- When will interference with other employees and/or disruption of a collective agreement amount to undue hardship?

V. Religious Accommodation in the Workplace: Keeping the Faith Between Employers, Employees, and Unions

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Introduction[1]

As the Canadian workforce continues to diversify—parallel to changes in society generally—employers continue to be faced with new challenges in their obligation to balance production efficiency, on the one hand, and accommodation of the needs of employees, on the other. Nowhere is that challenge more evident than in the area of accommodation of religion in the workplace.

This paper will consider the legal foundation for freedom of religion in Canada, as well as the evolving duty to accommodate religious beliefs and practices in the workplace. Through a review of arbitral and court decisions, the paper will provide an overview of the changing nature of employers' duty to accommodate employees' religious requirements, and will identify those developments as they relate to specific workplace issues.

Religion as a Fundamental Freedom

Paragraph 2(a) of the *Canadian Charter of Rights and Freedoms* provides that everyone is entitled to freedom of conscience and religion. Similarly, human rights legislation across the country further enshrines this right by prohibiting discrimination on the basis of belief, religion, creed, and other similar terms. Courts and tribunals have generally taken a liberal approach to interpreting and applying these rights. In one of the earliest decisions under

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the *Charter*, *R. v. Big M Drug Mart*[2] (*Big M Drug Mart*), the Supreme Court of Canada described freedom of religion as follows:

> ....The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear and hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.[. . .] Freedom can primarily be characterized by the absence of coercion or constraint. [. . .] Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice.[3]

The Supreme Court had occasion to revisit the notion of freedom of religion in the more recent decision of *Amselem et al. v. Syndicat Northcrest et al.*[4] (*Amselem*). This case involved a request for the removal, based on a municipal by-law, of temporary religious huts or "succots" from the balconies of condominium owners who were Orthodox Jews. The succots were part of the claimants' celebration of religious holy days. The municipality claimed that the tents violated its building by-laws, which prohibited any kind of decoration, alteration, or construction on balconies. In finding that the by-law infringed the claimant's freedom of religion, the Court reviewed both the definition and content of an individual's right to religious freedom. The Court emphasized that freedom of religion should be read broadly, and included the right to openly hold and freely declare rights, as well as the freedom not to hold or be associated with a particular religion. The Court also defined religion as follows, at paragraph 39:

> While it is perhaps not possible to define religion precisely, some other definition is useful since only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held, are protected by the guarantee of freedom of religion. Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment....

Consistent with the reference to "personal convictions or beliefs" in the above definition, the majority of the Supreme Court estab-

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[2]R. v. Big M Drug Mart, [1985] 1 S.C.R. 295.
[3]*Id.* at para 93
[4]Amselem et al. v. Syndicat Northcrest et al., [2004] S.C.C. 47.

lished a subjective test for assessing claims of infringement of religious freedom:

> A sincere belief related to religion; and
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> Conduct or legislation that affects the claimant's capacity to act according to their religious beliefs in a manner which is substantial.

The majority decision further set out a two-step process for evaluating the "sincere belief related to religion." First, it must be determined on what religious precept the belief or conviction is based. The majority decision specifies that the employee has the onus of establishing that a belief is genuinely religious and not secular. Second, an assessment must be made of the sincerity of the claimant's religious beliefs. The individual must objectively believe that he or she is under a religious obligation. The extent of sincerity is to be judged on a case-by-case basis, and supported by sufficient evidence.

The majority cautioned that it is not necessary for an individual to demonstrate that a belief is held by leaders, or even a majority, of a religious group:

> . . . [I]t should be noted that to analyse a religious practice in the context of conscientious objection, it is necessary to examine the believer's perception. It is important that a believer's religious practices not be limited to those of the majority or of an entire community, or to those that are considered to be generally accepted. Still, it is the person relying on a religious precept to establish the mandatory nature of his or her religious practice who must prove that the precept exists.[5]

Two years after the *Amselem* decision, the Supreme Court affirmed those same principles in *Multani v. Commission Scolaire Marguerite-Bourgeoys*[6] (*Multani*). In this case, the Court considered the claim of infringement of freedom of religion by a Sikh student, who was precluded by the public school board of the school he attended from wearing a "kirpan" (a type of ceremonial dagger worn as an expression of faith) while at school. Although recognizing the importance of the school board's objective of ensuring student safety, the Court found that the school board had not considered relevant evidence about the safety incidents involving kirpans, and had made no effort to accommodate the student. In upholding the student's claim, the Court determined that he had both demonstrated a sincere belief in his religious practice, and

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[5] *Id.* at para. 138.
[6] Multani v. Commission Scolaire Marguerite-Bourgeoys, [2006] S.C.C. 6.

that not being allowed to wear a kirpan would have constituted more than a trivial infringement of his freedom of religion.

Although these earlier decisions all reflect a broad and liberal approach to the interpretation of religious freedom, in its most recent decision, the Supreme Court of Canada has emphasized that the right is not absolute, and must be reconciled with other rights. In *Bruker v. Marcovitz*,[7] the Supreme Court of Canada addressed a claim of breach of a divorce settlement between two members of the Jewish faith. Bruker and Marcovitz married in 1969, and commenced divorce proceedings in 1980. Three months later, a settlement agreement was negotiated. As a term of the agreement, the parties agreed to appear before the rabbinical authorities to obtain a Jewish divorce, or "get," immediately upon the granting of the civil divorce. In the Jewish faith, a wife cannot obtain a get unless her husband consents to give it; where consent is withheld, she remains his wife (even if divorced under civil law) and is unable to remarry under Jewish law. In this case, the husband refused to grant the get for 15 years, by which time the wife, who never remarried, was almost 47 years old. She commenced proceedings and sought damages for her husband's breach of contract—specifically, the failure to grant the get in accordance with the written agreement. The trial judge found that the agreement was valid and binding, and that the wife's claim for damages was properly justiciable in the civil courts. The Court of Appeal disagreed, finding that the substance of the obligation was a religious or moral one, and therefore, unenforceable by the courts (a position adopted by the two dissenting judges of the Supreme Court).

A majority of the Supreme Court allowed the appeal. It noted that determining when the assertion of a right must yield to a more pressing public interest is "a complex, nuanced, fact-specific exercise that defies bright-line application." In this case, however, it had no difficulty finding that the agreement was properly justiciable:

> The fact that Paragraph 12 of the Consent had religious elements does not thereby immunize it from judicial scrutiny. We are not dealing with judicial review of doctrinal religious principles, such as whether a particular get is valid. Nor are we required to speculate on what the rabbinical court would do. The promise by Mr. Marcovitz to remove the religious barriers to remarriage by providing a get was negotiated

[7]Bruker v. Marcovitz, [2007] S.C.C. 54.

> between two consenting adults, each represented by counsel, as part of a voluntary exchange of commitments intended to have legally enforceable consequences. This puts the obligation appropriately under a judicial microscope.[8]

In coming to this conclusion, the Court observed that many other justiciable types of contracts have religious aspects (e.g., the dismissal of a minister from a church). Here, the public interest in protecting equality rights, the dignity of Jewish women, as well as the public benefit in enforcing valid and binding contractual obligations, were among the interests and values that outweighed Marcovitz's claim that enforcing the agreement would interfere with his religious freedom. Applying *Anselem*, it found that any infringement of Marcovitz's freedom of religion was "inconsequential" in comparison. The case reinforces the principle that claims of religious freedom must be balanced with countervailing rights, values, and harm on a case-by-case basis.

Accommodating Religion in the Workplace

By virtue of the *Charter* and human rights legislation, employers are required to accommodate the religious beliefs and practices of employees in the workplace, to the point of undue hardship. Courts and other tribunals have made it clear that an employer must make serious efforts to accommodate the needs of workers who face an interference with their protected rights. In particular, employers must attempt to create a work environment in which a worker is able to benefit from all rights, including freedom of religion. The result has been a rich history of case law defining the scope of employers' duty to accommodate religious freedom at work.

Interestingly, the earliest cases addressed by the Supreme Court of Canada all involved accommodation of an employee's religious practice in establishing work schedules. In *Ontario (Human Rights Commission) and O'Malley v. Simpson-Sears*[9] (*O'Malley*), the Supreme Court of Canada established principles for the application of the duty to accommodate, which remain central to Canadian jurisprudence. The Court determined that a rule or condition of employment that contravenes an employee's protected right should be struck down unless it is justified as a bona fide occupa-

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[8] *Id.*, at para. 47.
[9] Ontario (Human Rights Comm') & O'Malley v. Simpson-Sears, [1985] 2 S.C.R. 536.

tional requirement (BFOR). The Court also recognized, for the first time, that accommodation of employee needs to the point of undue hardship may be required for an employer to satisfy its legal obligations. However, the Court also stated that employers' efforts towards reasonable accommodation may not necessarily result in full accommodation. Specifically, an employee may be expected to take ownership of her or his accommodation, which, in some cases, may mean accepting reasonable limits on the exercise of religious convictions in the workplace.

The Supreme Court's next decision on religious accommodation in the workplace, *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*[10] (*Central Alberta Dairy Pool*), provided a non-exhaustive list of factors for determining whether an employer's efforts at accommodation have reached the point of undue hardship. These factors include financial cost, disruption of the collective agreement, problems of morale for other employees, the interchangeability of the work force and facilities, as well as the size of the employer's operation in measuring financial cost related to accommodation. As will be seen, these factors remain relevant today, and underlie a number of arbitration and tribunal decisions on accommodation of religion in the workplace.

Finally, one of the most significant cases in the Supreme Court of Canada's early jurisprudence on workplace accommodation is *Board of School Trustees, School District No. 23 (Central Okanagan) v. Renaud*[11] (*Renaud*). Here the Court recognized that an employee seeking accommodation is not entitled to a "perfect solution." Instead, the employee must be prepared to consider all reasonable measures that sufficiently accommodate her or his religious requirements. The other novel aspect of the *Renaud* decision was the Supreme Court's declaration that accommodation is a multi-party endeavour, requiring participation and compromise on the part of the union and employee as well as the employer. Evidently, in light of these joint duties and the established factors for assessing accommodation measures, what is determined to be "reasonable" is a question of fact and will vary highly depending on the circumstances of each case.

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[10]Central Alberta Dairy Pool v. Alberta (Human Rights Comm'n), [1990] 2 S.C.R. 489.

[11]Board of Sch. Trs., Sch. Dist. No. 23 (Central Okanagan) v. Renaud, [1992] 2 S.C.R. 970.

Most recently, in *McGill University Health Centre v. Syndicat des employés de l'Hôpital général de Montréal et al.*,[12] the Supreme Court re-emphasized the individual nature of the accommodation process. The Court also underlined once again the onus on all workplace parties, including the employee seeking accommodation, to participate meaningfully in the search for accommodation. Although decided in the context of a disability claim, the principles enunciated can be applied equally to the duty to accommodate more generally. In reviewing the law on accommodation, the majority of the Court stated the following:

> Throughout the employment relationship, the employer must make an effort to accommodate the employee. However, this does not mean that accommodation is necessarily a one-way street. [. . .] When an employer makes a proposal that is reasonable, it is incumbent on the employee to facilitate its implementation. If the accommodation process fails because the employee does not co-operate, his or her complaint may be dismissed.[13]

Evolution of the Duty to Accommodate

Since the *O'Malley* decision, the approach to assessing the duty to accommodate has continued to evolve. Arguably the most significant development arose from two companion cases decided by the Supreme Court of Canada, in which the Court fundamentally changed the test for assessing whether the duty to accommodate individuals' protected rights has been met. In *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*[14] (*Meiorin*) and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*[15] (*Grismer*), the Supreme Court abolished the distinction between direct and adverse effect discrimination, which had been recognized in *O'Malley* and subsequent decisions. Instead, the Court adopted a "unified approach" to assessing claims of discrimination and accommodation. The approach is based on the following three-step test, which employers must now satisfy to justify any workplace standard that adversely

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[12]McGill Univ. Health Centre v. Syndicat des employés de l'Hôpital général de Montréal et. al., 2007 SCC 4.

[13]*Id.*, at para. 22

[14]British Columbia (Pub. Serv. Employee Relations Comm'n) v. BCGSEU, [1999] 3 S.C.R. 3.

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

affects an employee based on a prohibited ground of discrimination, including religion:

1. The measure/policy was adopted for a purpose that is rationally connected to the performance of the job;
2. A sincere belief on the part of the employer that this measure/policy is necessary to fulfil a legitimate work-related purpose; and
3. The measure/policy is reasonably necessary to accomplish a legitimate work-related purpose, and to demonstrate reasonable necessity, the employer must demonstrate that it is impossible to accommodate the employee without undue hardship.

Importantly, the Supreme Court clarified that in order to satisfy the third step of the test, employers must show that workplace standards that have discriminatory effects on employees must have "built-in" accommodation measures. In other words, it is not sufficient for an employer to adopt a standard that is, or could be, discriminatory, and assess the need for accommodation as it arises. Instead, employers must be proactive in incorporating accommodation measures into any standards that may negatively impact employees under a prohibited ground of discrimination.

Following the *Meiorin* decision, many accommodation claims were made on the basis that employers had to demonstrate that it would be "impossible" to accommodate the claimant without undue hardship. In *McGill University*, the Supreme Court clarified the test set out in *Meiorin* by confirming that the duty to accommodate is "neither absolute nor unlimited," and that employees have a role to play in arriving at an appropriate accommodation. This clarification confirms that the duty to accommodate requires employers to provide *reasonable* accommodation, not accommodation to the point of impossibility.

Religious Accommodation: Specific Workplace Issues

Cases on accommodation of religious beliefs or practices in the workplace tend to fall into one of five categories: (1) workplace schedules that conflict with observance of a weekly Sabbath; (2) leave of absence to observe religious holy days; (3) dress codes; (4) workplace duties that conflict with religious beliefs; and (5) imposition by the employer of a particular religious belief.

This paper will also examine the exception to the duty to accommodate employees' religious beliefs and practices, for employers who may lawfully require that employees belong to a particular religion as a condition of employment.

Workplace Schedules and Conflicts With Weekly Sabbath

As discussed earlier, the Supreme Court's decisions in *O'Malley*, *Central Alberta Dairy Pool*, and *Renaud* all established that employers have a positive obligation to consider scheduling changes before terminating an employee, where the work schedule conflicts with the employee's observance of the weekly Sabbath. These cases establish that in the absence of concrete evidence of undue hardship, the employee's religious discrimination claim will generally be allowed. Thus, employers must be prepared to tolerate *some* hardship, including increased costs and inconvenience, to make the scheduling changes required to accommodate observance of a religious Sabbath.

In *O'Malley*, the employee became a member of the Seventh-Day Adventist Church, one of the tenets of which was strict observance of the Sabbath from sundown Friday to sundown Saturday. She claimed discrimination as a result of being forced to work on Friday evenings and Saturdays as a condition of employment. Although the employee accepted part-time employment, which did not require working on the Sabbath, her claim of discrimination was nonetheless pursued up to the Supreme Court of Canada. In a unanimous decision, the Court found that the employer had not met its burden of accommodating the employee's religious practice to the point of undue hardship. The Court outlined the employer's actions as follows:

> In this case the respondent-employer called no evidence. While the evidence called for the complainant reveals some steps taken by the respondent towards her accommodation, there is no evidence in the record bearing on the question of undue hardship to the employer. The first reaction to the complainant's announcement that she would not be able to continue to work on Saturdays was the response that she would have to resign her job. Within a few days, and before she had left her employment, the employer on its own initiative offered part-time work, which was accepted. In addition the employer agreed to consider Mrs. O'Malley for other jobs as they became vacant. All of the vacancies of which Mrs. O'Malley had notice required Saturday work except one and for that one she was not qualified. There was no evidence adduced regarding the problems which could have arisen as a result of further steps by the respondent, or of what expense would

> have been incurred in rearranging working periods for her benefit, or of what other problems could have arisen if further steps were taken towards her accommodation. There was therefore no evidence upon which the Board Chairman could have found that such further steps would have caused undue hardship for the respondent and thus have been unreasonable.[16]

As a result, to satisfy the duty to accommodate, employers must present detailed evidence of measures considered or taken within the accommodation process. Moreover, there must be concrete evidence to support an employer's claim that the employee's scheduling needs cannot be met without undue hardship.

Likewise, in both *Central Alberta Wheat Pool* and *Renaud*, the Court concluded that accommodation of the employee's requirements had not been made to the point of undue hardship, because either the employer or the union failed to consider a reasonable proposal for accommodation of the employee's requirements.

Following *O'Malley*, *Central Alberta Dairy Pool*, and *Renaud*, other decisions have clarified that there are limits to the inconvenience that an employer can be expected to incur, both in terms of increased cost and disruption to production in providing accommodation—provided that the employer (and/or the union) demonstrates that proper consideration has been given to possible accommodations.

The case of *Ontario (Human Rights Commission) and Roosma v. Ford Motor Company of Canada*[17] (*Roosma*) involved two employees who were members of the Worldwide Church of God, which also required the observance of the Sabbath from sundown Friday to sundown Saturday. The collective agreement, however, required employees to work Friday evening shifts twice a month. The employer and the union provided temporary accommodation through swapping shifts with other workers, but the employer was not prepared to change the employees' shifts on a permanent basis. Both employees were ultimately terminated for absenteeism related to Sabbath observance.

In upholding the employer's requirement that employees work Friday evenings, the Divisional Court accepted morale among other employees as a valid consideration. In this case, the employer had presented evidence of a persistent absenteeism problem on

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[16] Ontario (Human Rights Comm') & O'Malley v. Simpson-Sears, [1985] 2 S.C.R. 536, para. 29.

[17] Ontario (Human Rights Comm'n) & Roosma v. Ford Motor Co. of Canada, (2002), 21 C.C.E.L. (3d) 112 (Div. Ct.), *aff'g* (1995), 24 C.H.R.R. D/89 (Ont. Bd. Inq.).

the Friday evening shift, and of acrimony by other employees in relation to any individual exemptions from the requirement to work that shift. The court accepted the employer's evidence, and held that both the employer and union had satisfied their respective duties to accommodate their workers to the point of undue hardship.

In *Vanderhoof Specialty Wood Products v. Industrial Wood and Allied Woodworkers Union of Canada*,[18] the grievor was also a member of the Seventh-Day Adventist faith, whose Sabbath observance conflicted with work schedules. The union and the employer each proposed different methods of accommodating the grievor in the work schedule; both involved him being assigned to a day shift on a permanent basis rather than rotating with other employees, however, they differed as to the impact of seniority on the assignment of other employees to cover the grievor during his missed shifts. The employer believed that all employees should share the burden of accommodation, and required all employees to rotate through the grievor's missed shift. The union proposal, on the other hand, only required employees junior to the grievor to cover the shifts. The arbitrator focused on the importance of seniority in finding undue hardship, and held that the union's proposal, which favoured the senior employees, represented a reasonable accommodation. The decision thus confirms that minimizing disruption to seniority entitlements may be a legitimate consideration in identifying appropriate accommodation solutions.

Arbitrators also expect employers to sustain increased costs and inconvenience in accommodating schedule changes for employees to observe their weekly Sabbath. Again, undue hardship will not be reached without concrete evidence of substantial cost and inconvenience. In *Chrysler Canada Ltd. v. United Automobile Workers*,[19] the employee converted to the Seventh-Day Adventist Church partway through his employment at the Windsor plant, and refused to work any Friday night or Saturday shifts. The employer made a variety of efforts to accommodate the grievor within existing scheduling practices and procedures, but disciplined him for absences on those days on which he could not be accommodated. The employer eventually terminated the employee. In upholding the grievance, the arbitrator held that the scheduling requirement

[18]Vanderhoof Specialty Wood Prods. v. Industrial Wood & Allied Woodworkers Union of Canada, Local 1-424 (Ramsey Grievance), [2004] B.C.C.A.A.A. No. 132.

[19]Chrysler Canada Ltd. v. United Automobile Workers, Local 444 (1986), 23 L.A.C. (3d) 366.

could not be considered a reasonable BFOR. The arbitrator reasoned that the employer could take reasonable steps to accommodate the employee, without undue interference or expense in the operation of the business. The arbitrator thus held that the duty to accommodate required moving beyond existing schedule practices and procedures.

Human Rights Tribunals have also made it clear that they will carefully scrutinize decisions to terminate the employment of individuals whose religious observance of the Sabbath requires scheduling accommodations by the employer. For example, in *Strauss v. Ontario (Liquor Licence Board)*,[20] the employee, an Orthodox Jew, needed to leave work an hour early on Fridays during the winter because sundown occurs earlier, and she needed time to prepare for the Sabbath. The employer initially accommodated the requirement through the use of overtime and "flex" time arrangements during the early period of her employment. However, a new supervisor required her to seek weekly approval. The tribunal held that there was no discrimination because the employee failed to adequately inform her employer (the new supervisor) of her actual religious needs, despite the employer's reasonable steps to communicate with her and to accommodate her needs in the past. Although the employer could have done more without reaching the point of undue hardship, the tribunal held that the employer had sufficiently discharged its duty.

Both courts and arbitrators have indicated that operational difficulties and quality-control issues are legitimate considerations in assessing the point of undue hardship. For example, the Divisional Court in *Roosma*[21] upheld the Board of Inquiry's finding that concrete evidence of operational difficulties and quality-control issues were appropriate factors in assessing whether or not the employer and the union had met the duty to accommodate to the point of undue hardship. It was found that the complainants' absence from Friday shifts had a substantial impact on production, safety, and quality. Where the employer can provide concrete evidence of the negative impact on operations of a proposed accommodation, it may be able to sufficiently establish undue hardship.

Likewise, the employer may establish undue hardship where its production needs reasonably require the incumbent of a specific

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[20]Strauss v. Ontario (Liquor Licence Bd.) (1994), 22 C.H.R.R. D/169 (Ont. Bd. Inq.).

[21](2002), 21 C.C.E.L. (3d) 112 (Div. Ct.), *aff'g* (1995), 24 C.H.R.R. D/89 (Ont. Bd. Inq.)..

position to work a set schedule. This was the case in *Canadian Forest Products Ltd.*[22] As in the above cases, the grievor was a Seventh-Day Adventist, and refused to work from sundown on Fridays until sundown Saturdays. The employer had previously accommodated the employee so that he did not have to work on his Sabbath. However, the grievor successfully applied for a new position within the organization. The employer was not willing to accommodate the employee's need for time off on the Sabbath in this position. The arbitrator ultimately held that the employer was clear enough to the employee about the requirements to work on both Friday and Saturday in the new position. The grievor's silence on these issues thus implied that he was available to work on those days, and his grievance was therefore dismissed.

In another similar case, *Corporation of the Town of Oakville*,[23] it was held that the duty to accommodate did not require an employer to change the essential requirements of the job where it was essential that work be performed on the day coinciding with the employee's Sabbath. Here, the grievor was a By-Law Enforcement Officer for the Town of Oakville, and was an active member of the Church of Jesus Christ of Latter Day Saints (Mormon). He observed the Sabbath on Sundays. The arbitrator held that the critical element of the job for which he was hired was Sunday by-law enforcement. The arbitrator also held that the requirements of a job may mean that certain people simply are unable to hold it, and that in this case the grievor's religious beliefs were incompatible with the essential components of the job and the purpose for which the position was created. The duty to accommodate therefore does not extend so far as to force the employer to change a position that was created for a specific purpose.

In assessing whether an employer must accommodate an employee's request for scheduling changes, it is important to distinguish between employees' observance of genuine religious tenets, and their desire to follow practices that may be inspired by their religious beliefs, but that do not themselves amount to religious beliefs. Two recent arbitration awards highlight this distinction. In *Toronto Association for Community Living*,[24] the grievor was a part-time residential counsellor and a member of the Scarborough Church of God. Following a change in management, she was told

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[22]Re Canadian Forest Prods. Ltd. (Polar Div.) & I.W.A.—Canada, Local 1-424 (1995), 50 L.A.C. (4th) 164 (Blasina).

[23]Re Corporation of the Town of Oakville (unreported, Nov. 18, 1992, Hunter).

[24]Toronto Ass'n for Community Living (2005), 138 L.A.C. (4th) 378 (Surdykowski).

that she would have to work weekends. She made clear that this would be difficult for her because of "family and other job commitments." Only some two and a half months later did she advise the employer that religion was an issue—namely, that she could not work Sundays because it was the Sabbath in her church, and her religious beliefs compelled her to attend two Sunday services each week. The arbitrator found that she had a genuine belief in the tenets of her church, and was therefore entitled to invoke freedom of religion to request accommodation. Neither of the two accommodation alternatives offered by the employer was reasonable. Instead, the employer should have accommodated the grievor by exempting her from the weekend shift requirements, as it had been doing prior to the management change.

By contrast, in *Hendrickson Spring, Stratford Operations*,[25] the grievor could not work 12-hour compulsory overtime shifts on Sundays due to a conflict with his religious beliefs. Although part of his time on Sunday was consumed with church attendance, most of the day was taken up with community work that the grievor considered fundamental to his beliefs as a Polish Catholic. The employer had offered an accommodation that allowed the grievor to be absent to attend the 9 a.m. and 7 p.m. church services on Sunday, but that required him to come into work for approximately six hours between services. The union concurred in this arrangement, but the grievor did not, and he was ultimately disciplined for being absent without excuse for compulsory overtime shifts. The arbitrator, referring to the Supreme Court of Canada's *Amselem* decision, agreed that the employer's approach of accommodating the grievor's church attendance but not his other Sunday activities—which were essentially secular in nature, even if prompted by the grievor's religious beliefs—was reasonable.

Finally, although not binding in Canada, a recent case from the United States provides interesting insight into the extent of employers' duty to accommodate religious practices in workplace scheduling. Specifically, the case highlights the need for flexibility in providing religious accommodation, and emphasizes that the process should result in equal but not better treatment for the claimant. The case of *Equal Employment Opportunity Commission v. Firestone Fibers & Textiles Company*[26] involved a complainant who

[25]Hendrickson Spring, Stratford Operations (2006), 142 L.A.C. (4th) 159 (Haefling).
[26]Equal Employment Opportunity Comm'n v. Firestone Fibers & Textiles Co., 515 F.3d 307 (4th Cir. 2008).

became a member of the Living Church of God in 2001. In addition to a weekly Sabbath, his religion included the observance of a total of 20 holy days a year. In his original position, he was not required to work on the Sabbath, however, as part of a company-wide restructuring, he was reassigned to a position that did require him to work on the Sabbath. He then approached his supervisor for an accommodation.

The supervisor tried a range of accommodation measures. These included assigning the complainant to a different shift and a different position, as well as having various employees fill in for him during the hours of his Sabbath. None of these options were viable for a range of reasons, including that the complainant lacked seniority or transferable skills, and because of the significant burden to be placed on the company and his co-workers. The worker instead began to take leave according to standard attendance accommodations available under the collective agreement, which allowed employees to obtain leave of absence by using vacation time, swapping shifts up to eight times per year, and taking up to 60 hours of unpaid leave for any reason. The employer terminated the complainant when his unpaid leave time exceeded 60 hours.

In upholding the termination, the court made two important observations regarding religious accommodation. First, the court rejected the complainant's argument that he was entitled to "total accommodation" of his religious requirements—in other words, that the employer was required to grant leave for every holy day recognized by the employee's faith. The court emphasized that the burden imposed on the employer is one of *reasonable* accommodation, not *total* accommodation. Second, the court found that the employer's existing accommodation measures were reasonable, and that providing the claimant with additional accommodation would provide him with greater rights than those enjoyed by other employees. In other words, the court's reasoning reflects the principle that employees requiring accommodation are entitled to *equal* treatment, not *better* treatment.

Leave to Observe Religious Holy Days

The Supreme Court addressed the requirements of religious accommodation and leave for religious observances in *Chambly*.[27]

[27]Commission scolaire régionale de Chambly v. Bergevin, [1994] 2 S.C.R. 525.

This case involved a grievance on behalf of three teachers who were observant Jews requesting a paid day off to observe Yom Kippur. Relying on a policy that those who took days off for religious holy days would not be paid, the school board denied the request. The Court held that the school board had not met its duty to provide reasonable accommodation:

> There was no proof presented by the respondent School Board, that to pay the salaries of the Jewish teachers would impose an unreasonable financial burden upon it. Indeed it would be extremely difficult to put forward such a position in light of the fact that the Board through collective bargaining had specifically provided, in art. 5.14.05, for the payment of teachers who were absent for what the parties considered to be a good or valid reason and, in art. 5.14.02, for a number of days for a variety of reasons. It would be difficult if not unreasonable to contend that the absence of a teacher in order to observe a holy day would not constitute a "good reason" for the absence. It follows that the observance of a holy day by teachers belonging to the Jewish faith should constitute a "good reason" for their absence and should qualify them for payment of a day's wages, pursuant to the provisions of that collective agreement. This would be an eminently reasonable, indeed a correct, interpretation of the collective agreement. Further I would observe that this had been recognized as acceptable in the past, as confirmed by the practice existing prior to 1983 of many Jewish teachers who were absent on Yom Kippur without any loss of wages.

More recent decisions, however, have recognized that a "menu of options" approach is available to employers to allow employees to observe holy days, other than simply providing paid leave of absence. In the case of *Richmond v. Attorney-General of Canada*,[28] employees requested days off to observe the Jewish holy days of Rosh Hashanah and Yom Kippur. In response to the request, the employer had offered a range of options including annual leave, compensatory days off, exchanging work shifts, or various arrangements such as allowing catching up of lost time. The Federal Court found that the range of options provided to the employee constituted reasonable accommodation.

Similarly, in *Ontario (Ministry of Community and Social Services) v. Grievance Settlement Board*,[29] the Ontario Court of Appeal addressed a claim by an employee that the employer was required to provide paid leave of absence to allow him to observe 11 holy days over the calendar year that were recognized by the Worldwide Church of

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[28]Richmond v. Attorney-General of Canada, [1997] 2 F.C. 946.

[29]Ontario (Ministry of Cmty. & Soc. Servs.) v. Grievance Settlement Bd., 50 O.R. (3d) 560 (C.A.).

God. The employer had a policy allowing for two days off with pay for religious observance purposes, to reflect the two statutory holidays of Christmas and Good Friday enjoyed by Christians. Employees who required further accommodation to fulfil their religious obligations could request other scheduling accommodations, including use of a compressed work week that gave employees one day off every three weeks, use of earned vacation entitlements, or unpaid leave of absence. The court categorically dismissed the employee's claim that the additional days off gained through a compressed work week amounted to "vacation benefits," which the employer could not force him to use for religious observance purposes. Rather, the court found that this measure was a scheduling change, which was a reasonable form of accommodation:

> A review of the relevant authorities leads me to conclude that employers can satisfy their duty to accommodate the religious requirements of employees by providing appropriate scheduling changes, without first having to show that a leave of absence with pay would result in undue economic or other hardship. Indeed, in some instances, scheduling changes may provide the fairest and most reasonable form of accommodation.[30]

In light of these decisions, employers should be prepared to consider and recognize a range of options to allow employees to observe religious holy days, without automatically concluding that employees are entitled to leave with pay.

Dress Codes

A number of decisions have addressed conflicts between an employer's dress code requirements and employees' religious beliefs or practices. Usually, the dress code rules relate to the employer's health and safety policies.

The case of *Bhinder v. Canadian National Railway Company*[31] involved a Sikh employee who was discharged for refusing to comply with the employer's direction that all employees at a particular site wear a hard hat. The employee refused to do so because it would have required the removal of his turban, a religious requirement. The Supreme Court held that the safety helmet rule was a BFOR and that, accordingly, there was no violation of the *Human Rights Act*. There was therefore no duty to accommodate on the part of the employer. This case must, however, be assessed in light

[30] *Id.*, at para. 37.
[31] Bhinder v. Canadian Nat' Ry. Co., [1985] 2 S.C.R. 561.

of later decisions, in particular by the Supreme Court in *Meiorin*, which abolished the distinction between direct and adverse effect discrimination, and required employers to provide concrete evidence that they could not accommodate an employee without incurring undue hardship.

In *Pannu v. Skeena Cellulose*[32] (*Pannu*), the employee, a Sikh, was a Recaust Operator. His job involved potential exposure to toxic gases. The Worker's Compensation Board (WCB) had regulations requiring Recaust Operators to wear a self-contained breathing apparatus (SCBA). The employee was baptized a Sikh during the course of his employment, and could no longer perform the shutdown operations because a tenet of his faith required the wearing of a beard. The employer tried to fit the required equipment over his beard, and when that was not possible, tried without success to find an alternative. Eventually, the WCB fined Skeena for failing to ensure that the employee wore an SCBA as required by the regulations. The employee then filed a discrimination complaint against both the WCB and Skeena.

The tribunal dismissed the complaint against the WCB, as any discrimination would have been the result of the application of the regulations by Skeena, rather than the regulations themselves. The tribunal also held that Skeena had discriminated against the employee. However, the tribunal held that Skeena met the test for undue hardship. Specifically, accommodation did not require the employer to transfer the risk of toxic exposure to another employee. Thus, the point of undue hardship had been reached and the SCBA was justified as a BFOR.

Workplace Duties That Conflict With Religious Beliefs

Consistent with all of the principles discussed earlier, tribunals have determined that where an employee sincerely holds religious beliefs that are incompatible with workplace duties or technology, the employer will be required to accommodate the employee to the point of undue hardship.

In *Jones v. C.H.E. Pharmacy Inc. et al.*,[33] a complaint of religious discrimination was upheld, where a Shopper's Drug Mart employee was given an ultimatum by the store manager to either handle poinsettias and assist with the Christmas decorations or lose his job. The employee was a Jehovah's Witness, and his faith

[32]Pannu v. Skeena Cellulose (2001), 38 C.H.R.R. D/494.
[33]Jones v. C.H.E. Pharmacy Inc. et al., 2001 BCHRT 1, (2001), 39 C.H.R.R. D/93.

prevented him from participating in displaying any Christmas decorations. In the past, the employer had accommodated the employee by having other employees do the decorating, however on this occasion no accommodation was provided. Not surprisingly, the tribunal ultimately held that accommodation would not have constituted undue hardship, as the employer could easily have delegated the task to another employee.

A similar claim was advanced in *Henry v. Kuntz*.[34] The employee, a Rastafarian, claimed that the employer had forced his attendance at a Christmas party, despite being aware of his religious beliefs. The tribunal found that the employee had not taken sufficient steps to make the employer aware of his religious beliefs and requirements. Accordingly, the duty to accommodate was not triggered. The tribunal also found that comments regarding not coming to work if the employee did not attend the party were nothing more than a joke.

In *Moore v. B.C. (Ministry of Social Services)*,[35] a financial aid worker was terminated because she refused to authorize medical coverage for a client of the Ministry to have an abortion. Her supervisor had ordered her to authorize coverage, and she refused on the basis that her religion did not allow her to do so. The tribunal held that reasonable accommodation was possible, and there would not be any serious detrimental impact on service delivery. Thus, the employer was held not to have accommodated to the point of undue hardship, and thus the termination was held to be discriminatory.

In *407 ETR Concession Company*,[36] the arbitrator reinstated three Pentacostalist grievors who were terminated for refusing to provide a measurement of their hand so they could participate in a new biometric security system. The employer had failed to accommodate their sincere religious belief that the collection of the measurement would subject them to the "Mark of the Beast" and cause them damnation. The system was implemented for security and attendance management purposes, and required scanning each employee's hand to create a 9-digit biometric identifier. Although the employer conceded that the grievors had a sincere religious belief and should be accommodated, the arbitrator expressed his dissatisfaction with the threshold test for religious

[34]Henry v. Kuntz, 2004 HRTO 7 (OHRT).
[35]Moore v. B.C. (Ministry of Soc. Servs.) (1992), 17 C.H.R.R. D/426 (B.C.C.H.R.).
[36]407 ETR Concession Co. (2007), 158 L.A.C.(4th) 289 (Albertyn).

accommodation established in *Amselem*—the existence of a sincere, subjective religious belief. Under this standard, the grievors' beliefs were given significant latitude. The arbitrator also recognized that accommodating a subjective belief can be difficult, but allowed the grievance because the employer had taken a disciplinary approach to their objection and had not considered accommodation until after the grievances had been filed. He also held that it would be reasonable for the employer to exempt the grievors from biometric scanning and allow them to use swipe cards because the employer had not proven a risk of time fraud that would weigh against this accommodation.

Imposition of Religious Beliefs

Employers cannot arbitrarily impose their religious convictions on employees. The Ontario Board of Inquiry made this clear in *Dufour v. J. Roger Deschamps Comptable Agréé*.[37] In this case, the employer had posted material promoting one particular religious point of view, in both the open areas and individual work stations. The employer also provided the Bible and other religious material to employees, and requested employee participation in fundraising for religion-based campaigns. The Board found that such activity was improper. The Board also made it clear that although the complainant has the burden of proving a prima facie case of discrimination, the power imbalance between employer and employee weighed against the employer.

Exceptions to Religious Accommodation

Human rights legislation sometimes allows employers to adopt employment standards that would otherwise be considered discriminatory in order to safeguard the religious character of the workplace. Ontario's *Human Rights Code*, at subsection 24(1), provides exceptions to equal treatment for employment. The exceptions apply to "special employment," and include religious, philanthropic, educational, fraternal, or social institutions, or organizations that deliver services to persons protected by the *Code*. Additionally, subsection 18(1) of the *Code* provides an explicit exception from discrimination for denominational schools. This exception is essentially an incorporation of section

[37]Dufour v. J. Roger Deschamps Comptable Agréé (1989), 10 C.H. R.R. D/6153 (Ont. Bd. Inq.).

93(1) of the *British North America Act*, which protected denominational schools.

Courts have generally upheld the statutory exceptions. In *Daly et al. v. Attorney General of Ontario*,[38] the Ontario Court of Appeal upheld the right of a Roman Catholic school board to consider religion in the hiring of a teacher. The case challenged section 136 of the *Education Act*, which prohibited consideration of religion in hiring if the candidate agreed to respect the philosophy of the separate school. The court held that section 136 violated the constitutional guarantee of denominational schools to manage their operations.

On the other hand, at least one other case has made it clear that policies of denominational schools may indeed be found discriminatory, in spite of the statutory exemption. The case of *Ontario English Catholic Teachers' Association v. Dufferin-Peel Roman Catholic Separate School Board*[39] involved a policy of not allowing non-Catholics to be hired into positions of responsibility such as Principal, Vice-Principal, and Department Head. The court held that the Province is able to enact laws affecting denominational schools, as long as such legislation complies with s.93(1) of the *British North America Act*. Specifically, s.93(1) only provides a guarantee to protect denominational schools. The court therefore held that the school board must demonstrate that its policies in not hiring non-Catholics into positions of power is reasonably necessary to preserve the Catholic nature of schools.

Conclusions

The duty to accommodate religious beliefs and practices in the workplace poses unique and compelling challenges, both for employers and unions. The decisions reviewed here demonstrate that satisfying the duty to accommodate employees' religious requirements to the point of undue hardship is a significant burden, particularly in light of the Supreme Court of Canada's indication, in *Amselem* and *Multani*, that the standard for assessing religious beliefs or practices is a subjective one. This standard truly means that each individual's subjective beliefs must be considered and addressed, and must be accommodated unless that

[38]Daly et al. v. Attorney General of Ontario (1999), 44 O.R. (3d) 349 (C.A.).

[39]Ontario English Catholic Teachers' Ass'n v. Dufferin-Peel Roman Catholic Separate Sch. Bd., [1999] O.J. No. 1382 (Ont. C.A.).

accommodation would result in undue hardship for either the employer or the union.

However, that daunting task of accommodating a multitude of individually held beliefs has been tempered, at least to some degree, by a healthy dose of reality from courts, tribunals, and arbitrators. The decisions discussed above confirm that the obligation on employers and unions is to provide *reasonable* accommodation, not perfect accommodation. In addition, there is a corresponding duty on employees to cooperate, in a meaningful way, in the search for appropriate accommodations, and to accept reasonable proposals. As a corollary, recent decisions have also affirmed that employers can offer a range of options to meet employees' religious requirements, particularly with respect to scheduling arrangements.

Given these parameters, there is no reason why reasonable workplace parties who approach accommodation issues in a cooperative spirit should not be able to "keep the faith" in the workplace!