LIBRARY of PARLIAMENT
BIBLIOTHÈQUE du PARLEMENT

BACKGROUND PAPER

An Examination of the Duty to Accommodate in the Canadian Human Rights Context

Publication No. 2012-01-E
10 January 2012

Laura Barnett
Julia Nicol
Julian Walker

Legal and Legislative Affairs Division
Parliamentary Information and Research Service

An Examination of the Duty to Accommodate in the Canadian Human Rights Context

(Background Paper)

HTML and PDF versions of this publication are available on IntraParl (the parliamentary intranet) and on the Parliament of Canada website.

In the electronic versions, a number of the endnote entries contain hyperlinks to referenced resources.

Ce document est également publié en français.

Library of Parliament ***Background Papers*** present and analyze various aspects of current issues in an objective, impartial manner. They are prepared by the Parliamentary Information and Research Service, which carries out research for and provides information and analysis to parliamentarians and Senate and House of Commons committees and parliamentary associations.

Publication No. 2012-01-E
Ottawa, Canada, Library of Parliament (2012)

CONTENTS

AN EXAMINATION OF THE DUTY TO ACCOMMODATE IN THE CANADIAN HUMAN RIGHTS CONTEXT

1 INTRODUCTION

Equality is a fundamental Canadian right guaranteed by this country's Constitution and human rights laws. At the same time, equality means different things to different people, and individuals frequently disagree over what an equal society should look like. Canadians rely on governments, legislatures, tribunals and courts to provide guidance when it comes to implementing the principles of equality on a practical basis. One of the primary applications of the human right to equality is through the accommodation of difference, including factors such as disability, religion or gender, by the institutions that govern our lives, from employer, to service provider, to government.

This paper explores the right to equality in Canadian law and how that right has generated a duty of reasonable accommodation that governs the practices of various actors in our communities including employers, landlords, service providers and governments across the country. Specific examples will be provided of how the duty to accommodate has been interpreted in relation to disabilities and religious obligations, as well as gender and family status.

2 THE DUTY TO ACCOMMODATE

2.1 THE LEGISLATIVE FRAMEWORK

In any discussion of human rights guarantees in Canada, the question of which laws may be applicable to a given situation is of utmost importance. The *Canadian Charter of Rights and Freedoms* (the Charter) outlines those human rights that have received constitutional protection, and applies to all government action across all jurisdictions in Canada. The most relevant right for the purposes of this paper is the equality guarantee found in section 15. This provision prohibits discrimination on various grounds, while allowing room for affirmative action measures.[1] Nevertheless, the Charter is generally of limited application, as it serves to protect individuals only from the actions, policies and legislation of government, not from those of other individuals or organizations.

Of broader scope – and the primary focus of this paper – are the quasi-constitutional[2] federal, provincial and territorial human rights laws that serve to protect individuals from discrimination in areas such as employment, services, education, and housing. While these laws vary in terms of precise content,[3] in general, they all serve to prohibit an individual or organization from discriminating against an employee, tenant or service-user on specified grounds, such as those outlined in section 3(1) of the *Canadian Human Rights Act* (CHRA):[4]

> For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

The idea behind each jurisdiction's equality guarantee – including section 15 of the Charter – is to promote substantive equality and not just formal equality. While formal equality dictates only that every citizen should be treated the same (which, in itself can lead to inequalities), substantive equality requires accounting for people's differences and historical disadvantage, and taking active steps to address the discriminatory effects of any policies or initiatives. For example, a workplace may advertise that it has a non-discrimination policy when hiring its employees, which would be an example of formal equality. However, if the workplace is not wheelchair-accessible, then it could effectively exclude a person who has a mobility impairment. To achieve substantive equality, duty holders must remove any barriers or obstacles that prevent the full participation in society by everyone where it is reasonable to do so.

As will be explored in further detail below, however, there are limits on how far the duty holder must go to accommodate an individual. In the Charter context, section 1 allows reasonable limits to all Charter rights, including section 15. Human rights acts also allow for duty holders to justify discrimination where it is a bona fide occupational requirement or there is a bona fide justification, such as barring blind individuals from driving for safety reasons.

2.2 THE DUTY

Ultimately, federal/provincial/territorial anti-discrimination measures place a positive duty on employers, service providers and landlords (the duty holders) to accommodate people's needs for reasons associated with recognized discriminatory grounds. As just one example: where a member of a particular religion holds beliefs that prevent him or her from working on a certain day, the employer should seek ways to accommodate the employee.

Some jurisdictions make this duty to accommodate more explicit than others in their legislation. Manitoba is one province that lays out the duty relatively clearly – section 9(1)(d) of Manitoba's *Human Rights Code* specifically defines discrimination as including "failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon" the prohibited grounds. By contrast, the CHRA affirms in very broad and general terms in section 2 that the purpose of the Act includes:

> 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 … without being hindered in or prevented from doing so by discriminatory practices … .

The CHRA also explains in section 15(2) that for any discriminatory practice to be justified, the duty holder must show that "accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost."

While the process for determining the duty at the federal/provincial/territorial level varies, it generally begins with a request for accommodation or a complaint of

discrimination that is first managed at the internal level (between the complainant and management of an organization). If a settlement cannot be reached, then in most jurisdictions the complainant may take the issue to the human rights commission,[5] which will attempt to mediate, and, if necessary, could refer the dispute to a human rights tribunal. In some circumstances, such tribunal decisions can be judicially reviewed by the courts (a limited form of appeal).

There is rarely a precise formula for applying the duty to accommodate to any given situation. It calls upon the parties involved to be creative and sincere in finding and negotiating solutions. Reasonable accommodation requires a balance between the right of the person seeking accommodation to equal treatment and the rights of the duty holder to run a productive operation. For example, the duty holder may not be required to create something completely new that did not previously exist, such as a new position with new duties in the employment context. Rather, the obligation is to make a genuine effort.[6]

Complainants also generally have a duty to assist in the search for reasonable accommodation and its application. While privacy concerns must certainly be taken into consideration, a duty holder should generally be given sufficient information about the particular reasons behind the request for accommodation in order to be able to meet his or her obligations. For example, if the protected ground involved is a disability, then a solution will work only if everyone involved has a clear understanding of any impairments or barriers that need to be addressed.

2.3 JUDICIAL INTERPRETATION OF THE DUTY TO ACCOMMODATE

While the Charter is part of Canada's Constitution and thus overrides any other Canadian laws that are found to violate Charter rights, federal/provincial/territorial human rights codes are also considered quasi-constitutional, putting them above other laws in the same jurisdiction. Most human rights codes specifically provide that they prevail over other laws in the same jurisdiction, unless that other law explicitly states otherwise. This ensures that other provincial laws such as building codes, health and safety requirements, or labour laws cannot be used to automatically justify discrimination.[7]

Depending on the context, courts and tribunals apply either the Charter or federal/provincial/territorial accommodation provisions when making rulings on discrimination and the extent to which an obligation to provide substantive equality has been fulfilled. However, often the courts apply the same approach under both the Charter and accommodation provisions in human rights acts.

When bringing forward a case under section 15 of the Charter, a claimant must prove that a law or government action treats him or her differently than a comparable group of people based on one of the grounds enumerated in section 15,[8] or one analogous to them.[9] If the court agrees that there has been discrimination, it will then determine whether that discrimination is justifiable "in a free and democratic society" in accordance with section 1 of the Charter. To make this determination, the court undertakes a proportionality analysis, balancing the importance of the government's

objective and the reasonableness of the discriminatory means adopted to achieve that objective. Basically, do the benefits outweigh the harmful effects?[10]

In many ways, this section 1 analysis mirrors the test that has been developed by the courts for applying the duty to accommodate under anti-discrimination laws – duty holders, human rights commissions and tribunals across the country now use what is termed the "bona fide justification test," which allows for a duty holder to justify discrimination in certain cases. Generally, in the workplace context for example, a standard or requirement that discriminates against an employee or a group of employees on a prohibited ground is not allowed, but courts will accept such discrimination if the employer is able to show that the standard or requirement is a bona fide occupational requirement (BFOR). An example of a valid BFOR, as noted above, might be requiring a driver to have good vision, even though this standard clearly discriminates against visually impaired employees.

In the 1999 case (*Meiorin*,[11] discussed in section 3.3 of this paper) that is a key reference for this issue, the Supreme Court held that in order to prove that the impugned standard is a BFOR, the employer must prove three things, on a balance of probabilities:

- The standard is rationally connected to performance of the job, i.e., for safety- or efficiency-related reasons;
- The standard was adopted in an honest and "good faith" belief that it was necessary for the fulfilment of a legitimate work-related purpose; and
- The standard was reasonably necessary for the accomplishment of that purpose, i.e., it would be impossible to accommodate the employee without undue hardship to the employer.

In *Grismer*[12] (discussed in section 3.1 of this paper), the Supreme Court extended this test beyond the employment context to enforce the duty to accommodate in the housing and service industries, unless it can be proven that the discrimination is based on a reasonable cause or a bona fide justification (BFJ). Again, this defence fails if it can be proven that the service provider can modify the offending conditions or practice without undue hardship.[13]

Courts have since interpreted the duty to accommodate in federal, provincial, and territorial human rights codes as requiring the duty holder to take all reasonable measures to accommodate, short of undue hardship, in order to avoid discrimination.

Although there is no standard definition of "undue hardship," courts and human rights tribunals have set out a number of factors that must be taken into account when determining whether this standard is met. These include:[14]

- Cost: The cost to an organization or individual must be substantial for the standard of undue hardship to be met.
- Health and safety: Consideration must be given to the effect of accommodation on the health and safety of the complainant, all employees, and the general public. In some cases, a decision-maker may allow a person seeking

accommodation to accept some degree of risk. For example, traffic regulations require motorcyclists to wear helmets, but cases have been brought by Sikhs seeking an exemption so that they can wear their turban instead. Such cases have been decided both ways,[15] but in general, undue hardship will likely be found if there is a "demonstrable probability of substantial harm"[16] to any party.

- Conflicting rights: The duty to accommodate must not replace discrimination against the complainant with discrimination against others – any demand that involves significant interference with the rights of others will generally constitute undue hardship.

Finally, the Supreme Court has emphasized that when accommodation is offered, the individual cannot generally reject that offer out of hand in search of an even better solution. The duty to accommodate is not about finding the best accommodation available, but about finding reasonable accommodation for all parties.[17]

3 GROUNDS OF DISCRIMINATION

The following pages provide examples of how the duty to accommodate has been applied by courts and human rights tribunals in relation to some of the grounds of discrimination prohibited by human rights laws in Canada.

3.1 DISABILITY

Disability is the most common ground involved in reasonable accommodation cases across Canada.[18] In 2010, 44% of all complaints accepted by the Canadian Human Rights Commission (CHRC) were related to disability.[19] The preponderance of such cases may be related to the fact that approximately 14% of Canadians reported having a disability in 2006 (4.4 million people), and this number is growing with Canada's ageing population.[20]

Disability cases can be challenging because of the diverse range of physical and mental conditions and impairments that can be involved. In cases involving many of the recognized prohibited grounds of discrimination, accommodation can often be provided by a change to policies or programs; however, accommodating a disability may involve finding creative solutions through alterations to physical spaces, the use of additional technology, or modifications to workloads or job responsibilities.[21] Accommodating some illnesses, whether physical or mental, may also require an employee to take leaves of absence from work for indefinite periods of time, which may require temporary reorganization within a workplace.

Before any duty to accommodate can be found to exist by a court or tribunal, it must first be established that the complainant has a true disability that fits within the definitions of the relevant human rights law. While "disability," or "handicap," is included as a prohibited ground of discrimination in all human rights legislation in Canada as well as section 15 of the Charter, definitions of what constitutes a disability vary between jurisdictions.[22] Generally speaking, a disability will be found to exist where a person's physical or mental condition prevents him or her from

performing an activity that most other people can do.[23] Conditions that are of a transitory nature and have a limited impact on a person's ability to carry out life's functions, such as a cold or flu, are less likely to be protected.[24]

Canadian jurisprudence has recognized a wide range of disabilities in reasonable accommodation cases, both temporary and permanent, including: epilepsy, heart condition, cancer, seasonal allergies, asthma, Crohn's disease, hypertension, alcoholism or drug dependency, gambling, hysterectomy, spinal malformation, visual acuity, physical injuries, and mental illness or other mental health conditions including depression and post-traumatic stress disorder. Some conditions have been accepted as disabilities in some circumstances and rejected in others: one example is obesity. Some obesity cases have turned on whether the medical evidence supports that an individual has a bona fide physical "disability" caused by an injury, illness or condition or whether he or she is an otherwise healthy person who had become obese for other reasons, such as a lifestyle choice.[25] One Ontario tribunal clarified that obesity must be an ongoing condition that is effectively beyond the individual's control to be included in the protected ground of disability.[26] The question of whether a physical or mental condition was in fact the result of voluntary behaviour has also been examined in cases involving addictions such as to drugs, alcohol or gambling. These cases have often turned on whether the complainant was in fact an addict, and therefore had a disability, or was simply a user.[27] Depending on the circumstances, an addict may have a duty to facilitate the accommodation he or she seeks by undergoing treatment.

If it is proven that a person has a disability within the meaning of the relevant human rights law in an accommodation case, the tribunal's or court's analysis generally turns to examining whether a respondent's BFOR or BFJ defence is valid. For instance, in the *Grismer* case mentioned above, the complainant had a condition known as homonymous hemianopia, which prevented him from having full peripheral vision. When the British Columbia Superintendent of Motor Vehicles determined that Mr. Grismer's vision no longer met the required standard that all licensed drivers have a minimum field of vision of 120 degrees, his driver's licence was cancelled. Though other exceptions had been provided to accommodate other conditions in the past, the government's policy was to reject any applicant with homonymous hemianopia. The government stated that passing the field of vision test was a BFJ. In adapting the employment-related *Meiorin* decision to the provision of services, the Supreme Court concluded that the 120-degree vision standard was not reasonably necessary for the service provider to fulfill its intended purpose or goal. In other words, the complainant's disability could have been reasonably accommodated and the standard used in the licensing test could be modified in order to do so.

In terms of final outcomes, disability cases often require parties to produce innovative solutions to find suitable accommodations. For instance, in the case of *Youth Bowling Council of Ontario* v. *McLeod*,[28] the complainant wanted to participate in a bowling league, but her cerebral palsy prevented her from bowling without the use of an aid. The league did not want her to participate using the special wooden ramp she placed on her lap that had been designed to accommodate her needs. The Ontario Court of Appeal examined the ramp and found that it did not provide the complainant

with any particular advantage in bowling, and therefore did not impose an undue hardship on the league.

Emerging trends in disability issues suggest that duty holders may be expected to take more proactive steps in order to anticipate the types of accommodations that they will need to make for persons with disabilities (rather than simply waiting for a complaint to be made). In *Council of Canadians with Disabilities* v. *VIA Rail Canada Inc*., the Supreme Court of Canada emphasized the point previously raised in *Grismer*, that service providers have a duty to be "inclusive" with regard to persons with disabilities.[29] The CHRC has interpreted inclusivity requirements as extending to all stages of any project or initiative, "whether designing a building, establishing a policy, or developing new technology."[30] It also notes that this interpretation is in keeping with the principles of the United Nations *Convention on the Rights of Persons with Disabilities*, which Canada has recently ratified and which, among other things, creates an obligation in international law for state parties to ensure that reasonable accommodation is provided to all persons with disabilities.[31]

3.2 RELIGION

Cases involving religion as a ground for accommodation can be controversial, and many have received a considerable amount of media attention. As Canadian society becomes more diverse, its tolerance for diverse religious customs, practices and beliefs will increasingly be tested. Recent debates, for instance, have centred on the interplay between freedom of religion and gender equality, with the wearing of Islamic head coverings drawing particular attention in the media. Cases relating to religion are somewhat exceptional in that they are often Charter cases, not only cases decided under human rights acts. They also often raise challenging issues that go to the heart of people's understanding of our social values of secularism, gender equality and public safety – more so than disability cases, which tend to focus on the cost and logistics of accommodating an individual's personal needs. Given the diversity of issues raised by the various circumstances in religious accommodation cases, it is useful to examine a number of these in more detail.

One of the first cases requiring religious accommodation in Canada involved a woman who objected to working from Friday evening to Saturday evening when she became a Seventh Day Adventist, as her religion required her to respect this day as a day of rest from work. Her position, however, required her to work at some point in that period to remain a full-time employee. In its 1985 decision,[32] the Supreme Court of Canada concluded that the *Ontario Human Rights Code* implicitly required the employer to demonstrate that it had tried to accommodate her to the point of undue hardship, which it had not done. The Court essentially integrated the concept of reasonable accommodation, then found only in academic writing and American cases, into Canadian law because the Code was silent on the matter.

In an unusual case in the 1990s, *Grant*,[33] a group of RCMP veterans sought an order forcing the RCMP to *stop* accommodating the wearing of turbans and other religious requirements for Sikh officers. The veterans were concerned that, among other issues, allowing officers to wear turbans and other religious symbols would affect their appearance of neutrality. The Federal Court of Canada found that the wearing

of the turban did not create a situation of coercion or compulsion to participate in the officer's religion or concern about bias and did not violate the rights of members of the public or other officers.

The Sikh kirpan or ceremonial dagger has also been the subject of accommodation requests, resulting in complaints under the various human rights acts and the Charter. The results have been mixed, depending on the context. For example, in terms of airline security, kirpans of a certain size have been prohibited. A 1999 case[34] before the Canadian Human Rights Tribunal dealt with the situation of an airline that refused to allow a Sikh man to board with a kirpan as its length did not respect the airline's policy of allowing only kirpans that were less dangerous than the utensils provided on board. Other companies were allowing a kirpan with a blade up to four inches long.

The Canadian Human Rights Tribunal found the airline's policy respecting weapons to have a rational connection with the business of an airline company. In determining whether greater accommodation was required, the tribunal assessed whether a four-inch blade such as Mr. Nijjar's would create a "sufficient risk" to justify refusing such accommodation. The tribunal concluded that the four-inch standard used by other companies was arbitrary and that incidents, though rare, had occurred in the past where kirpans were used as a weapon. Furthermore, the risk was faced by other people rather than the kirpan carrier himself. The transitory nature of air travel was also important, as it did not allow airline staff time to get to know the individual or to access emergency personnel if there were an incident. Thus, requiring the airline to allow kirpans with greater potential to harm than the utensils on board would pass the point of undue hardship, and the request for accommodation was refused.

The kirpan was also at issue in a Charter case, *Multani*,[35] that came before the Supreme Court of Canada in 2006, in which a school board refused to allow a Sikh student to wear a kirpan to school. The Court concluded that the student's freedom of religion, protected under section 2(*a*) of the Charter, had been violated. The next step was to balance the competing values in question under section 1 of the Charter, and the Court chose to use a duty to accommodate analysis as an analogy to assist in this balancing.

In the schoolyard context, the Court found that a complete ban on kirpans was not a reasonable option considering the low risk a kirpan posed to school security if certain conditions were put in place, such as ensuring that it be sewn into the boy's clothes at all times. In addition, the Court noted the other items regularly available at schools that could be used as weapons, such as scissors, pencils or baseball bats. Thus, the school board's rule impaired the student's right beyond the minimal extent permitted under section 1 of the Charter, and the board's decision was reversed. In contrast with the airplane scenario above, the Court felt that there was an ongoing relationship in the school environment that provided the opportunity to establish rules surrounding the use of the kirpan, and the context resulted in different conclusions with respect to safety risks.

Another recent Charter case brought before the Supreme Court of Canada based on religious accommodation involved a Hutterite community requesting exemption from

the requirement to have a photograph on drivers' licences. Photographs of people are forbidden according to Hutterite religious beliefs. As in *Multani*, the Supreme Court found[36] that there was prima facie discrimination and went on to determine the issue under section 1 of the Charter. It held that the need to protect the integrity of the licensing system and protect against identify theft made photographs necessary and justified the limitation on the community's religious freedom.

Beyond the courtroom, the question of religious accommodation has also become a political issue, seen by some as threatening secularism and gender equality. In 2007, the Government of Quebec established the Consultation Commission on Accommodation Practices Related to Cultural Differences to study the issue of reasonable accommodation. The Bouchard-Taylor Commission, as it came to be known, published its report in 2008.[37] Among its many conclusions and recommendations, the Commission noted that the problem surrounding religious accommodation was more an issue of perception than an actual crisis as the number of accommodation requests in this area has not been very large. The report recommended, among other things, more training for public servants to improve intercultural understanding, and better integration of immigrants through measures such as recognition of skills and diplomas and French language training and promotion of the use of the French language. However, the Commission's report does not appear to have quelled the debate about accommodation in Quebec. The issue continues to generate media and public interest when complaints are made, such as the recent case against a mayor who conducts prayers before council meetings in a municipality that also maintains Christian religious symbols in council chambers.[38]

3.3 GENDER OR SEX

Like disability and religion, "gender" or "sex" are categories found in all Canadian jurisdictions' human rights acts as prohibited grounds of discrimination. Though the meaning of these words may seem obvious at first glance, their definition has required elaboration in the jurisprudence.

Certainly, there are some cases where the simple fact of being a woman is at issue, such as the case of *Meiorin* mentioned above, which established the BFOR test. Ms. Meiorin, a forest firefighter, was unable to pass an aerobic standard and was dismissed, though no problems with her work had been identified. The evidence showed that most women have lower aerobic capacity than men and cannot increase their capacity through training sufficiently to meet the firefighter standard. Thus, the general standard discriminated against women. The Supreme Court found that meeting this standard was not necessary to identify candidates who would be able to do the job safely and efficiently. Nor did the employer demonstrate that using another standard would cause it undue hardship. Accordingly, the standard was found not to be a BFOR and could not be relied on as justification for her dismissal.[39]

Other situations, though less obvious, have also been found to fit within the grounds of gender or sex. To provide clarification, discrimination on the basis of pregnancy has been defined in the human rights acts of many jurisdictions across Canada as

being included in sex or gender discrimination, while Quebec lists pregnancy as a separate ground of discrimination. Under this rubric, where an employee's job creates a risk for the unborn child and accommodation is not possible within that position, an employer may be required to explore the possibility of other positions to accommodate the employee. Fellow employees may be required to accept changes to their tasks and, depending on the situation, the creation of a new position may even be required.[40]

Discrimination based on breastfeeding has also been considered to be discrimination based on sex or gender. In one case, a doctor recommended that a mother breastfeed for as long as possible to help her child's weak immune system. The mother made requests for changes to her work schedule that were accepted only in part. The human rights tribunal rejected the employer's argument that objective proof of a need to breastfeed is required, finding that a working mother has a right to breastfeed her child. The tribunal required the employer to develop and promote a policy on accommodation for breastfeeding for its employees as well as providing a financial award to the affected employee.[41]

Increasingly, discrimination against transsexuals has also been found to be discrimination on the basis of sex (as well as disability, though the use of that ground has been somewhat controversial). Cases have involved issues relating to access to the gender-specific bathroom of choice of the transsexual person and the right to volunteer in a feminist organization that provides services to women who have been victims of male violence.[42]

3.4 Family Status

Of all the grounds of discrimination discussed in this paper, "family status" is perhaps the hardest to define. When family status was first added to the CHRA, the example provided by the Minister of Justice at the time was of discrimination in employment because of family origins.[43] In contrast, the primary issue of accommodation recently addressed by the courts under family status relates to work schedules and childcare needs.

Two streams of jurisprudence have developed on the question of accommodating childcare needs, one broader than the other. Both approaches recognize childcare obligations as part of family status, but they vary in terms of the threshold required to establish discrimination.[44] The narrower stream, adopted in a 2004 B.C. Court of Appeal case,[45] basically treats discrimination based on family status differently than other forms of discrimination by requiring that a complainant demonstrate "serious interference" with a "substantial duty" rather than a simple finding of discrimination. The narrower interpretation seems, at least in part, to be inspired by concerns about a potential flood of claims, given the large number of employees who are also parents. The wider interpretation treats childcare needs the same as other grounds of discrimination. Recent cases appear to confirm that the wider interpretation is the correct approach.

In a 2010 case,[46] a single mother was asked to relocate temporarily by her employer, CN Rail, as was relatively common in her position. However, previous experiences

leaving her son had been negative. The child had health issues and it would have been difficult to bring him with her. CN gave the employee four months' delay before requiring her to move, but did not accommodate her further, seeing her refusal to move as a personal choice to prioritize a family obligation over her employee obligations. However, the Canadian Human Rights Tribunal concluded that this was an incorrect understanding of the legal requirements of accommodation. It clarified that family status includes both being a parent and the obligations associated with that role.[47] The case also clarified that accommodation has two aspects: procedural and substantive. An employer must consider all reasonable possibilities for accommodation to respect its procedural duties, in addition to actually providing accommodation where justified (the substantive aspect). In this case, the tribunal adopted the wider threshold for finding discrimination, noting that there was no evidence of an overwhelming number of requests or undue hardship. Accordingly, the company was required to review its policies and provide training for managers and staff, as well as financial compensation for the affected employee.

4 CONCLUSION

Accommodation challenges employers, service providers and other duty holders to go beyond treating all people the same and to recognize that people may in fact need to be treated differently in order to achieve true equality in a meaningful way. Sometimes, it is difficult to balance the requirements of equality with other important considerations, such as safety or financial constraints. The principle of undue hardship acknowledges that there are limits to what is possible. When an accommodation is reasonably obtainable, however, Canadian laws across the country make it clear that it must be granted.

NOTES

1. Affirmative action measures are permitted under section 15(2) of the Charter.
2. The Supreme Court of Canada has described human rights laws as quasi-constitutional: *Insurance Corp. of British Columbia* v. *Heerspink*, [1982] 2 S.C.R. 145; *Zurich Insurance Co.* v. *Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321.
3. For example, Quebec's *Charter of Human Rights and Freedoms* is much more extensive than most provinces' human rights laws, which focus specifically on discrimination.
4. Most reasonable accommodation cases tend to be brought under provincial/territorial human rights legislation, as the *Canadian Human Rights Act* (CHRA) applies very specifically to employers and service providers that fall under federal jurisdiction, such as federal government departments and agencies; Crown corporations; chartered banks; radio, television, and telephone companies; and other federally regulated industries.
5. In British Columbia and Ontario, complaints are first filed directly with a human rights tribunal.
6. *Holmes* v. *Attorney-General of Canada*, [1997] F.C.J. No. 577; upheld on appeal, [1999] F.C.J. No. 598.

7. Manitoba Human Rights Commission, *Guidelines on Reasonable Accommodation under The Human Rights Code (Manitoba) for employers, unions, landlords, service providers, and persons or groups with special needs*; Susan Joanis, "Human Rights Law in B.C.: Religious Discrimination," *Canadian Human Rights Reporter*, March 2001.

8. Race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

9. *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. Citizenship, sexual orientation, marital status and Aboriginal residence are the analogous grounds recognized by the courts to date.

10. *R.* v. *Oakes*, [1986] 1 S.C.R. 103.

11. *British Columbia (Public Service Employee Relations Commission)* v. *British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)*, [1999] 3 S.C.R. 3.

12. *British Columbia (Superintendent of Motor Vehicles)* v. *British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868.

13. Manitoba Human Rights Commission, *Guidelines on Reasonable Accommodation under The Human Rights Code (Manitoba) for employers, unions, landlords, service providers, and persons or groups with special needs*; Alberta Human Rights Commission, *Interpretive Bulletin: Duty to Accommodate*, February 2010.

14. Ontario Human Rights Commission, *Fact Sheet: How Far Does the Duty to Accommodate Go?*; Alberta Human Rights Commission (2010); Manitoba Human Rights Commission, *Guidelines on Reasonable Accommodation under The Human Rights Code (Manitoba) for employers, unions, landlords, service providers, and persons or groups with special needs*; Pierre Bosset et al., "Religious Pluralism in Québec: A Social and Ethical Challenge," Commission des droits de la personne et des droits de la jeunesse, February 1995; José Woehrling, "L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse," *McGill Law Journal*, Vol. 43, No. 3 (1998), pp. 325–401.

15. See, for example, *Dhillon* v. *British Columbia (Ministry of Transportation & Highways)* (1999), 35 C.H.R.R. D/293, in which the British Columbia Human Rights Tribunal waived the helmet obligation, stating that the discrimination involved in mandating the helmet was not justified by the marginal increase in risk to the person or increase in medical cost. However, in 2008 in *R.* v. *Badesha*, [2008] O.J. No. 854, the Ontario Court of Justice took the opposite approach, holding that the province's need to uphold reasonable safety standards outweighed the motorcycle rider's right to wear a turban.

16. Ontario Human Rights Commission, "How Far Does the Duty to Accommodate Go?," *Fact Sheet*.

17. *Central Okanagan School District No. 23* v. *Renaud*, [1992] 2 S.C.R. 970.

18. See statistics contained on websites from human rights commissions across Canada. See also: Michael Lynk, *Disability and the Duty to Accommodate in the Canadian Workplace*, 2002.

19. Canadian Human Rights Commission, *2010 Annual Report*, March 2011, p. 4.

20. Human Resources and Skills Development Canada, *Advancing the Inclusion of People with Disabilities 2009*.

21. Lynk (2002).

22. See, for example, Russel W. Zinn and Patricia P. Brethour, Chapter 5, in *The Law of Human Rights in Canada: Practice and Procedure*, looseleaf ed., Canada Law Book, Aurora, July 2010.

23. Ibid., p. 5-10.

24. *Ouimette* v. *Lily Cups Ltd.* (1990), 12 C.H.R.R. D/19 (Ont. Bd. Inq.).

25. See, for example: *Hamlyn* v. *Cominco Ltd.* (1989), 11 C.H.R.R. D/333 (B.C.C.H.R.); *Davison* v. *St. Paul Lutheran Home*, [1991] S.J. No. 602, [1993] S.J. No. 591 (C.A.).

26. *Ontario (HRC)* v. *Vogue Shoes* (1991), 14 C.H.R.R. D/425 (Ont. Bd. Inq.).

27. *Kemess Mines Ltd.* v. *International Union of Operating Engineers*, *Local 115* (2006), 264 D.L.R. (4th), 2006 BCCA 58.

28. *Youth Bowling Council of Ontario* v. *McLeod*, [1994] O.J. No. 4420 (C.A.).

29. *Council of Canadians with Disabilities* v. *VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650.

30. Canadian Human Rights Commission (2011).

31. The Convention and its Optional Protocol were adopted on 13 December 2006 and came into force on 3 May 2008. Canada signed the Convention on 30 March 2007, the day it opened for signature, and later ratified it on 11 March 2010.

32. *Ontario Human Rights Commission* v. *Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536.

33. *Grant* v. *Canada (Attorney General)* (1995), 120 D.L.R. (4th) 556 (F.C.A.).

34. *Nijjar* v. *Canada 3000 Airlines Ltd.*, [1999] C.H.R.D. No. 3.

35. *Multani* v. *Commission scolaire Marguerite-Bourgeoys*, [2006] S.C.J. No. 6.

36. *Alberta* v. *Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567.

37. Gérard Bouchard and Charles Taylor, *Building the Future: A Time for Reconciliation*, Consultation Commission on Accommodation Practices Related to Cultural Differences, Québec, 2008.

38. This reference concerns a human rights complaint made against the municipality of Saguenay and its mayor: *Simoneau* c. *Tremblay*, 2011 QCTDP 1.

39. *British Columbia (Public Service Employee Relations Commission)* v. *British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)*.

40. *Dominion Colour Corp.* v. *Teamsters, Local 1880 (Metcalfe Grievance)*, [1999] O.L.A.A. No. 688.

41. *Cole* v. *Bell*, 2007 CHRT 7.

42. Zinn and Brethour (2010), pp. 10-25 to 10-27.

43. *Johnstone* v. *CBSA*, 2010 CHRT 20, para. 222.

44. Ibid., para. 211.

45. *Health Sciences Assn. of British Columbia* v. *Campbell River and North Island Transition Society*, [2004] B.C.J. No. 922 (B.C.C.A.). *Whyte* v. *Canadian National Railway*, 2010 CHRT 22, para. 150, summarizes the case law in both streams.

46. *Whyte* v. *Canadian National Railway.* Note that two other cases with similar facts were brought against CN Rail in 2010 as well: *Seeley* v. *Canadian National Railway*, 2010 CHRT 23, and *Richards* v. *Canadian National Railway*, 2010 CHRT 24.

47. Also see *Johnstone* v. *CBSA* for a similar analysis.