ Among other and probably

104 All computations were done using STATA/MP 11. As a check against programming errors, the “unweighted” frequencies of all of the variables we examined were compared to the corresponding “unweighted” frequencies for each variable reported in the PALS User Guide. These comparisons used the PWD sample, without any further restrictions. Our analysis focuses on the sub-sample of “employed disabled” workers. However, unemployed persons may experience more “discrimination” than those who are employed (that is, the unemployed may be more likely to need an accommodation), which in turn may help to explain why they are unemployed. If the unemployed do have greater unmet accommodation needs, the measured shortfall in our analysis may understate its actual extent among all PWD in the labour force, because unemployed PWD are more likely to need an accommodation. The analysis is therefore subject to selection effects. We nevertheless expect that our empirical estimates, based on the employed sample, represent a lower bound for the results that would be obtained for a broader sample of the employed and unemployed.

105 The severity of a disability may be associated with the degree of stigmatization and stereotyping, which would tend to confirm its suitability as a proxy for costs. On the other hand, employers may be less likely to question the *bona fides* of more severe disabilities or the need to accommodate them, which would impugn its suitability as a proxy for costs.

better proxies is the individualized nature of the accommodation in question (e.g., an ergonomic work station), as such an accommodation is likely to have higher direct costs per worker than one which will help many workers (e.g., accessible washrooms). We also consider the effects of a series of variables which are expected to affect the likelihood of a positive return on an investment in accommodation: the worker's employment status (permanent or temporary, and full-time or part-time),¹⁰⁶ education level, and income level.

We also expect that institutional rules and workplace cultural norms, on which the PALS offers relatively little information, will influence the likelihood of accommodation. However, Williams-Witt and Taras suggest that (as noted above) regularity of work attendance is seen in many workplaces as a measure of commitment both to co-workers and to the employer, and can therefore affect both the employer's initial willingness to accommodate and the permanence of an accommodation. If that is true, we would expect employers to be less likely to grant requests for modified scheduling (which may be particularly important to older workers). Furthermore, we hypothesize that if the onset of a limitation occurred at work and with the current employer, the employer may feel more of a responsibility to the worker, and may feel better able to judge the worker's future productive potential because of familiarity with his or her pre-disability performance.

Older workers are more likely to be unionized,¹⁰⁷ and as unions typically have a significant positive impact on a range of pay and non-pay outcomes for workers,¹⁰⁸ we expect unionization to have a positive effect on the likelihood of accommodation. However, while the power of unions to enforce the legal duty to accommodate should make accommodation more likely, unionization may also bring seniority systems and other bureaucratic rules that can conflict with potential accommodations. Moreover, as noted above, the literature suggests that a history of conflictual labour relations in the particular workplace may make accommodation less likely. Therefore, while the broader literature on unionization indicates that being represented by a union may, on net, mean a higher chance of obtaining accommodation, we have no clear expectation on the size of that effect.

106 The permanent worker variable may also capture differences in how the labour market (or employers) treat workers (e.g., in terms of internal job opportunities or responsibilities).

107 Human Resources and Skills Development Canada, *Unionization Rates*, online: <http://www4.hrsdc.gc.ca/.3ndic.lt.4r@-eng.jsp?iid=17#M_3>.

108 M Gunderson & D Hyatt, "Union Impact on Compensation, Productivity, and Management of the Organization" in M Gunderson & D Taras, eds, *Canadian Labour and Employment Relations* (Toronto: Pearson: 2009) 383.

(ii) *Our Methods*

We estimate a count regression equation that explains variation in the “number” or “count” of accommodations that are not provided, across disabled workers.¹⁰⁹ The dependent variable is the accommodation shortfall, which is constructed on the basis of counts of the number of required accommodations that are not provided to each person.¹¹⁰

The partial effect of a specific variable on the shortfall depends on the particular value of the explanatory variable used to estimate the effect, so the partial response varies across individuals. We therefore calculate the “average marginal effect,” by taking an average of the “marginal effect” calculations across observations. For continuous variables (e.g., employment hours), the average marginal effect is calculated as the derivative, and for binary categorical (dummy) variables it is calculated as the difference between the probability of the variable when category 1 is assumed and when category 0 is assumed (e.g., the difference between the probability of being male versus the probability of being female, for a dummy variable that takes on a value of 0 if the individual is male and 1 if female).

¹⁰⁹ We estimate a Poisson regression. The data include 14 required accommodations and 13 provided accommodations. For each person, a dummy variable was defined that takes a value of 1 if an accommodation is required and another dummy variable that takes a value of 1 if the accommodation is provided, given that it is required. It is important to note that provided accommodations are a subsample of required accommodations, in that the provided accommodation is only defined for an individual if he or she reports that it is needed (i.e. the required accommodation for a given accommodation dummy variable takes a value of 1). Since there are 14 required accommodations and only 13 provided accommodations, accommodation provision is only defined over 13 required accommodations. Note as well that required accommodations, provided accommodations, and the shortfall for each person are based solely on the subset of accommodations that individual workers believe they require.

¹¹⁰ Specifically, for each person, the number of required accommodations and the number of accommodations provided were calculated. Then, using this information, the shortfall for each person was calculated as the difference between the number of required accommodations and the number of provided accommodations.

TABLE 3
Accommodation Shortfall Count Model, 2006

Explanatory Variable	Coefficient	Robust Std. Error	T-Statistic
Socio-Demographic:			
Age	.0214763	.0275421	0.78
Age ²	-.0003997	.0003309	-1.21
Female	.1340753	.1332817	1.01
Urban	-.1437515	.1408827	-1.02
French Language	.4755561	.1230248	3.87 *
High School or Less	-.09949	.1900613	-0.52
College	-.0513459	.1764288	-0.29
Low Income	.1820994	.1618279	1.13
Employ. Income	.0009001	.0037917	0.24
Weeks of Work	-.0057154	.0036047	-1.59
Weekly Hours	.01254	.0055531	2.26 *
Unionized	-.3522681	.1432433	-2.46 *
Establishment Characteristics:			
Mult. Loc. Establishment	.038134	.1246882	0.31
Est. Employ. 20-99	.1598877	.1412719	1.13
Est. Employ. 100-500	.2021651	.1566428	1.29
Est. Employ. > 500	.1535466	.2203756	0.70
Permanent Job	-.4945425	.1245058	-3.97 *
Limitation Characteristics:			
Severe Limitation	-1.398177	.4401152	-3.18 *
Severity x Age	.0382399	.0098622	3.88 *
Duration of Limitation	-.0352752	.0405882	-0.87
(Limitation Duration) ²	.0022526	.0019078	1.18

Required Accommodation:			
Job Redesign	.6815819	.1210568	5.63 *
Modified Hours/Days	.2929345	.1293028	2.27 *
Human Support	.712689	.2297022	3.10 *
Technical Aids	.5249036	.3292562	1.59
Computer Related	.2852184	.4062403	0.70
Communication Aid	.4199403	.4341765	0.97
Erg. Work Station	.2645379	.1538458	1.72
Chair/Back Support	.8497635	.1280411	6.64 *
Rails/Ramps	-.0685896	.2317287	-0.30
Parking	.0987135	.2254575	0.44
Elevator	.2291976	.3003553	0.76
Access. Washroom	-.3784936	.3052991	-1.24
Access. Transp.	.2649653	.2447035	1.08
Other	-.1789952	.2045711	-0.87
Industries (Relative to Manufacturing):			
Public Admin.	-.078444	.294375	-0.27
Education	.3423767	.3403352	1.01
Health	.1079979	.2890244	0.37
Primary	-.5299788	.6301795	-0.84
Construction	.0745128	.2971367	0.25
Trade	.0917851	.2707577	0.34
Transport	-.2269318	.3256468	-0.70
Services	.1671101	.2570806	0.65
Leisure	.1927776	.2742997	0.70
Occupations (Relative to Management):			
Business, Finance, Admin.	.8583863	.4267402	2.01 *

Sciences	.9570989	.4833181	1.98 *
Health	.942703	.4883741	1.93
Educ. & Government	.8604595	.4407455	1.95
Culture	1.078649	.5824983	1.85
Sales & Service	.9502137	.4220042	2.25 *
Operators	1.279455	.4276349	2.99 *
Unique to Primary	.9241717	.8949513	1.03
Proc./Manuf./Utilities	1.344987	.4614294	2.91 *
CONSTANT	-2.865338	.7476675	-3.83
<p>* = Statistically Significantly different from 0 at the 95% level ($t > 1.96$)</p> <p>Dependent Variable = Shortfall (number of required accommodations that are not provided to each person).</p> <p>Poisson regression where Number of observations = 1536</p> <p>Wald chi2(53) = 730.53</p> <p>Log pseudolikelihood = -743.59926</p> <p>Prob > chi2 = 0.0000</p>			

Table 3 lists explanatory and control variables used in the base specification of the regression.¹¹¹ Age is included in level form and in squared form to allow for nonlinearities in the effect, since the older a person is, the more likely he or she is to develop new limitations or to see existing limitations become more severe.¹¹² Since at least some limitations are progressive, the longer the person has had a limitation, the more severe it can be assumed to be. Consequently, the limitation duration variable is included in level form and in squared form, to allow for nonlinearities of this effect. Since many of these variables are positively associated with age, we expect that simply examining age *per se* would overestimate its effects on accommodation. We account for this by controlling for age

111 The “paid worker” variable was excluded from all equations because it is perfectly collinear with other variables.

112 This effect may not be strong in our analysis, because we are already using the sub-sample of disabled workers.

effects independent of other relevant variables. This also permits us to consider distinct age-related disabilities which may be a function of the aging process. Finally, limitation type and accommodation requirements turned out to be highly collinear, so they could not both be included in the estimation. We opted to focus on accommodation requirements, as they are directly probative with respect to employer cost considerations.

We varied the base model to estimate alternative specifications. One excluded industry. Another excluded industry and occupation. These specifications did yield some differences in results, but they were not consequential. A third alternative specification included onset of the disability with a previous employer (versus the current employer).¹¹³ Standard errors were calculated for the population, which permits inferences to be based on the entire population rather than just the sample.

(iii) *Our Results*

The results for the base specification of the accommodation shortfall count regression are presented in Table 3. Neither age nor age squared was statistically significant on its own. Interestingly, severity was significant and negative, indicating that more severe limitations are associated with a smaller shortfall, and thus with greater employer willingness to accommodate. In our descriptive statistics, increased severity was associated with less accommodation. The regression results suggest that it is not severity itself which produces this association, but something else that is associated with severity. A more severe disability may make an employer less likely to question the *bona fides* of an accommodation request. This may account in part for the negative relationship between severity and accommodation shortfall.

On the other hand, age interacted with severity is significant and positive. This suggests that the older the worker and the more severe the limitation, the greater the accommodation shortfall. To further assess the relationship between age and the severity of limitations, we calculated the shortfall (i.e., average effects) by both the severity of disability and age. These results are presented in the first two rows of Table 4, for less severe and more severe limitations respectively. In addition, the marginal effect of increased severity (i.e., the difference between the average effects of lesser and greater severity) is calculated at each age (row 3), as is the level of significance of the marginal effect (row 4).

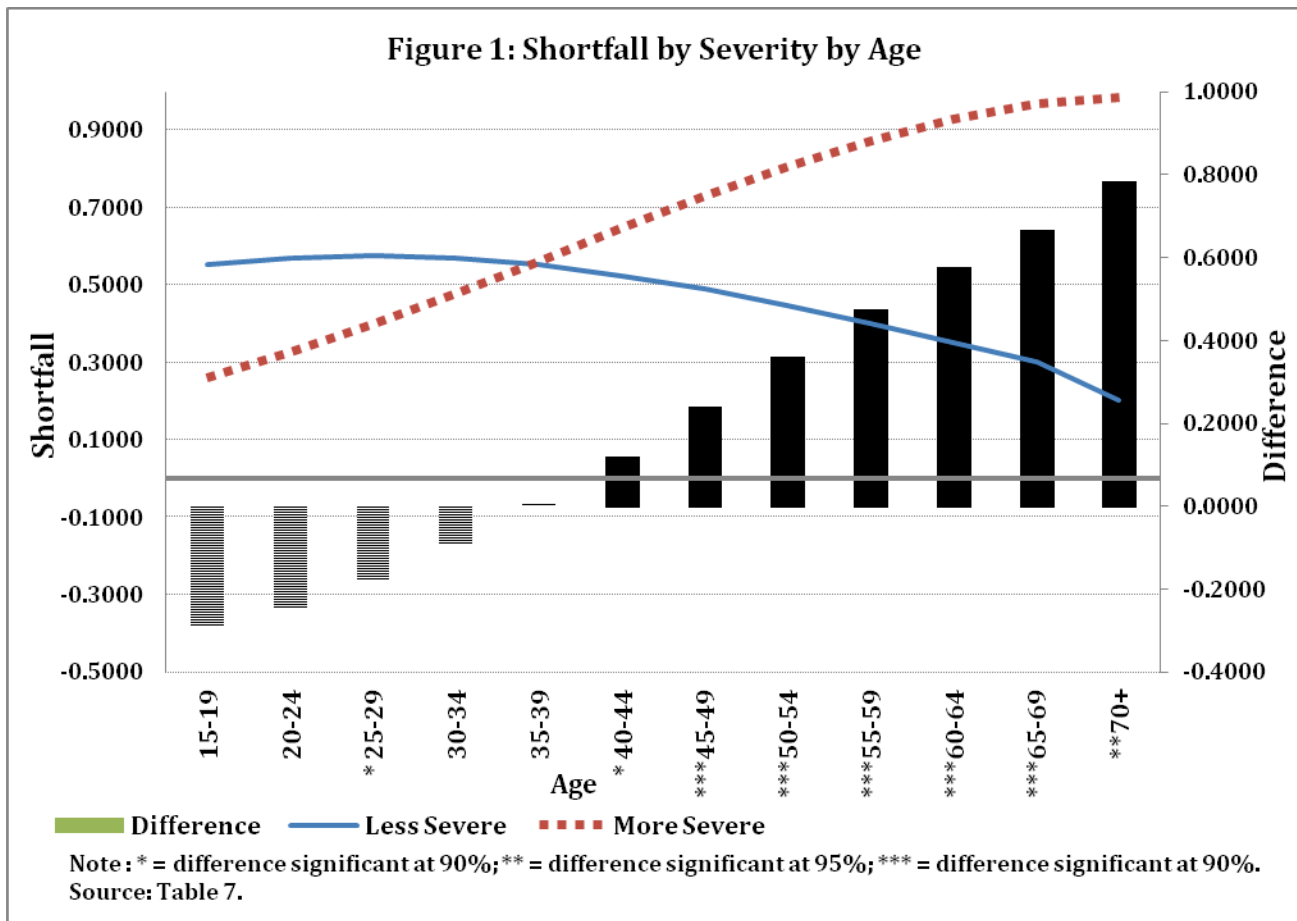
¹¹³ The “Where Employed When First Experienced Limitation” variable relates to where the onset of the limitation occurred — with the present employer, or a previous employer, or not at work.

TABLE 4
Shortfall (Average Effects) by Severity of Disability and Age, 2006

Severity	Age											
	15-19	20-24	25-29	30-34	35-39	40-44	45-49	50-54	55-59	60-64	65-69	70+
Less Severe	0.553	0.569	0.575	0.569	0.552	0.524	0.489	0.446	0.400	0.351	0.302	0.202
	3	8	2	2	1	9	2	8	1	2	1	3
More Severe	0.261	0.326	0.399	0.478	0.561	0.646	0.729	0.806	0.874	0.928	0.967	0.986
	9	5	0	1	4	2	1	3	1	9	5	4
Difference (Marginal Effect)	-	-	-	-	0.009	0.121	0.239	0.359	0.474	0.577	0.665	0.784
	0.291	0.243	0.176	0.091	3	3	9	5	0	7	4	2
	4	3	2	1								
Significance	***	**	*			*	***	***	***	***	***	**

Notes: * Difference Significant at 90%; ** Difference Significant at 95%; *** Difference Significant at 99%

Difference is the marginal effect = More Severe - Less Severe.



The results from Table 4, which are depicted in Figure 1, show that the shortfall in providing accommodations decreases with age for less severe limitations but increases with age for more severe limitations. The marginal effect of more severity (i.e., the difference in the average effects between less severity and more) increases dramatically with age for disabled workers over 40, and is statistically significant. These results, taken together, suggest that age and severity in combination have a sizeable and increasing effect on the shortfall. This is consistent with the hypothesis that employers will consider the potential return on investment in accommodating severe disabilities, and will see the return as being less for an older employee. This may in turn reflect perceptions that age increases the risk that disabilities will worsen — the idea that the worker is just “getting old.”

Consistent with the hypothesis that costs matter, we also found that the shortfall was significantly greater for certain accommodations, such as modified hours or days, which are designed to benefit an individual employee¹¹⁴ and may thus cost proportionately more than those which benefit a

¹¹⁴ Other examples are job redesign, human support, and special chair or back support.

larger number of disabled workers or customers, such as ramps, handrails and accessible washrooms.¹¹⁵ The fact that modified duties increase the shortfall is also consistent with the hypothesis that workplace norms on employee commitment can stand in the way of accommodation. As noted above, this may be particularly problematic for older workers.

Similarly, consistent with the hypothesis that return on investment matters, holding a permanent job is associated with a smaller shortfall. However, higher weekly working hours are associated with a larger shortfall, a finding that invites further inquiry. In our descriptive statistics, a university education is associated with a smaller shortfall, and low income is associated with a larger one, but neither is statistically significant. This may be due to the collinearity of the income and education variables.

In our third specification, the “onset at current employer” variable had, as expected, a negative effect on the shortfall. This fits with the hypothesis that employers provide accommodation differentially depending on when and where the onset occurred.¹¹⁶ Also as expected, being unionized is associated in a statistically significant way with a smaller shortfall.

To conclude, our findings suggest that although other factors are also at play,¹¹⁷ cost considerations are likely an important determinant of the accommodation shortfall, and that views of aging interact significantly with them.

5. REASONS FOR RETHINKING THE CANADIAN POLICY APPROACH

Overall, our analysis indicates that about 35% of employed PWD in Canada do not receive needed accommodations, that the causes of the problem are often systemic, and that population aging

115 This type of required accommodations had a negative (but not statistically significant) effect on the shortfall. Required accommodations that had a positive (but again not statistically significant) effect on the shortfall included technical aids, computer accommodations (Braille, large print, voice recognition, scanners), communication aids, ergonomic work stations, and accessible parking, elevators and transportation.

116 The coefficient for this onset-capturing variable must be interpreted with caution, because a worker may change jobs to get more accommodation. Other coefficient estimates, and the significance of some other variables, were affected by including this variable in the specification, but probably because the sample was greatly reduced relative to the base specification.

117 Having French as the worker’s native language is significantly associated with a larger shortfall, a finding that calls for further study. A possible contributing factor is the linguistic construction of activity limitation; in French, the most widely used term is *handicap*, which tends to connote a more severe condition than the English term “disability.” We also found significant industry effects which call for additional study. The varying role of labour costs in overall cost structures, and the absence of profit motive in the public sector, may account for these effects.

stands to aggravate it. Yet those causes are quite likely preventable. Lack of information can be cured; stereotyping can be discouraged; rules and norms that unnecessarily disadvantage PWD can be modified; and the allocation of accommodation costs to private employers could be altered by public programs, if policy-makers were to value the public benefits highly enough.

For reasons mentioned in Part 2 above, the current policy approach, with its heavy reliance on complaint-driven enforcement of human rights codes, is not well designed to achieve those outcomes. The mix of systemic causes of the accommodation gap will often lie beyond the direct institutional reach of complaint-driven enforcement. In other respects as well, the human rights enforcement system may not have enough of a deterrent effect to ensure compliance with the duty to accommodate PWD. Our analysis of the likely causes of accommodation shortfalls in Part 4 suggests that this is the case. The extent of employer non-compliance with the duty to accommodate disability is hard to gauge precisely; what is undue hardship varies with the characteristics of the employee, the employer and the particular accommodation needed, and this makes it difficult to predict whether a particular denial of accommodation will run afoul of the law.

There are unfortunately no systematic empirical studies that can help with these questions, but we do believe that a significant share of the accommodation gap is due to employer non-compliance with the duty. There are evident tensions between the widespread employer incentives and motivations documented in the literature reviewed in Part 4 and what the law requires. Of the five probable causes of failure to accommodate discussed above in Part 4(a), all but the first — the absence of any accommodation that could enable a worker to work productively — are likely to result in frequent non-compliance with the duty to accommodate. Ignorance of the law and lack of information about possible accommodations are generally not valid defences to a claim that an employer has violated the duty; once an employer is aware of an employee's disability, it is obliged to investigate possible courses of action and to be "innovative yet practical" in seeking an accommodation.¹¹⁸ While an employee's failure to disclose will often be a defence, employers must inquire into whether an employee needs accommodation whenever there is reason to suspect that performance issues are caused by a disability.¹¹⁹ The fact that widely held perceptions about PWD are often inaccurate when applied to a specific individual means that acting on those perceptions may well constitute unlawful discrimination,

118 *Meiorin*, *supra* note 39 at para 64.

119 See e.g. *Canada Safeway and United Food & Commercial Workers (UFCW), Local 401* (1992), 26 LAC (4th) 409 (Wakeling), affirmed 83 WAC 306 (Alta CA) at 433-434.

and an employer must instead do an individualized assessment of the worker's skill and ability.¹²⁰ Similarly, acting on concerns that hiring PWD may hurt co-worker morale, or be negatively received by customers, constitutes unlawful discrimination if not grounded in an assessment of the capabilities of the particular individual, because it gives effect to the prejudices of others.¹²¹ Acting on concerns that an employee may file a discrimination complaint also violates human rights laws, as it seeks to preempt the exercise of legal rights. Furthermore, the undue hardship requirement means that employers are often precluded from relying on economic incentives to refuse to provide accommodation. As the Supreme Court of Canada put it in the leading *Renaud* case, "the use of the term 'undue' infers that some hardship is acceptable";¹²² adjudicators have consistently held that employers must absorb non-trivial costs to accommodate employees.¹²³ Finally, the right to be free of discrimination applies to workplace rules, standards, practices and informal norms, and employers must generally ensure that they yield to the duty to accommodate.

It must also be remembered that the duty to accommodate is concerned only with obligations of the employer, not with obligations of the state. It simply does not address situations where an accommodation, though an undue hardship on the employer, would nonetheless be a significant social benefit if provided through a government program of some sort.

In sum, with a view to fostering workplace accommodation of PWD, there is a need to look beyond the current Canadian approach. We will now outline three categories of options, with a view to illustrating the need for close policy analysis rather than endorsing any particular approach.

(a) Enhanced Compliance Programs

First, to improve the effect of complaint-driven enforcement, policy-makers might seek to enhance the deterrent and reputational effects of remedies under human rights statutes, and the capacity of employees to frame and pursue complaints under those statutes. The latter objective could be served

120 *Eaton v Brant County Board of Education*, [1997] 1 SCR 241, at para 69. The Supreme Court of Canada recognized the need for individualized accommodation because the ground of disability "means vastly different things depending on the individual and the context." See also Ontario Human Rights Commission, *Principles of Accommodation*, online: <<http://www.ohrc.on.ca/en/guidelines-accessible-education/principles-accommodation>>.

121 See e.g. *Shuswap Lake General Hospital and British Columbia Nurses' Union (Lockie)*, [2002] BCCA No 21 (QL) at para 115.

122 *Central Okanagan School District No 23 v Renaud*, [1992] 2 SCR 970 at para 19.

123 See generally Kevin D MacNeill, *The Duty to Accommodate* (Toronto: Canada Law Book, 2003) at 12-23 to 12-31.

by providing free or low-cost legal advice and representation to complainants.¹²⁴ Deterrence might be strengthened by awarding exemplary damages in cases of deliberate non-compliance, by making more use of regulatory fines and by publishing the names of employers found to be in breach. Human rights commissions could be empowered to bring strategic litigation addressing systemic problems on the part of large employers or in problematic industry sectors.¹²⁵

However, given the difficulties of regulating hiring decisions, there is a serious risk that tougher complaint-driven enforcement might have unintended adverse consequences for PWD, in the form of reduced employment opportunities. There is some evidence that this is already happening, even under current enforcement strategies.¹²⁶ Alternatives to complaint-driven enforcement should therefore be considered. One such alternative would require employers to take positive steps to reduce the risk that employees will be denied accommodations to which they are entitled. Such proactive risk management systems are required by legislation on bullying, harassment, and occupational health and safety.¹²⁷ Another model is provided by the Integrated Accessibility Standards regulation under the *Accessibility for Ontarians with Disabilities Act 2005*.¹²⁸ When this regulation takes effect, it will require employers to develop policies for accommodating PWD, to inform employees of those policies, to communicate the policies and the availability of accommodation to applicants for jobs or promotions, and to develop procedures for creating individual accommodation plans with the involvement of the employee and his or her representative.

Looking beyond the duty to accommodate, legislators could mandate employment equity plans under which employers would seek systematically to hire and retain a workforce that is representative of the relevant labour market. Long experience with federal employment equity legislation offers some

124 For examples of such proposals, see Ontario Human Rights Code Review Task Force, *supra* note 43 at 50-61; Canadian Human Rights Act Review Panel, *supra* note 43 at 74-79.

125 See Ontario Human Rights Code Review Task Force, *supra* note 43 at 73-74; Canadian Human Rights Act Review Panel, *supra* note 43 at 63-66.

126 Thomas DeLeire, "The Unintended Consequences of the Americans with Disabilities Act" (2000) 23:1 Regulation 21; D Acemoglu & JD Angrist, "Consequences of Employment Protection? The case of the Americans with Disabilities Act" (2001) 109:5 Journal of Political Economy 915; Morley Gunderson & Douglas Hyatt, "Do Injured Workers Pay for Reasonable Accommodation?" (1996) 50:1 Indus & Lab Rel Rev 92.

127 See e.g. *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace)*, SO 2009 c 23.

128 See O Reg 191/11, (2011) O Gaz ss 20-32.

evidence that it can help to improve opportunities for PWD.¹²⁹ As the Canadian Human Rights Act Review Panel proposed more than a decade ago,¹³⁰ such proactive approaches might be supported by internal responsibility systems in the form of joint employer-employee accommodation committees.

(b) Supports to Employers

A second category of options includes measures to support employers by disseminating information which includes practical advice and business case analysis, or by reducing the cost of employing disabled workers through carefully targeted wage or accommodation subsidies.¹³¹ As noted above, many Canadian employers express interest in programs that would provide them with information on accommodation costs and benefits. Such programs could also provide access to disability management consultants and mentoring services.¹³² Their potential value is indicated by the disjuncture between the often positive experience of employers who hire PWD and the widespread overestimation of the costs and risks of accommodation.¹³³ Governments might also increase support to employment services agencies, while requiring that such agencies meet appropriate standards. These supports might conceivably be extended to make available, at the joint request of the employer and employee, case management services like those provided under workers' compensation systems.

It should be recognized, however, that none of these forms of support is likely to be effective in cases where an accommodation really would impose high costs or high risks on an employer. To deal

129 *Employment Equity Act*, SC 1995, c 44. Corporations that have an explicit hiring policy for PWD are likely to be more willing to employ them. Joel Levy *et al*, "Employment of People with Severe Disabilities in Large Businesses in the United States" (1991) 14:4 *International Journal of Rehabilitation Research* 323. There is some evidence that employment equity plans will be more effective if used in tandem with programs aimed at the supply side of the labour market, such as job training and employment programs specifically targeted to assist PWD in finding and holding suitable jobs. Gary R Bond, "Supported Employment: Evidence for an Evidence-Based Practice" (Spring 2004) 27:4 *Psychiatric Rehabilitation Journal*.

130 Canadian Human Rights Act Review Panel, *supra* note 43 at 27-34.

131 *Breaking the Barriers – Synthesis*, *supra* note 5 at 134-138.

132 HL Brostrand, "Tilting at Windmills: Changing Attitudes Toward People with Disabilities" (2006) 72:1 *Journal of Rehabilitation* 4; Michael J Prince, "Advancing the Participation of People with Disabilities in the Labour Market: International Practices and Lessons" (presentation to Human Resources and Skills Development Canada, January 2012).

133 Australia has recently followed the U.S. lead in implementing such a program. See online: <<http://jobaccess.gov.au/Home/Home.aspx>>.

with those situations, given the importance of the public goods at stake, policy-makers might consider an accommodation subsidy program.¹³⁴

(c) Supports to Workers

A third approach would support workers outside of the human rights litigation process. Such support might include informational and awareness-raising resources that would explain the legal concepts of disability and the duty to accommodate, and would offer help in resolving accommodation problems prior to litigation.¹³⁵

6. CONCLUSION

As noted at the outset of this paper, in 2006 (despite the booming economy and tight labour market at the time) about 35% of Canadian employees with disabilities reported not receiving one or more needed forms of workplace accommodation. The Canadian population is aging; among disabled employees, about 60% are now between 40 and 59 years old, and about 40% report that they require at least one type of accommodation. All of this suggests that a large and probably growing number of Canadians do not receive accommodations that they need to reach their productive potential at work, or perhaps even to continue working at all. This is deeply problematic from the standpoints of equity, productivity and public health.

Our research indicates that the older the worker and the more severe his or her activity limitation, the greater the accommodation shortfall. This finding is best understood against the background of earlier studies indicating that economic considerations and stereotypes about age and disability, both of which work to the disadvantage of older workers, do influence employer decisions on whether to accommodate. We add to that background a set of new findings that the shortfall is probably aggravated by certain types of case-specific factors: factors that make an accommodation more costly for the employer (such as the worker's need for individualized accommodation); factors that lower the employer's expected return on an investment in accommodation (such as a worker's non-permanent status, or the onset of the disability in a previous job or outside the workplace); and the fact that certain types of accommodation (such as the provision of modified duties or hours) can conflict

134 For examples, see *Breaking the Barriers – Synthesis*, *supra* note 5 at 136-138. Australia, for instance, has recently implemented such a program, from which Canada might learn. For an overview, see <http://jobaccess.gov.au/Employers/Financial_help_and_wages/Pages/home.aspx>.

135 New Zealand provides free access to mediation to resolve disputes arising out of the employment relationship. *Employment Relations Act 2000*, Public Law No 24, s 144.

with workplace cultural norms. The accommodation gap thus appears to be the product of a confluence of incomplete information, problematic stereotypes and negative economic incentives. These all seem to interact with perceptions of the aging process on the part of employers, co-workers and the public, in ways that can be expected to exacerbate the problem as the population ages.

Current legal and policy structures are unlikely to deal effectively with that problem. Under today's framework, the only universal measure is human rights law's duty to accommodate, which is enforced through a reactive and complaint-driven legal regime that does not reach broadly or deeply enough into workplace decision-making to close much of the accommodation gap. A patchwork of other laws and programs do support the goal of increased accommodation, but they are far from universal in application and their effectiveness remains largely unevaluated.

Canadians might usefully consider a coordinated national strategy that could treat access to effective accommodation as a basic and universal entitlement, and that could reduce economic incentives to under-accommodate. Developing such a strategy at the federal level would run counter to the federal government's current approach of devolving to the provinces a broad range of traditionally federal labour market and workplace-related programs — an approach in which the provinces have been complicit. A universal program could, however, take the form of highly coordinated provincial policies which would serve to provide fairly complete coverage. Some form of nation-wide initiative, whether from the federal government or from the provinces, would be needed to bring this about.

Population and workforce aging has emerged as one of the most important and sustained policy challenges for governments as well as employers. Giving effective workplace accommodation to persons with disabilities will only become more important over time. It will require a better compliance strategy for human rights law, the dissemination of better information on disabilities and how to accommodate them, and perhaps the provision of direct economic supports to employers and employees. Canadian governments, employers and unions should press for a comprehensive review and assessment of options to close the accommodation gap, and should consider a nationally coordinated policy effort to that end.