Chapter 11

THE OUTER LIMITS OF THE DUTY TO ACCOMMODATE IN CANADA

I. Paid Time Off for Religious Holidays in Canada: Exploring the Limits of the Duty to Accommodate

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Introduction

The duty to accommodate on the basis of religion has constituted a large part of Canadian human rights jurisprudence.[1] In that context, courts and arbitrators alike have specifically struggled with the question of when an employee may legitimately receive paid time off for religious holidays, so that the employee can fulfil his or her religious obligations. This paper begins by providing a brief overview of the law surrounding the duty to accommodate in Canada, and then specifically explores the issue of the circumstances in which an employee is entitled to receive paid time off to observe a religious holy day.

This question has become increasingly relevant in arbitral jurisprudence, at least in Ontario. Initially, the Supreme Court of Canada's 1994 decision in *Chambly*[2] was interpreted by the Ontario Human Rights Commission (the body charged with administering the Ontario Human Rights Code) as requiring an employer to provide employees with at least two paid days off for observing non-Western Christian religious holidays (on the theory that two

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[1]Indeed, some of the leading cases in the Supreme Court of Canada involving discrimination in the workplace, and the roles of both employers and unions in combating discrimination, have arisen in the religious context, including the Supreme Court of Canada's seminal decision in *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.* [1985] 2 S.C.R. 536 (recognizing adverse effects discrimination and duty to accommodate) and *Central Okanagan Sch. Dist. No. 23 v. Renaud* [1992] 2 S.C.R. 970 (outlining respective roles of employers, unions, and individual employees in accommodation process). Both decisions are reviewed in the next section.

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

Christian holidays, Good Friday and Christmas, are statutory public holidays for which Christian observers receive paid time off despite not working).

However, the courts, arbitrators, and even human rights adjudicators have not interpreted *Chambly* in this way, in large measure reflecting the view (often not explicitly acknowledged) that the right to be free from discrimination, and the corresponding duty to accommodate, must co-exist with and should not override the perspective that it is a fundamental feature of the employment relationship that it is necessary to perform labour and be at work in order to receive compensation. On this view, the duty to accommodate must be reconciled with, and effectively be subservient to, the overriding principle that human rights legislation does not require an employer to provide compensation without receiving labour in return (i.e. when an employee is not at work).[3]

As a result, it would appear that the general trend of the case law has been that an employee whose religion requires that he or she take time off for a non-Christian holiday is not entitled to be paid for not working on a non-Christian holy day, except where the employee can use a separate entitlement to a pre-existing earned or discretionary special paid leave entitlement on the day of the religious holiday, or indirectly when the employee can make up the time up through rescheduling in order to be "compensated" for the pay lost as a result of taking the religious holiday.

Because in most cases either of these possibilities exists to some extent, the caselaw has not yet satisfactorily addressed the outcome in a situation where paid leave provisions are not available *and* where there is no scheduling change available. In assessing that issue, courts and arbitrators will have to determine whether paying employees when they do not provide work is per se undue hardship, or whether some additional degree of undue hardship should and will be required.

To some extent, the difficulty in this area may stem from the fact that it has not been easy for adjudicators to compartmentalize and separate the supposedly discrete legal concept of the duty to accommodate up to the point of undue hardship from the concept of the discrimination, which is a prerequisite to the invocation of a duty to accommodate in the first place. This would

[3]The leading case in this area is generally regarded to be the Ontario Court of Appeal's decision in *Ontario Nurses' Ass'n v. Orillia Soldiers Mem'l Hosp.* [1999] O.J. No. 44, discussed below.

appear to stem, at least in part, from the notion that there simply is no discrimination when employees are not paid because they are not at work, so that the only accommodation arbitrators are prepared to consider is one that avoids that result.

However, this approach seems to miss the fundamental point that the essence of the discriminatory treatment in these situations is the preferential treatment given to Christian observers, who in fact are paid for not being at work on their religious holidays. It seems reasonable to ask how, if the Christian majority can be accommodated by receiving paid time off for their religious holidays, the religious minorities to whom the protection against discrimination is directed cannot.

The following section provides a general overview of the duty to accommodate in Canada: when it is triggered, and how it applies. The section after that briefly reviews the prevalent approach taken to the duty to accommodate in cases involving claims for compensation by employees who are not able to work because of their membership in a disadvantaged or minority group protected by human rights legislation. The final section then discusses the prevalent Canadian approach to the specific question of whether the duty to accommodate requires paid time off in the case of claims by non-Christian employees for the time they take off to celebrate their religious holidays.

Discrimination and the Duty to Accommodate in Canada

The duty to accommodate in Canada arises in the context of both the *Charter of Rights and Freedoms* as well as from human rights legislation in each province. This paper focuses on this duty as interpreted in cases involving breaches of the *Ontario Human Rights Code*[4] and, in some instances, will touch upon similar legislation in other provinces.

In Ontario, under Part 1, section 5(1) of the *Code*, every person has a right to equal treatment in employment without discrimination on the basis of certain grounds, including creed. Creed is not defined in the *Code* but has been interpreted to encompass, at the very least, organized religion accompanied by established practices and observances.

Section 11 of the *Code* provides that the right of a person under Part 1 is infringed where an employer practice or policy results in

[4]R.S.O 1990, c. H.19.

an exclusion, restriction, or preference of a group of persons who are identified by a prohibited ground of discrimination and of which the person is a member. Section 11 also provides an exception to this rule: that an employer's policy will not constitute a breach of the *Code* where it is "reasonable and bona fide in the circumstances." However, a finding of "reasonable and bona fide" will not be made unless the claimant cannot be accommodated without undue hardship.

These provisions have been interpreted by the courts numerous times, resulting in a general framework for assessing discrimination claims and any duty to accommodate that may arise.

The Supreme Court of Canada first dealt with the concept of religious accommodation in *Ontario (Human Rights Commission) v. Simpsons Sears* (hereinafter *O'Malley*).[5] O'Malley became a member of the Seventh-Day Adventist Church and as a result was no longer able to work from sundown Friday to sundown Saturday. However, periodic Friday night and Saturday shifts were required for all employees, as this was the store's busiest time of the week. Justice McIntyre, on behalf of the Court, held that a blanket employment rule honestly made for sound economic and business reasons may nevertheless be discriminatory if it affects a person differently from others to whom it is intended to apply.

The Court enunciated a bifurcated analysis with respect to assessing discrimination complaints. Under this approach, discrimination was divided into instances of "direct" discrimination and "adverse effect" discrimination. The Court outlined that direct discrimination occurs where "an employer adopts a practice or rule which on its face discriminates on a prohibited ground." Adverse affect discrimination, on the other hand, arises where an employer:

> for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.[6]

Either type of rule can lead to a prima facie case of discrimination based on creed. The Court in *O'Malley* indicated the need for different remedies in the two types of cases. Where a rule discrimi-

[5] [1985] 2 S.C.R. 536.
[6] *Ibid.* at par. 18.

nated directly, and was unable to meet any statutory justification test, it simply would be struck down. However, establishing that such a rule was a bona fide occupational requirement (BFOR) was a full defence in cases of direct discrimination. In the case of adverse effect discrimination, the rule or condition would not be struck down, but its effect on the complainant would be considered and some accommodation would be required from the employer for the benefit of the complainant. There would be no need for justification of the rule as a BFOR, as a facially neutral rule requires none.

Justice McIntyre, on behalf of the Court, stated that the *Code* must be "construed and flexibly applied to protect the right of the employee who is subject to discrimination and also to protect the right of the employer to proceed with the lawful conduct of his business."[7] He went on to adopt what the American courts had described as a "duty to accommodate" short of undue hardship:

> ....the duty to accommodate, referred to in the American cases, provide[s] that where it is shown that a working rule has caused discrimination it is incumbent upon the employer to make a reasonable effort to accommodate the religious needs of the employee, short of undue hardship to the employer in the conduct of his business.
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> ...in other words, to take such steps as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer.[8]

As there was no express statutory base for such a proposition in the *Code* at the time, the Court saw fit to import this doctrine to fill the "vacuum in the Code."[9]

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[7] *Ibid.*, par. 20.

[8] *Ibid.*, par. 20, 23.

[9] *Ibid.*, par. 20. The *Code* has since been amended, and the current section 11 now codifies this doctrine, in the case of constructive or adverse effects discrimination, as follows:

> **11.** (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
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> (a) the requirement, qualification or factor is reasonable and bona fide in the circumstances; or
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> (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.
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> **Idem**
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> (2) The Commission, the Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member can-

Fourteen years after the *O'Malley* decision, in *Meiorin*,[10] the Supreme Court developed a revised "unified" approach to resolving cases of discrimination. Justice McLachlin (now the Chief Justice) outlined various problems with the conventional bifurcated approach set out in *O'Malley* and proposed that the new unified approach to discrimination claims would apply the duty to accommodate into all cases where prima facie discrimination had been proven, whether the discrimination was direct or adverse effect. The Court outlined a new test for determining whether a prima facie discriminatory standard is a BFOR. Under that test, an employer may justify the impugned standard by establishing 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; 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.[11]

Justice McLachlin went on to state that this approach is premised on the need for employers to develop standards that accommodate the potential contributions of all employees in so far as this could be done without undue hardship. In short, "[u]nless no further accommodation is possible without imposing undue hardship, the standard is not a BFOR in its existing form and the prima facie case of discrimination stands."[12]

Application of the *Meiorin* test often turns on the third step, as the first two steps are generally not hard to meet. In order to establish that a standard is reasonably necessary to the accomplishment of the legitimate work-related purpose, the employer

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not be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

[10] British Columbia (Public Serice Employee Relations Commission) v. BCGSEU [1999] 3 S.C.R.

[11] *Ibid.*, par. 54.

[12] *Ibid.*, par. 55.

must establish that it cannot accommodate the claimant without undue hardship. The Court in *Meiorin* saw fit to elaborate on what the term "undue hardship" means. The Court's previous jurisprudence dealing with both the justification for direct discrimination and the concept of accommodation in adverse effect discrimination cases was found to be helpful in this regard.

As had been noted by Justice Sopinka in *Central Okanagan School District No. 23 v. Renaud*,[13] more than negligible effort is required to satisfy the duty to accommodate: "The use of the term 'undue' infers that some hardship is acceptable; it is only 'undue' hardship that satisfies this test."[14] Justice Wilson in *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*[15] listed factors that may be considered when assessing an employer's duty to accommodate to the point of undue hardship:

> ....financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations. This list is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case.[16]

The Court noted in *Meiorin* that the various factors are not entrenched, except to the extent that they are expressly included or excluded by statute. In all cases such considerations are not set in stone and "should be applied with common sense and flexibility in the context of the factual situation presented in each case."[17] McLachlin J. went on to enumerate some of the important questions that may be asked in the course of this analysis:

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

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[13] *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970.
[14] *Ibid.*, par. 19.
[15] [1990] 2 S.C.R. 489.
[16] *Ibid.*, p. 521.
[17] Commission scolaire régionale de Chambly v. Bergevin [1994] 2 S.C.R. 525, at p. 546, and discussed in Part IV below.

(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? As Sopinka J. noted in *Renaud*, the task of determining how to accommodate individual differences may also place burdens on the employee and, if there is a collective agreement, a union.[18]

If individual differences may be accommodated without imposing undue hardship on the employer, then the standard is not a BFOR and the employer has failed to establish a defence to the charge of discrimination.

The Requirement of Work in Exchange for Compensation as an Overriding Consideration Under Human Rights Legislation

Although not a case specifically involving a claim for paid leave for religious holidays, the Ontario Court of Appeal considered the question of whether the requirement to work in exchange for compensation could contravene human rights legislation, at least in the context of disability, in *Ontario Nurses' Ass'n v. Orillia Soldiers Memorial Hospital*[19] (hereinafter *Orillia Soldiers*). That case involved collective agreement terms providing that employers would no longer make premium contributions to benefit plans when employees were on unpaid leave after a certain period; the issue was whether those provisions discriminated against employees who were on leave because of a disability.

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[18]British Columbia (Pub. Serv. Employee Relations Comm'n) v. BCGSEU [1999] 3 S.C.R. 3, at para. 65 (internal citations omitted).
[19][1999] O.J. No. 4.

Noting that the purpose of benefit premium contributions was to provide an additional form of compensation in exchange for work, the court held that in order to determine if the provision was discriminatory on its face, the proper comparator group was other employees on unpaid leave, rather than other employees at work. On this basis, the court concluded that:

> [i]t is not prohibited discrimination to distinguish for purposes of compensation between employees who are providing services to the employer and those who are not. It would be prohibited discrimination for the employer to provide different compensation to different groups of employees providing services, if the distinction were based on a prohibited ground.[20]

This is not inconsistent with the Supreme Court of Canada's holding in *Chambly*, as the discrimination in that case was not direct discrimination, but adverse effects discrimination. Indeed, the Court of Appeal went on to hold that the collective agreement provision cutting off employer benefit premium contributions could be regarded as resulting in adverse effects or constructive discrimination:

> In my view, it is possible to find that the neutral rule in this case has a discriminatory effect within the meaning of s. 11(1). To repeat, the neutral rule may be stated as follows: the employer contributes toward premium coverage of participating eligible nurses in the active employ of the hospital. This rule has the effect of requiring the group of employees identified by the prohibited ground of discrimination to assume the burden of paying the entire contributions for benefits if they wish to maintain coverage. Admittedly, these employees are treated no differently than other employees on unpaid leave of absence, the difference is that these employees are adversely effected by the rule because of their disability. The issue then is whether the employers are entitled to the BFOQ justification in s. 11(1)(b). In my view, they are.[21]

However, the court went on to hold that "requiring work in exchange for compensation is a reasonable and bona fide requirement."[22] As a result, according to the court, no compensation-related accommodation is required or possible in circumstances where employees are simply incapable, by reason of their disability, of performing any work. As the court concluded, "these employees are on long-term disability because they are unable to provide any service. Thus, there is no amount of accommoda-

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[20] *Ibid.* at par. 27.
[21] *Ibid.*, par. 53
[22] *Ibid.*, par. 58.

tion that the employer could provide that would overcome the fundamental problem that these employees are unable to work."[23]

Orillia Soldiers has been widely accepted across the country, by courts and arbitrators alike, as setting forth the governing legal principles when it comes to the duty to accommodate disabled employees on the basis of disability in matters of compensation.

One of the more thoughtful analyses of the issues is contained in a decision of a Saskatchewan court in *Real Canadian Superstore*,[24] which considered whether bonus provisions of a collective agreement conditioning eligibility on full-time employment discriminated against employees who were working part-time hours as a result of their disabilities. In her decision, Justice Smith drew a distinction between the accommodation of the special needs of disabled workers to facilitate their participation in the workplace and compensation of such individuals:

> [32]...Generally, to find that a rule or policy of general application, neutral on its face, has a discriminatory adverse impact on an individual or group identified by a protected ground, it is necessary to find disparate treatment of the individual or group in comparison to other members of the comparator group not so identified, on the basis of the protected personal characteristic. In my view, it is not possible to make that finding in this case. Again, were it sufficient, in order to find discrimination in the prohibited sense, to find simply that an employee has received less benefit than he or she would have received had he or she not been disabled, there would be no need for even entering into the complex determination of the appropriate comparator group, based upon the underlying purpose or rationale of the policy or rule at issue. On the simple "but for" test these factors, endorsed and relied upon in repeated decisions of the Supreme Court, simply do not figure in the equation.
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> [33] The Board's confusion in this case is attributable, I believe, to a more general and widely prevalent confusion and uncertainty in relation to the scope of the "duty to accommodate" the special needs of protected groups that arbitrators, human rights commissions and the courts have, generally, implied into both legislated protection against discrimination and the guarantee of equality in s. 15 of the Charter. In particular, the Board has, in my view, failed to give effect to a distinction that must be drawn between the duty imposed on employers to accommodate differences in order to facilitate equal access to or participation in the workplace for individuals and groups who may be

[23] *Ibid.*, par. 60.

[24] *Real Canadian Superstore v. United Food and Commercial Workers, Local 1400* (1999), 182 D.L.R. (4th) 223; affirmed (2000), 187 D.L.R. (4th) 759 (Sask. CA).

> excluded by reason of sex, religion or disability, for example, and the prohibition against discriminatory disparate treatment in relation to compensatory benefits provided for work performed.
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> [56] What the Ontario Court of Appeal has recognized, in *Orillia Hospital*, is that comparisons in relation to compensation issues must be made in recognition of the reality that normally the purpose or underlying rationale of such benefits is to compensate employees for work performed. Accordingly, to distinguish among employees on the basis of whether and to what extent work has been performed does not contravene the equality principles which drive the interpretation of legislation such as ours. To say that the duty to accommodate inherent in the Saskatchewan Code does not oblige employers simply to top up wages of disabled employees who are unable, even with full accommodation to the point of undue hardship, to perform work is simply another way of saying the same thing.

As another Saskatchewan judge put it in *Canada Safeway Ltd.*,[25] "[t]he duty to accommodate does not extend so far as to oblige an employer to provide better salary and benefits to a disabled employee than it provides to non-disabled employees working the same number of hours."[26]

Discrimination and the Duty to Accommodate: Paid Religious Holidays

The Supreme Court of Canada's Decision in Chambly

The Supreme Court has only considered the issue of entitlement to time off for religious leave in the context of discrimination

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[25] *Canada Safeway Ltd. v. Retail, Wholesale and Dep'tmen Store Union, Local 454* (2004), 246 Sask.R. 260.

[26] *Ibid*., at par. 26. Notably, in its *Orillia Soldiers* decision, the Court of Appeal disagreed with a decision of arbitrator Richard Brown in *Versa Services* (1994), 39 L.A.C. (4th) 196. Brown had held that the concept of adverse effects or indirect discrimination applied only to issues of participation and not compensation. As set out above, the Court of Appeal disagreed, holding that the failure to compensate employees because of their disability can amount to adverse effects discrimination, but that an employer is not, by reason of the bona fide occupational qualification justification, required to accommodate disabled employees who cannot work by paying them compensation, as the provision of labour for compensation is itself a BFOR. Presumably, undue hardship, on this reasoning, is met at the point where the only accommodation is to provide an employee with wages or benefits where he or she is not working in exchange for payment. In either event, the result is the same, and rests on the notion that, at least in the employment context involving disabled employees, working is the fundamental quid pro quo of compensation. Interestingly, subsequent to *Orillia Soldiers*, in *Canadian Bank Note Co. v. Graphic Communicationns Union, Local 41-M,* [1999] O.L.A.A. No. 700 (Ont. Arb. Bd.), decision dated September 8, 1999, Arbitrator Brown indicated that he agreed with and preferred the Court of Appeal's *Orillia Soldiers* approach to his earlier decision in *Versa Foods*.

and the duty to accommodate in its *Commission scolaire régionale de Chambly v. Bergevin*,[27] a case arising under the Quebec *Charter of Human Rights and Freedoms*.[28] At that time, the Court indicated that the principles outlined in *O'Malley*[29] had been followed both in other provinces and in the federal sphere, and thus the principles were equally applicable in Quebec.

In *Chambly*, three Jewish teachers employed by the respondent school board took a day off to celebrate Yom Kippur. The school board granted them leave of absence, but without pay, and a grievance was brought seeking reimbursement for the day's pay. Historically, these teachers had been able to utilize special leave provisions contained in their collective agreement in order to be paid for this day off. When the school board ceased allowing the teachers to use this provision in 1983, the union brought a grievance.

The Supreme Court held that the school calendar, although neutral on its face, and so not directly discriminatory, had the effect of adversely discriminating against Jewish teachers. In the Court's view, as a result of their religious beliefs, and in the absence of some accommodation by their employer, they had to lose a day's pay to observe their holy day while the majority of their colleagues had their religious holy days recognized as holidays from work. As the Court stated:

> 18. In my view, the calendar which sets out the work schedule, one of the most important conditions of employment, is discriminatory in its effect. Teachers who belong to most of the Christian religions do not have to take any days off for religious purposes, since the Christian holy days of Christmas and Good Friday are specifically provided for in the calendar. Yet, members of the Jewish religion must take a day off work in order to celebrate Yom Kippur. It thus inevitably follows that the effect of the calendar is different for Jewish teachers. They, as a result of their religious beliefs, must take a day off work while the majority of their colleagues have their religious holy days recognized as holidays from work. In the absence of some accommodation by their employer the Jewish teachers must lose a day's pay to observe their holy day. It follows that the effect of the calendar is to discriminate against members of an identifiable group because of their religious

[27] [1994] 2 S.C.R. 525.
[28] R.S.Q., c. C-12.
[29] Ontario (Human Rights Comm'n) v. Simpsons Sears [1985] 2 S.C.R. 536.

> beliefs. The calendar or work schedule is thus discriminatory in its effect.

It followed, in the Court's view, that the employer had to take reasonable steps to accommodate the adversely affected individual or group of employees.

With regard to the duty to accommodate, the Court found it significant that because the annual salary of the teachers was based upon the 200 working days while children were at school, it would be impossible for a Jewish teacher to make up for a lost day by working on another day (for example a weekend or holiday). In short, teachers can teach only when the school is open and students are in attendance.

In the Court's view, the loss of a whole day's pay—that could not be made up in any way—had a very real impact on the teachers and their families. The Court readily found that replacing Jewish teachers on Yom Kippur and compensating them for their absence did not constitute undue hardship. The school board had provided no evidence that paying the salaries of the Jewish teachers would impose an unreasonable financial burden upon it. Furthermore, the Court pointed out that this would indeed be difficult for the board to establish, given that the collective agreement specifically provided for "special leave" provisions for the payment of teachers who were absent for what the parties considered to be a good or valid reason, as well as other leave provisions that applied to various situations. As the Court stated: "the collective agreement provides a flexibility that demonstrates that a reasonable accommodation could be made."[30]

The Court concluded 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."[31] The Court was also supported in this conclusion by the board's pre-1983 practice of paying teachers on Yom Kippur.

However, despite the result in *Chambly*, the impact of the decision has been relatively limited, with its result confined to situations where no scheduling changes were possible because of the nature of the workplace, and where there were pre-existing paid

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[30] *Ibid.* at par. 39.
[31] *Ibid.*, par. 40.

leave entitlements available in the collective agreement that could be invoked by the employees requesting paid leave without any risk of undue hardship to the employer. To a large extent, this is because, as set out below, arbitrators and courts have, explicitly or implicitly, invoked the *Orillia Soldiers* work for pay quid pro quo principle to trump the claim for religious accommodation.

The Intersection of Chambly *and* Orillia Soldiers*: Conflicting Interests in Religious Accommodation Cases*

In its 2000 decision in *Tratnyek*,[32] the Ontario Court of Appeal considered the case of an employee who requested a number of days off for religious purposes and was offered various options for being paid for the days, including using five mandatory unpaid days off, and using the extra paid days he had banked as a result of voluntarily working a compressed work week, as paid days for his religious days off. The employee declined the employer's offer on the basis of his view that these other days were available to other employees, and that it was discriminatory to require him to use them for religious observance purposes.

Although it also did not specifically consider the *Orillia Soldiers* decision, the court found that the employer had met its duty to accommodate by offering scheduling changes (such as the compressed work week) so that employees could fulfil their religious obligations without having to lose wages or encroach on pre-existing earned entitlements such as vacation time. According to the court, "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."[33]

Referring to *Chambly*, the court also held that "[j]ust as scheduling changes can provide reasonable accommodation in some cases, in others they will not. If the proposed scheduling change occasions significant hardship or inconvenience to the employee, other forms of accommodation must be explored."[34] In this respect, in the court's view, the result in *Chambly* would have been

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[32] Ontario (Ministry of Community and Social Services) v. OPSEU [2000] 50 O.R. (3d) 560.
[33] *Ibid.*, par. 37.
[34] *Ibid.*, par. 46.

different had reasonable scheduling changes been available and presented to the teachers; it was only because the day could not be made up that the Supreme Court of Canada held that employees were required to use their entitlements to paid days off in the collective agreement. Thus, nothing in *Chambly* stood for the proposition that employers cannot fulfil their duty to accommodate by offering appropriate scheduling changes, where those are reasonably available.

Echoing *Orillia Soldiers* (but not referring to it), the court observed that if scheduling changes were feasible, they would "enable employees to observe their religious holy days without loss of pay and without having to encroach on pre-existing earned entitlements, while at the same time completing their assigned hours of work**,** *thereby relieving the employer from having to pay them for days on which they provide no service.*"[35] However, whether the Court of Appeal was suggesting that there are circumstances where an employer may be required to pay for days on which an employee does not provide service because of a religious holiday is less than clear. In addition, the Court of Appeal's decision in *Tratnyek* did not have to address the application of the undue hardship standard in situations where (unlike in *Chambly*) the collective agreement does not provide for paid time-off entitlements available to be used for religious holidays, while at the same time (like in *Chambly*) there are no reasonable scheduling changes that could be made (e.g., if Tratnyek had not worked a compressed work week).

What appears clear, however, from the decisions in both *Chambly* and *Tratnyek* is that if they are available, employers must permit, and indeed can require, employees to use at least some kinds of paid time off collective agreement provisions and entitlements.

Outside of the judicial arena, three recent decisions reveal the extent to which adjudicators have been, directly or indirectly, affected by *Orillia Soldiers* in considering paid time off for religious holidays.

In *Toronto District School Board and CUPE, Local 4400, Unit B*,[36] Arbitrator Whittaker dealt with a teacher who had requested three days paid leave in order to celebrate Passover; the Board

[35] *Ibid*., par. 51 (emphasis added).
[36] [2008] 178 L.A.C. (4th) 182.

provided the leave, but without pay. The parties agreed that in the particular circumstances of the grievor's job as an English as a Second Language teacher, as in the situation in *Chambly*, the teacher's work could not be assigned or performed in a different way so as to permit him to make up time for the three days of leave. Arbitrator Whitaker set out that it is "well established that where an employee must forgo wages to observe religious holidays, that this is on the face of it, discrimination contrary to sections 5 and 11 of the Code." Thus, the issue before him was whether an employer must provide paid leave without receiving labour in return, as an appropriate accommodation of what would otherwise be discrimination.

Following *Chambly*, Arbitrator Whittaker had no trouble concluding that the employer's practice was discriminatory on its face. Referring to and relying on the *Orillia Soldiers* case, he noted that, in general, requiring labour in exchange for wages is a reasonable and bona fide requirement:

> [W]hether employer accommodation is directed to the needs of a disabled employee or an employee seeking to participate in religious observance, the goal and objective should generally be the same. That goal is to assign work in such a manner and to support and enable the employee to provide labour—in return for wages. The goal or objective is not to provide income continuation where no work can be performed.
>
> In dealing with claims for accommodation arising from disability, it is well accepted that an accommodated employee who cannot work a full schedule of hours is not entitled necessarily to be paid for those hours which cannot be worked. Why should it be different if the employee cannot work because of religious obligations rather than disablement?
>
> The employer's obligation is not to pay for unearned wages, but rather to reconfigure the work and/or its assignment, to the point of undue hardship.
>
> I conclude from this overview that the goal of accommodation in employment is to permit the employee to work and to obtain the benefit of compensation for work. The most essential feature of the wage/labour relationship is this exchange of two things of value—labour from the employee to the employer, and wages from the employer to the employee.
>
> In the grievor's circumstances this must mean that the employer is obliged to accommodate by doing whatever is possible to rearrange or

> reassign the grievor's work so that he can work the full number of days that remain to be worked in the long-term assignment for which he has posted—while being given the time off to attend to his religious observance.
>
> Accommodation is not the payment of wages for no work in exchange, but rather the facilitation of the opportunity to work all of the time available for the performance of work. It is the ability to earn full wages and to take the holy days off of work.

Arbitrator Whittaker noted that, given the agreement between the parties before him that there was no way for the employer to reassign or reschedule the grievor's work so as to permit him to work to make up the time for the days off, the obligation to accommodate up to the point of undue hardship had been met. As result, the grievor was not entitled to be paid for days off for religious leave, as the exchange of labour for compensation was a BFOR saved by s. 11(1)(a) of the *Code*.

One of the cases reviewed by Arbitrator Whitaker was *Markovic and the O.H.R.C. and Autocom Manufacturing*,[37] a decision of Human Rights Tribunal of Ontario Adjudicator Sherry Liang. The issue in that case involved a member of the Serbian Orthodox Church, who alleged that his employer had discriminated against him by refusing to provide paid leave for his observance of the Eastern Orthodox Christmas (which occurred in January). On behalf of the employee, the Human Rights Commission argued that two days of paid leave from work must constitute one of the options made available to an employee on an equal basis with other scheduling options. According to the Commission, an employer could avoid offering the two days of paid leave only if providing those days would cause the employer to suffer undue hardship.

After holding that a schedule of work based on holidays recognized under the *Employment Standards Act* is secular in nature, but discriminatory in effect, the Tribunal found that the duty to accommodate must "co-exist" with the regular contract of employment, which is based on the exchange of services for pay.[38]

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[37] [2008] H.R.T.O. 64.

[38] In this respect, both *Toronto District School Board* and *Markovic* also refer to the Supreme Court of Canada decision in *Hydro-Québec* [2008] S.C.C. 43 (CanLII). In that case, in considering the issue of an employer's duty to accommodate a disabled employee's long-term absence from work, the Court stated (echoing *Orillia Soldiers)* that*:* "The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not

Thus, although the Tribunal did not make reference to *Orillia Soldiers*, it applied its conception of the fundamental workplace quid pro quo—the exchange of services for pay. In the result, the Tribunal held that the duty to accommodate could be met by providing employees with options for scheduling changes that did not result in any loss of pay to the employee, including making up time when the employee was not otherwise scheduled to work, working on a secular holiday if the employer operated on that day, switching shifts with another employee, or where possible otherwise adjusting the employee's shift schedule. As the Tribunal concluded, "where the 'problem' is the need for time, the solution is the enabling of time."

As to *Chambly*, the Tribunal emphasized that in that case, not only were scheduling changes not available, but the required accommodation was simply to require the employer to permit the use of paid absences already provided for in the collective agreement. However, according to the Tribunal, the decision in *Chambly* did not support the Commission's position that an employer has a duty to provide up to two paid days off for religious observances, unless to do so would cause undue hardship. Rather, it was the combination of the provisions of collective agreement and the fixed work schedule in *Chambly* that led to the *Chambly* Court's conclusion. For this reason, *Chambly* did not establish as a general principle that employers must pay employees for time off for religious observances. As the Tribunal concluded:

> [51] The result in Chambly is in my view consistent with the principles I have expressed above. Absent the option of scheduling changes, the most appropriate solution was the use of a special leave provided for under the collective agreement. The Court of Appeal in *Tratnyek* concluded that the result in *Chambly* would have been different had reasonable scheduling changes been available (see *Tratnyek*, para. 49), and I agree with its understanding of the *Chambly* decision. The Supreme Court did not establish as a general principle that employers must pay employees for time off for religious observances.

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unfairly excluded where working conditions can be adjusted without undue hardship. However, the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration." As the *Markovic* tribunal put it: "Typically, the duty to accommodate is about the design and modification of workplace requirements to enhance the ability of certain employees to participate in the workplace without, at least in the first instance, dislodging the assumption of services for pay."

However, significantly, the Tribunal did state that other accommodation options would have to be considered where scheduling changes are not available, or where scheduling changes are available but there are individuals for whom none of the scheduling options are suitable, but did not identify what would or would not constitute undue hardship in such circumstances.

Finally, in *Turning Point Youth Services v. CUPE, Local 3501*[39] (Kartash Grievance), a board of arbitration considered a grievor who had requested two days off with pay to celebrate the Jewish holidays of Rosh Hashanah and Yom Kippur. The employer refused the request for pay, but offered various options for addressing the issue of pay for the days, none of which were acceptable to the grievor. The employer offered the grievor the options of working a compressed work week, using her earned entitlements under the collective agreement (such as vacation or float days), or changing her schedule so that she would not be scheduled to work at all on the two days.

Arbitrator Herman, after reviewing the judicial and arbitral case law, concluded that subsequent to *Chambly*, courts and arbitrators have held that payment for days off required for religious purposes is not the only reasonable method of accommodation for employees taking the days off. Although he did not review *Orillia Soldiers*, he specifically accepted the Court of Appeal's decision in *Tratnyek* as binding authority for the proposition that "an employer need not establish that it would cause undue hardship to pay employees for the day off before offering other options for reasonable accommodation, options that can in given circumstances include scheduling changes."[40]

Conclusion

Based on the law as it currently stands in Canada, the duty to accommodate to the point of undue hardship applies to employees who, because of their religious beliefs, cannot work on certain non-Christian religious holidays. The duty to accommodate applies not only because Christian employees receive two paid days off for Christmas and Easter but, more generally, because of

[39] [2008] 169 L.A.C. (4th) 388.
[40] *Ibid.*, par. 14.

the discriminatory effect of a secular work scheduled on employees with non-Christian religious beliefs.

Under case law to date, it seems clear that the duty to accommodate to the point of undue hardship does not automatically require that an employer simply pay employees for taking additional non-Christian religious days off work, at least where reasonable alternatives short of that outcome are available. Courts, arbitrators, and tribunals generally consider the availability of reasonable scheduling changes and the existence of discretionary collective agreement entitlements for taking paid time off as reasonable accommodations of employee religious beliefs. Standing alone, this does not seem objectionable. Where employee religious beliefs can be accommodated in a manner that is objectively reasonable, and that does not impose a hardship or material inconvenience for them, without imposing a loss of pay, then even in the absence of undue hardship on the employer, this would appear to be a reasonable accommodation, and there would not seem to be any compelling reason to obligate an employer to go any further.

What remains unsatisfactorily addressed, however, is the application of the undue hardship standard in a number of other situations, for example, where scheduling changes are not available, where no scheduling change can be made or an employee has a reasonable basis for objecting to proposed scheduling changes, or where there are not any collective agreement provisions permitting discretionary paid leave that can be utilized to accommodate the employee's interest in not losing pay. In those cases, can the employer meet its obligation to accommodate short of undue hardship simply by invoking the *Orillia Soldiers* principle of "no work, no pay" (as, for example, Arbitrator Whittaker appears to have accepted in the *TDSB* case)?

As reviewed above, there is certainly considerable support for the proposition that payment for time not worked is inconsistent with the fundamental nature of the employment relationship, and so with the existence of any duty to accommodate in employment. On this view, just as disabled employees cannot claim that they have the right under human rights legislation to be paid when they are unable to work, so too religious employees should not be able to claim the protection of human rights legislation in order

to be paid for their religious holidays when they are unable to work.

At the same time, it is difficult to reconcile this approach with the individualized approach to undue hardship that the duty to accommodate is supposed to and normally does require (including in *Chambly* where the Supreme Court of Canada explicitly took into account the lack of evidence from the employer that it would face any significant increase in costs or hardship if it paid employees for taking Yom Kippur off). As a result, where there are no reasonable or suitable scheduling or collective agreement alternatives available to accommodate the employee, it should not automatically be deemed to be undue hardship for an employer to be required to pay the employee for religious holiday time off. Instead, this should depend on weighing and assessing the actual evidence relating to such factors as the employer's size, the size of the functional unit in question, the number of employees who request the leave, the number of days of leave sought, the duties of the employees seeking leave, the potential disruptions to work flow or productivity, the potential risks if any to others, whether the employer would incur additional costs as a result of the employee's absence, the steps taken by the employee in requesting the paid leave, and the steps the requesting employee can take in assisting in the accommodation of the leave request.[41] In other words, instead of a per se rule that paid leave can never be required, the employer should have to establish, as it does in other accommodation contexts, that there would be a serious impact on it and its overall operations.

In this respect, the supposed analogy with the approach taken in *Orillia Soldiers* to disability-based discrimination is not particularly strong. Unlike the application of the quid pro quo principle of "no work, no pay" in the case of disability, in the case of religious holidays there has been a societal and legislative determination to provide paid time off for at least two Christian holidays. As

[41]Some of these matters were identified by Arbitrator Whittaker in an earlier 2000 decision in *Re Seneca College of Applied Arts and Technology and Ontario Public Service Employees Union, Local 561* (2000), 93 L.A.C. (4th) 355, where he was considering the factors to be taken into account in the application of a collective agreement provision requiring that requests for paid leave of absence for, inter alia, religious purposes would not be unreasonably denied.

a result, observant Christian employees do not face the same prospect of losing pay in order to observe their religious holidays as do non-Christian employees. In other words, the principle of "no work, no pay" has already been abrogated for at least two Christian holidays. It seems disingenuous, to say the least, to purport to extend it to non-Christians, at least in the case of two paid days off or religious holidays per year.

Even beyond two days, the fact that as a society we do pay the majority Christian religion for their holidays seems to diminish the applicability of the *Orillia Soldiers* principle to non-Christian holidays, whether there are two or more for any particular religion.[42] Simply because some religions have only two mandatory days when an adherent would be expected to absent him- or herself to engage in religious observance does not mean that equal treatment without discrimination will follow if adherents of other religions are limited to two days off with pay to observe their holy days.

This is not to say that non-Christians are *entitled* to paid time off for all of their holidays, but simply to suggest that an employer should not be exempted per se from being required to meet the undue hardship standard in cases of paid leave for non-Christian religious holidays. As Justice Cory stated in *Chambly*:

I recognize that other cases may demonstrate circumstances which would make reasonable accommodation impossible. For example, if the religious beliefs of a teacher required his or her absence every Friday throughout the year, then it might well be impossible for the employer to reasonably accommodate that teacher's religious beliefs and requirements. However, that is far from the situation presented in this case.[43]

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[42]In response to the argument that granting non-Christian employees more than two paid days off for religious holidays would be "reverse discrimination" of some kind, it would be to return to the most formal notion of equality to suggest that Christian employees suffer unacceptable discriminatory treatment. The purpose of accommodation is not to equalize the number of paid religious holidays among employees with different religious beliefs, but to further freedom of religion, short of imposing undue hardship on the employer and other employees. Furthermore, while under undue hardship analysis, the effect on employee morale is a legitimate interest; it cannot be a concern that itself is rooted in discriminatory attitudes and resentment.

[43]Commission scolaire régionale de Chambly v. Bergevin [1994] 2 S.C.R. 525, note 15 at par. 44.