

WORKSHOP 6 - Reasonable Accommodation



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REASONABLE  
ACCOMMODATION  
In Canada and Quebec

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INTRODUCTION

- Well-established and integral part of Canadian law
- Criticism
  - «unpredictable», «vague» and «subjective»
  - Excessive focus on an «individualized approach» - without concern for the amelioration of group disadvantages.

But,

- Lofty ideal - a means of
  - protecting and promoting diversity
  - promoting the integration of minorities into society and the workplace.

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INTRODUCTION (cont'd)

- Basic principles
  - From *Conventional* to *Unified Approach*
  - *Meiorin* test and principles
- Accommodation applied to following grounds:
  - Age, religion, national and ethnic origin, pregnancy, sex discrimination & family status
- Legislation
  - Special measures and Accommodation
- Conclusion

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BASIC PRINCIPLES

- Concept of reasonable accommodation rooted in :
  - an effects-based approach to discrimination
  - «*the interests of true equality may well require differentiation in treatment.*»
  - guarantee of «substantive equality» not mere «formal equality»
- Primarily a product of the case law
- Not a free-standing duty (some exceptions)
- 'Positive duty' or means of 'avoiding' discrimination ?

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From *Conventional* to *Unified Approach*

- Conventional approach
  - Ont. Human Rights Comm. v. Simpsons-Sears, [1985] 2 S.C.R. 536
- Criticism of the Conventional approach
  - Different remedies (in some cases the exclusionary standard itself remains intact)
  - Underpinnings : formal not substantive equality
  - Ill serves the purpose of contemporary human rights legislation : to eliminate discrimination
- Unified approach
  - *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* («*Meiorin*»), [1999] 3 S.C.R. 3 (Meiorin)

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Unified approach

Meiorin

Elements of a Unified Approach — 3-step test – to determine whether standard that is *prima facie* discriminatory is justified (BFOR) - Employer may justify the impugned standard by showing on the balance of probabilities:

- (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
- (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; (not required under Quebec law) and
- (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

■ Meiorin, para. 54

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Meiorin principles

- Promise of substantive equality
- Consideration of the effects of systemic discrimination
- Procedural and substantive component
- Standards must be inclusive
- Case-by-case approach
- Flexibility and common sense
- Rigid rules must be avoided (Hydro-Québec, #17)
- Multi-party enquiry (Renaud)

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Undue hardship

Renaud

- Reasonable accommodation is a relative concept
- No absolute duty to accommodate
- Duty short of «undue hardship»
  - Some hardship acceptable
  - More than minor inconvenience
  - More than a negligible effort required
  - "reasonable" and "short of undue hardship" - not independent factors but alternate ways of expressing the same concept.
  - What constitutes reasonable measures is a question of fact and will vary with the circumstances of the case.

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

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Undue hardship (cont'd)

Relevant factors in determining undue hardship:

■ financial cost

■ the relative interchangeability of the workforce and facilities, and

■ the prospect of substantial interference with the rights of other employees.

■ The list is not intended to be exhaustive

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Multi-party enquiry

Employer

Union

Complainant

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Multi-party enquiry

Employer

(a) Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?

(b) If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?

(c) Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?

(d) Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?

(e) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?

(f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles? (e.g. employee, union, etc.)

Union

Complainant

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### Analysis

- Is the institutional policy or standard legitimate (if not, it cannot be upheld)
- If a rational connection has been established, is an alternative non-discriminatory standard available
- If not, is individual accommodation possible

■ SHEPPARD, Colleen, « *Of Forest Fires and Systemic Discrimination: A Review of British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.* » (2001) 46 McGill L.J. 533, p.550.

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### Grounds of discrimination

Discrimination based on :

- Age
- Religion
- National and Ethnic origin
- Pregnancy
- Family status
- Sex discrimination
- (Disability)

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### Age & Accommodation Context

- «Sea-change» in attitudes regarding mandatory retirement
- Legislative changes past 5 years abolishing mandatory retirement
- Exemption declared unconstitutional
  - *Vilven v. Air Canada* (2009), 69 C.H.R.R. D/362, 2009 FC 367, April 9, 2009 (Mactavish J.) and *Vilven v. Air Canada* (No. 4) (2009), 69 C.H.R.R. D/419, 2009 CHRT 24 (CHRT).

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WORKSHOP 6 - Reasonable Accommodation

Age & Accommodation

Type of accommodation

- Individualized testing (medical tests)
- Fitness test
- Flexible work arrangements
- Duty to provide training (information technology)
- Loss of insurance and other benefits (?)

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Age & Accommodation

Case law

- Mandatory retirement – age 65 – school bus driver – reliance on a ‘rigid rule’ – blanket application of a ‘standard of perfection’ with total absence of consideration for individual circumstances - failure to demonstrate a bona fide occupational qualification (bfoq).  
  
**Risk to safety:** matter can still be considered under the guise of hardship, but not as an independent justification of discrimination. «*The critical issue is whether the Superintendent’s non-accommodating standard was reasonably necessary to the achievement of reasonable highway safety.*» (par.30)  
▪ *Way v. New Brunswick (Education)*, (2011), CHRR Doc. 11-3018 (N.B. Bd.Inq.)
- Mandatory retirement – age 60 - airline pilots - tribunal dismissed the complaints finding that the mandatory retirement policy was justified on the basis of increased ‘operational costs’, inefficiency in the scheduling of pilots, negative ramifications for the pilots’ pension plan, and preserving an effective rule of seniority.  
▪ *Vilven v. Air Canada (No. 6)*, (2011), CHRR Doc. 11-3049, 2011 CHRT 10. (Application for judicial review)

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Age & Accommodation

Case law

- Individualized testing - firefighter - policy which requires individual firefighters who wish to continue working after the age of 60 to successfully complete a fitness test is a bfoq - complainant refused to submit to testing or to meet with the employer to address any concerns that the test discriminated against firefighters 60 and older - failure to meet his duty to cooperate – complaint dismissed.  
  
**Individualized testing:** while discriminatory tests are unacceptable, «*it would be odd to conclude that individual testing is in itself unacceptable when the Supreme Court of Canada in Meiorin [...] attached so much importance to the role of individualized testing in determining if an individual can be accommodated [...].*» (par. 39-40)
- *Baker v. Cambridge (City)* (No. 2), (2011), CHRR Doc. 11-1667, 2011 HRT0 1167

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### Age & Accommodation

- Flexible work schedule and conditions
  - such as compressed work weeks (working longer days in exchange for a shorter work week), flex-time (flexibility in start, end and break times as long as an agreed upon number of hours are worked), tele-working (working from home)
- Part-time work and job sharing
  - which allow for a transition into retirement while at the same time providing opportunities for other workers, e.g. a new parent who wishes to work part-time as well
- employing workers who have chosen to retire on short-term contracts or as consultants.
  - ONTARIO HUMAN RIGHTS COMMISSION, «Policy on Discrimination against Older Persons Because of Age», (2002) and rev'd 2007., section 5.4

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### Religion & Accommodation Context

- Most frequent (after disability)
- Definition of religion - «Sincerity of belief» standard

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### Sincerity of belief

- [...]claimants seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make.»
  - Syndicat Northcrest v. Amselem, [2004] 2 S.C.R. 551, 2004 SCC 47, para. 39 and 43.
- In order to establish that his or her freedom of religion has been infringed, the claimant must demonstrate:
  - (1) that he or she sincerely believes in a practice or belief that has a nexus with religion, and
  - (2) that the impugned conduct of a third party interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief.
  - Multani v. Commission scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256, 2006 SCC 6, para. 34

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WORKSHOP 6 - Reasonable Accommodation

Religion & Accommodation

Type of accommodation

- Time off for religious holidays
- Time off with pay
- Change in work schedule
- Prayer room
- Right to wear *kirpan* in school
- Right to wear the hijab at work
- Etc.

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Religion & Accommodation

Cases

- Unjustified refusal to allow owners of a condominium in a luxurious building to set up a Succah (temporary dwelling or structure) during the Jewish religious festival of Succot.
  - Amselem
- Refusal to allow student to wear kirpan to school (public school) - measures proposed to ensure that kirpan be placed in its sheath and wrapped and sewn securely - Minimal impairment test under s. 1 of the Canadian Charter. An absolute prohibition not in the range of 'reasonable alternatives'.
  - Multani

But,

Refusal to allow installation of a large external satellite dish that could receive religious and cultural programming from international sources - Condominium - Applicant of Egyptian origin - Corporation discriminated against him because of his religion (Muslim) and race - Unlike *Amselem*, no evidence that accessing this satellite service itself a religious practice or that absence of access to this technology would compromise or restrict exercise of any religious practice or belief.

- *Assal v. Halifax Condominium Corp.* No. 4,(2007), 60 C.H.R.R. D/101 (N.S. Bd.Inq.)

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Religion & Accommodation

Cases

TIME OFF WITH OR WITHOUT PAY

- Unjustified refusal to allow teachers to take paid leave during Jewish holiday (Yom Kippur) where collective agreement provided payment of teachers absent for good or valid reason or for a number of days for a variety of reasons.
  - *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525
- Applicant works for the respondent company engaged in the automotive parts and assembly business – hourly employee – union member – practicing Christian as defined by the Living Church of God – tenets of religion require that he refrain from work during the Sabbath and various other holy days (High Sabbaths). 'Perfect Attendance' policy which deprived the applicant of company bonuses not justified.

**Time off with pay:** Where special or discretionary paid leave is not otherwise available, the duty to accommodate does not require the employer to give the applicant paid time off for religious observance.( 62)

- *Korall v. Automodular Corp.* (No. 2) (2011), CHRR Doc. 11-1274, 2011 HRTO 774

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Religion & Accommodation Cases

- Mandatory photo requirement to obtain a driver's licence - belief it is a sin to be willingly photographed – freedom of religion – majority decision - justified infringement of the respondents' *Charter* rights -
  - *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567.
- Illustration of limits that SCC prepared to place on religious demands ?

Or,

- Increased burden on applicant (under justification analysis) to show 'seriousness of the limits' placed on religious practice or observance ?
  - WOEHLING, José, *L'arrêt Alberta c. Hutterian Brethren of Wilson Colony* (2009) – Quand la Cour suprême s'efforce de restreindre les accommodements en matière religieuse, in *Proportionnalité et accommodements – Actes des conférences 2010* (ABC), (2010) Les Éditions Yvon Blais, 83.

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Religion & Accommodation Cases

- Aboriginal inmate denied access to an Aboriginal spiritual advisor or Aboriginal spiritual literature while in detention - historical disadvantage of Aboriginal peoples within the criminal justice system a relevant contextual consideration in assessing discrimination or the perpetuation of disadvantage.
- **Individualized assessment – security:** duty to undertake an «individualized assessment» to determine whether or not it was safe to allow the Aboriginal spiritual advisor to visit the applicant while in segregation.(429)
  - *Kelly v. British Columbia (Public Safety and Solicitor General)* (No. 3) (2011), CHRR Doc. 11-0183,

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Religion & Accommodation Cases

**PRAYER**

- Muslim faith – Request to be absent from the training session for about 1 hour in order to pray – Refusal to consider shift swaps, a transfer to other sites and other opportunities known to have been provided on other occasions – Amounting to 'utter' failure to meet the first branch of the duty.

**No positive duty to inform prospective employer :** it is counter-intuitive to suggest that there is a positive duty on the part of a job applicant to reveal information to the prospective employer that may classify the applicant by a prohibited ground of discrimination. (25)

- *Qureshi v. G4S Security Services (Canada) Ltd.* (No. 2) (2009), 67 C.H.R.R. D/124, 2009 HRTO 409

- **Duty to set up prayer room in public establishments :** educational establishments have no duty to set up permanent prayer rooms, however, in keeping with spirit of the law, to authorize for purpose of prayer the use of rooms that are temporarily unoccupied.

- Commission des droits de la personne et des droits de la jeunesse opinion, opinion issued (February, 2006)
- Similarly, see BOUCHARD, Gérard and TAYLOR, Charles, *Building the Future – A Time for Reconciliation*, 2008, Quebec government publication, Québec.

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WORKSHOP 6 - Reasonable Accommodation

### National origin & Accommodation Cases

- College admissions policy – multimedia program – Failure to accommodate – Student originally from El Salvador unable to provide high school certificate but able to establish that university degrees obtained both in El Salvador and Quebec.
  - Québec (Commission des droits de la personne et des droits de la jeunesse) c. Collège Montmorency, 2004 CanLII 28761 (QC T.D.P.)
- Application for permanent residency on behalf of family member - Duty to accept documentation proving family relationship instead of school leaving certificate that was unavailable.
  - *Menghani v. Canada (Employment and Immigration Comm.)* (1992), 17 C.H.R.R. D/236 (Can.Trib.), conf'd in part by *Canada (Secretary of State) v. Menghani* (1993), 21 C.H.R.R. D/427 (F.C.T.D.).

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### National origin & Accommodation (cont'd)

- *International medical graduates (IMG)* - Investigation - allegations of discrimination in the admissions process leading to postdoctoral training programs in medicine – Evidence of a lack of adequate support measures for those trained in a different health care system and that the admissions process was not adapted to the particular path followed by International medical graduates, creating a disadvantage compared to those trained in Canada.
  - See, Commission des droits de la personne et des droits de la jeunesse Internet site at : <http://www2.cdpcj.qc.ca/en/img/Pages/default.aspx>

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### Pregnancy & Accommodation Context

- Fewer cases in recent years
- Case law relatively well settled
- Employment standards legislation
- Employment Insurance Act

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WORKSHOP 6 - Reasonable Accommodation

### Settled principles (pregnancy)

1. discrimination on the basis of pregnancy constitutes sex discrimination prohibited by human rights legislation.	1. <i>Brooks v. Canada Safeway Ltd.</i> , [1989] 1 S.C.R. 1219
2. Refusal to renew part-time contracts because the employee would be unavailable during her maternity leave constitutes discrimination.	2. <i>Commission des écoles catholiques de Québec c. Gobeil</i> , 1999 CanLII 13226 (QC C.A.); <i>CDPDJ (Sasseville) v. Commission scolaire de Jean-Rivard</i> , [1995] R.J.Q. 2245 (Trib. Qué.), conf'd on appeal October 14, 1999.
3. Refusal to adapt a pregnant employee's work schedule to accommodate visits to her physician discriminatory	3. <i>Québec (Comm. des droits de la personne) v. Lingerie Roxana Ltée</i> (1995), 25 C.H.R.R. D/487 (Trib.Qué.).
4. To deny seniority and other social benefits during maternity leave – discriminatory.	4. <i>Québec (Commission des droits de la personne et des droits de la jeunesse) c. Centre Hospitalier Hôtel-Dieu de Sorel et al</i> , 2001 CanLII 12711 (QC T.D.P.); <i>Québec (Comm. des droits de la personne et des droits de la jeunesse) c. Montréal (Ville)</i> (1997), 32 C.H.R.R. D/341 (T.D.P.Q.)

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### Pregnancy & Accommodation Cases

- Discrimination based on sex – complainant refused the Vice-Principal's position because she would have been on maternity leave for the first term. Disruptions to teaching and administrative positions is an inherent aspect of school business. Complete lack of any accommodation.
  - *Woo v. Alberta (Human Rights and Citizenship Comm.)* (2003), 49 C.H.R.R. D/510, 2003 ABQB 632, par. 56
- Failure to accommodate complainant who was pregnant when she applied for job as roads inspection officer – pre-employment medical examination requiring X-ray tests – Unjustified decision to postpone hiring
  - *Québec (Société de l'assurance automobile) c. Québec (Commission des droits de la personne et des droits de la jeunesse)*, 2004 CanLII 46419 (QC C.A.)
- Garbage truck driver – employee worked four days a week, but with long hours, an average of eleven and a half hours per day – refusal to accommodate request to work 10-hour days amounts to discrimination – failure to show undue hardship).
  - *Stackhouse v. Stack Trucking Inc. (No. 2)* (2007), 60 C.H.R.R. D/119, 2007 BCHRT 161.

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### Pregnancy & Accommodation (cont'd)

Other forms of accommodation:

- Flexible work schedule
- Preventive withdrawal from workplace in case of threat to health and safety
- Assignment to less strenuous work
- Adapting work environment

- DRAPEAU, Maurice, «Grossesse et accommodement: un devoir de société», in JEZÉQUEL, Myriam, *Les accommodements raisonnables : quoi, comment, jusqu'où ?*, Cowansville, Les Éditions Yvon Blais, 2007, p. 203.

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Sex discrimination & Accommodation

Cases

Women working in traditionally male dominated jobs:

- Adapting aerobic standard when testing women for job as forest firefighters to assess minimum capacity required to perform job safely and efficiently
  - *Meiorin*
- Adapting hiring procedure to allow women to obtain Class 3 Driver's permit after being hired – 97 % of such permits held by men.
  - *Commission des droits de la personne et des droits de la jeunesse c. Gaz métropolitain inc.* 2008 QCTDP 24; conf'd in large part by the Quebec Court of Appeal in *Gaz métropolitain inc. c. Commission des droits de la personne et des droits de la jeunesse*, 2011 QCCA 1201.
- Adapting hiring tests and tools in manner that takes into account physical characteristics of women
  - *Gaz Metro*

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Family status & Accommodation

Context

- Balancing parental obligations and work
- Still controversial issue
- Three schools of thought :
  1. Restrictive approach
  2. Liberal approach
  3. Not within the purview of human rights legislation

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Family status & Accommodation

*Restrictive approach*

- Concept of family status cannot be an open-ended concept
- potential to cause «*disruption and great mischief in the workplace*»
- A *prima facie* case of discrimination is only made out when «*a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employee.*»(38)
- *Health Sciences Assn. of British Columbia v. Campbell River and North Island Transition Society* (2004), 50 C.H.R.R. D/140, 2004 BCCA 260.

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Family status & Accommodation

Liberal approach

- Because human rights codes enjoy status as "fundamental law" - usually interpreted liberally to better fulfill their objectives.
- No hierarchy of rights: It is «*inappropriate to select out one prohibited ground of discrimination for a more restrictive definition.*»
- The concerns identified by the court in *Campbell River* can properly be assessed when evaluating the issue of undue hardship.
- *Hoyt v. Canadian National Railway Co. (No. 2)*(2006), 57 C.H.R.R. D/437, 2006 CHRT 33, par. 120

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Family status & Accommodation

Third approach : Not covered

- Different terminology
- E.g. use of 'civil status' rather than 'family status'.
- Arbitrators reluctant to apply the term 'civil status' to situations involving conflict between parental duties and work :
  - DROLET, Johanne, *L'accommodement des droits parentaux: où les arbitres tirent-ils la ligne ?*, Le droit de l'accommodement, Développements récents sur le droit de l'accommodement ainsi que leurs impacts pour les employeurs et les syndicats, Montréal, 2011, 130-156.
- Approach contrary to «large and liberal» interpretation by SCC of 'civil status':  
(1)*Brossard (Town) v. Quebec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279. On the definition of 'marital status', see also *B v. Ontario (Human Rights Commission)*, [2002] 3 S.C.R. 403, 2002 SCC 66.

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Family status & Accommodation

cases

- Part-time child and youth support worker – working hours changed from 8:30 a.m. to 3 p.m. - new shift required complainant to work from 11:30 a.m. to 6 p.m. – son with important psychiatric disorders – son's well-being requiring mother's presence and after-school care.
  - Campbell River
- Crew van driver – shift work including Saturdays – difficulties arranging childcare – request for shift change for three Saturdays – allowed but without pay.
  - Hoyt
- Border guard – request for static shift three days per week , instead of rotating shifts 24/7 - in order to arrange childcare for two young children – request to retain pension entitlements – remedy including access to static shift while retaining pension benefits – also order to develop a policy to address family status accommodation requests within 6 months - policies to include a process for individualized assessments of employees making such requests.
  - *Johnstone v. Canada (Attorney General)* (2008), CHRR Doc. 08-187, 2008 FCA 101 Appeal from: (2007), CHRR Doc. 07-092, 2007 FC 36; *Johnstone v. Canada Border Services Agency* (No. 2) (2010), CHRR Doc. 10-3507, 2010 CHRT 20.(application for judicial review).

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### Family status & Accommodation cases (cont'd)

- General clerk working full-time – wife legally blind and unable to safely care for three children at night - exemption from working night shift rotations denied – demotion to cashier position with pay cut constitutes discrimination based on family status and failure to accommodate short of undue hardship;
  - *Rawleigh v. Canada Safeway Ltd.* (No. 1) (2009), 68 C.H.R.R. D/172 (Alta. H.R.P.)
- Complainant required to report to work in another city to cover shortage of personnel – failure to examine her request for accommodation based on family status – single mother - shared custody arrangement with father of two children – move would entail uprooting children from school, father and community. Refusal to consider request for accommodation and to apply policy meant to deal with special needs discriminatory – Remedy including reinstatement - review of accommodation policy ordered.
  - *Richards, Cindy v. Canadian National Railway*, 2010 CHRT 24 (CanLII)
- Similarly, see
  - *Sesley, Denise v. Canadian National Railway*, 2010 CHRT 23 (CanLII); *Whyte v. Canadian National Railway Co.* (No. 3) (2010), CHRR Doc. 10-3519, 2010 CHRT 22. (Application for judicial review in all three cases).

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### Legislation: Special measures and accommodation

Legislation as a source of accommodation

- Employment standards and labour legislation
- Accessibility standards and requirements
- Legislative duty to accommodate
- Proactive legislation

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### Legislation Employment standards and labour legislation

- Sick leave
- Maternity, paternity and parental leave
- Protection against loss of group insurance and pension benefits during leave
- Right to reinstatement at end of leave
- Compassionate leave
- Workers' compensation legislation

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Legislation

Accessibility standards and requirements

- National Building Code
- Elections Act, R.S.Q. c. E-3.3, s.303 :«*The polling stations of an electoral precinct shall be grouped and situated in a place of convenient access, and shall be accessible to handicapped persons.*»
- Etc.

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Legislation

Legislative duty to accommodate

(free-standing duty)

- *An Act respecting Access to documents held by public bodies and the Protection of personal information, R.S.Q., chapter A-2.1, ss. 10 and 47 - «reasonable accommodation must be provided on request to enable the applicant to exercise the right of access to information.»*

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Legislation

Proactive legislation

- *Employment Equity Act, S.C. 1995, c. 44. ss. 5 (b) and 10 (1) (a)* (employers to implement employment equity with reasonable accommodation measures to ensure adequate representation).
  - Guidelines at: [http://www.chrc-ccdp.ca/publications/chapter\\_852\\_chapitre-eng.aspx](http://www.chrc-ccdp.ca/publications/chapter_852_chapitre-eng.aspx)
- Under *An Act respecting equal access to employment in public bodies*, R.S.Q., chapter A-2.01, the Commission des droits de la personne et des droits de la jeunesse similarly asks employers to provide information regarding accommodation policies.
  - Also, service for employers with information and advice regarding the duty to accommodate (Service-conseil en matière d'accommodement) <http://www2.cdpd.jq.ca/PAE/service-conseil/Pages/default.aspx>

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Legislation Construction

- Legislation cannot limit protection under human rights legislation which has paramountcy
  - *Commission des droits de la personne et des droits de la jeunesse c. Société de taxi Windsor Inc.*, 2011 QCTDP 5, par. 94 ; *Woo v. Alberta (Human Rights and Citizenship Comm.)*
- Where legislation is vague or ambiguous – interpretation must be compatible with human rights legislation and constitutional values based on equality.
  - *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650, 2007 SCC 15, par. 114

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Collective agreements

- The duty to accommodate and other obligations under human rights legislation implicit in collective agreements
  - *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42. See also, *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, [2007] 1 S.C.R. 161, 2007 SCC 4, par.33; *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, [2008] 2 S.C.R. 561, 2008 SCC 43, par. 20-22.

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CONCLUSION

«[...] community's commitment to a few key values: democratic governance, respect for fundamental rights and the rule of law, and accommodation of difference.»  
Chief Justice of Canada Beverley McLachlin

- A MULTI-FACETTED CONCEPT
- TWO-FOLD DUTY TO DEVELOP INCLUSIVE NORMS AND PROVIDE INDIVIDUAL ACCOMMODATION
- LESS 'SUBJECTIVE' AND 'ARBITRARY' THAN CRITICS WOULD HAVE IT
- THE PROCESS REQUIRED OF PARTIES WELL ESTABLISHED
- THE EXTENT OF THE ACCOMMODATION REMAINS SUBJECT TO CASE-BY-CASE ANALYSIS
- PART OF A CLUSTER OF LEGISLATIVE DUTIES

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**Approaches to Equality and  
Non-Discrimination inside and  
outside the EU  
Workshop 6  
Reasonable  
Accommodation  
Dr. Julie Ringelheim  
4 October 2011**

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**Reasonable Accommodation under EU  
Law: Concept, Limits and Possible  
Extension**

- I. Basic Notions
- II. Reasonable Accommodation under EU Law: 2 Limitations
- III. Extending the RA duty to other fields? The question of access to and supply of goods and services
- IV. Extending the RA duty to other grounds? The question of religion

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**I. Basic Notions**

- ♦ Article 5 Employment Equality Directive (Directive 2000/78):

In order to guarantee compliance with the principle of equal treatment in relation to **persons with disabilities**, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, **where needed in a particular case**, to enable a person with a disability to have **access to, participate in, or advance** in employment, or to provide training for such a person **unless** such measures would impose a **disproportionate burden** on the employer. When this burden is, to a sufficient extent, remedied by existing measures as an element of disability policy in the Member State, it should not be considered disproportionate."

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## I. Basic Notions

- ♦ Recital 20 of the Preamble => examples of reasonable accommodation: "i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks of the provision of training or integration resources."
- ♦ Recital 21 => To determine whether such measure gives rise to a disproportionate burden, account should be taken of, i.a. :
  - financial and other costs entailed,
  - scale and financial resources of the organisation
  - possibility of obtaining public funding or any other assistance

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## Underlying Idea of the RA duty

The problem lies with the environment rather than with the person who has a disability:

"...disability stems primarily from the failure of the social environment to adjust to the needs and aspirations of people with impairments, rather than from the inability of people with impairments to adapt to the environment." (L. Waddington & A. Lawson, *Disability and non-discrimination in the European Union*, 2009, at 16)

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## Characteristics of the RA duty

- ♦ It requires the employment to take the protected ground into account rather than to ignore it
- ♦ It requires individualized solutions, adapted to the particular situation of the individual who ask for it

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## II. Limitations of the RA Duty under EU Law

### 1. Field of application: employment

#### 1. Protected ground: disability

≠ US and Canada law:

- RA duty also applies outside the employment field
- RA duty also concerns the ground of religion (and other grounds in the case of Canada law)

## III. Extending the RA duty to other fields? The question of access to goods and services

- ♦ **Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (2008)**
- ♦ **UN Convention on the Rights of Persons with Disabilities**
- ♦ **Member States legislations**

## 2008 Proposal for a new Council directive

### Article 4(1)

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities:

- a) The measures necessary to enable persons with disabilities to have effective non-discriminatory access to social protection, social advantages, health care, education and access to and supply of goods and services which are available to the public, including housing and transport, shall be provided by anticipation, including through appropriate modifications or adjustments. Such measures should not impose a disproportionate burden, nor require fundamental alteration of the social protection, social advantages, health care, education, or goods and services in question or require the provision of alternatives thereto.
- b) Notwithstanding the obligation to ensure effective non-discriminatory access and where needed in a particular case, reasonable accommodation shall be provided unless this would impose a disproportionate burden.

## UN Convention on the Rights of Persons with Disabilities

### Article 2

Reasonable accommodation means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

### Article 5(3)

**In order to promote equality and eliminate discrimination, State Parties shall take all appropriate steps to ensure that reasonable is provided.**

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## UN Convention on the Rights of Persons with Disabilities

### Article 4(1)(e)

States undertake to ... Take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise.

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## IV. Extending the RA Duty to Other Grounds? The Question of Religion

- ♦ The example of US and Canada law
- ♦ The possibility to derive a duty to provide RA from the prohibition of indirect discrimination
- ♦ The case-law of the ECtHR

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ECtHR (GC), *Thlimmenos v. Greece*, 6 April 2000

« The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different. » (para. 44)

« In the present case the Court considers that it was the State having enacted the relevant legislation which violated the applicant's right not to be discriminated against in the enjoyment of his right under Article 9 of the Convention. The State did so **by failing to introduce appropriate exceptions to the rule** barring persons convicted of a serious crime from the profession of chartered accountants. » (para. 48)

ECtHR, *Jakobski v. Poland*, 7 December 2010

« According to the applicant's religion he was supposed to have a simple meat-free diet. He merely asked to be granted a vegetarian diet, excluding meat products ... The Court notes that his meals did not have to be prepared, cooked and served in a prescribed manner, nor did he require any special products ... The Court is not persuaded that the provision of a vegetarian diet to the applicant would have entailed any disruption to the management of the prison or to any decline in the standards of meals served to other prisoners. » (para. 52)

=> Breach of Article 9 (freedom of religion)

Difficulties associated with the application of the RA duty to religion

- ♦ Notion of religion or religious requirement
  - ♦ Cases in which the religious nature of a belief is contested
  - ♦ Cases in which the religious requirement invoked is contested within the religious community at stake: objective (official dogma) v. subjective (sincere belief of the individual believer) approach

### Difficulties: Notion of religion or religious requirements

**Eweida v. British Airways, UK Employment Appeal Tribunal, 20 November 2008:**

« In our judgment, in order for indirect discrimination to be established, it must be possible to make some general statements which would be true about a religious group such that an employer ought reasonably to be able to appreciate that any particular provision may have a disparate impact on the group. » (§ 60)

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### Difficulties associated with the application of the RA duty to religion

- ♦ Conflicts between religious claims and other peoples' rights
  - ♦ Notion of 'reasonableness'

E.g.: Ladele v. Islington, UK Employment Appeal Tribunal, 19 December 2008

Ms. Ladele's desire to have her religious views accommodated could not be allowed to override local authorities' concern « to ensure that all its registrars manifest equal respect for the homosexual community as for the heterosexual community. »

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### Difficulties associated with the application of the RA duty to religion

Submission of the UK Equality and Human Rights Commission before the ECtHR in relation to the application lodged by Ms. Ladele:

« ...it will generally be proportionate to refuse to make an accommodation in cases where a public sector employee seeks to be exempted from providing a public service on discriminatory grounds. Very strong arguments and evidence are required to prove th employer has acted disproportionately in cases such as these. State services must be provided on an impartial basis and employees cannot expect their public functions to be shaped to accommodate their personal religious beliefs. » (para. 56)

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