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REFLECTIONS ON THE SCOPE AND LIMITS OF THE DUTY OF REASONABLE ACCOMMODATION IN THE FIELD OF RELIGION

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INTRODUCTION

Under Québec's *Charter of human rights and freedoms*[1], the State, individuals or corporations are sometimes required to adjust the legitimate standards, practices or policies they apply to all people, without distinction, to take into account the particular needs of specific categories of people covered by a ground of discrimination[2]. In Québec and Canadian law, this duty of "reasonable accommodation" ("reasonable" in the sense that it can be provided without "undue hardship") is considered to be a "*natural corollary*" of the right to equality[3].

Recognition for the duty of reasonable accommodation as a corollary of the right to equality[4], however, raises several other questions.

First, the application of the duty of reasonable accommodation in the religious field raises legal issues. Some involve the extent of the concepts at play, and the limits of the duty of accommodation. What is a religion? In religious matters, how far does the duty to accommodate extend, given that the duty is limited by the notion of undue hardship? What effect, if any, does the public nature of a given institution have on the application of the notion of undue hardship? Other, more specific questions involve the scope of the provisions of the Charter that provide for exceptions to the right to equality. For example, are non-profit institutions of an educational or religious nature subject to specific rules in connection with the duty to accommodate?

Reasonable accommodation in the religious field also raises social and political issues. If the strict application of the standards and practices of a given institution is challenged on the basis of the right to equality, but the accommodation sought appears to affect fundamental values such as equality between the sexes, then this calls into question the legitimacy of the legal solution. With regard to the right to wear a hidjab at school, for example, some people consider that the debate has focused too much on legal aspects and not enough on the underlying social and political issues[5]. Going beyond the specific question of the right to wear an Islamic veil, this approach challenges the relevance of reasonable accommodation as a legal tool to regulate and manage religious diversity.

To stimulate an enlightened public debate about the management of religious pluralism and to help ensure that cases eventually investigated by the Commission are dealt with in the same

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1 *Charter of human rights and freedoms*, R.S.Q., c. C-12 [hereinafter referred to as the "Charter" or the "Québec Charter", depending on the context].

2 José WOEHRLING, "L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse", (1998) 43 *R.D. McGill* 325, p. 328.

3 *Ont. Human Rights Comm.* v. *Simpsons-Sears*, [1985] 2 S.C.R. 536, paragraph 22.

4 The duty of reasonable accommodation is not connected with the possible creation of so-called "religious" arbitration tribunals with jurisdiction over certain disputes, especially in family matters. Recognition of such tribunals would involve a form of "legal pluralism" that would extend well beyond the concept of reasonable accommodation. In Québec, arbitration is prohibited in family matters and in "other matters of public order" : art. 2639 C.c.Q. The creation of this kind of tribunal is therefore not dealt with in this study.

5 See generally : Pierre BOSSET, "Le foulard islamique et l'égalité des sexes : réflexion sur le discours juridique institutionnel en France et au Québec", in *Citoyenneté et droits fondamentaux : une citoyenneté fragmentée, limitée, illusoire?* (M. Coutu, P. Bosset, C. Gendreau and D. Villeneuve, eds.), Éditions Thémis, 2000, pp. 303-321.

way, this study looks at the various issues involved. It is mainly intended to help the Commission pursue its mission, either when it rules on the requests made to it under section 71(7) of the Charter, or when it investigates cases that include requests for reasonable accommodation in the religious field.

As a first step, we will make some opening observations about reasonable accommodation as a legal duty and a way to promote integration. Next, we will deal with three specific questions :

- the notion of religion;
- the scope of the duty to accommodate in the religious field, especially in the case of public institutions and service providers;
- the possible impact of the application of section 20 of the Charter to certain non-profit institutions.

The staff and, eventually, the members of the Commission will be responsible for applying the general principles outlined here to eventual investigations and to requests received in the future.

1 THE LEGAL AND SOCIAL GROUNDS FOR REASONABLE ACCOMMODATION

The duty of reasonable accommodation first appeared in the Québec and Canada legal landscape in the mid-1980s. In a key judgment, the Supreme Court of Canada recognized that an apparently neutral rule (in this case, a work schedule) could have a discriminatory impact on an employee because it was incompatible with her religious observance[6]. The Court pointed out that a "natural corollary" of recognition of a right [in this case, the right to equal treatment] must be "*the social acceptance of a general duty to respect and to act within reason to protect it*"[7]. This principle led to the conclusion that, to give meaning to the standard of equal treatment, the employee's right required "*reasonable steps towards an accommodation by the employer*" that involved changing her work schedule.

The duty of reasonable accommodation (short of undue hardship) is, today, an integral part of the right to equality. Theoretically, accommodation can be required in connection with any of the fourteen grounds for discrimination prohibited by the Charter. Besides religion[8], courts in Québec and Canada now regularly apply the duty of accommodation to cases involving other

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6 *O.H.R.C. (O'Malley)* v. *Simpsons-Sears* (1985), cited above, note 3. The appellant, Mrs. O'Malley, was working as a saleswoman in a major department store when she joined the Seventh-Day Adventist Church. A tenet of this faith was that Sabbath must be strictly kept, which prevented her from working on Saturdays. Since her religious observance meant that she could not work on Saturdays when required to do so by the schedule, the employer demoted her to a part-time position. The complainant alleged discrimination on the basis of creed.

7 *Ibid.*, pp. 554 and 555.

8 See : *Central Alberta Dairy Pool* c. *Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489; *Central Okanagan School District No. 23* v. *Renaud*, [1992] 2 S.C.R. 970; *Commission scolaire régionale de Chambly* v. *Bergevin*, [1994] 2 S.C.R. 525; *Large* v. *Stratford (City)*, [1995] 3 S.C.R. 733; *Smart* v. *Eaton*, (1994) 19 C.H.R.R. D/446 (T.D.P.); *Autobus Legault* c. *Commission des droits de la personne et des droits de la jeunesse*, [1998] R.J.Q. 3022 (C.A.).

grounds for discrimination, including sex[9], pregnancy[10], age[11] and disability[12]. The main beneficiaries of accommodation[13] have been women and the disabled, given the new possibilities for making the rules of the labour market more flexible[14]. Recent jurisprudence recognizes that service providers have a duty of reasonable accommodation[15], which has important consequences for the management and organization of public services.

The basis for reasonable accommodation, though, is not just legal, since it also has a social function. Standards, which by nature do not take particular situations into account, can act to exclude the members of certain groups and compromise their ability to join the mainstream of society. In connection, for example, with the wearing of the hidjab in public schools, there is a risk that a prohibition will force the girls concerned to leave the public education system, compromising their right to public education. This must be taken into account[16]. In short, the acceptance of specific religious practices is not simply a question of legal analysis, but also of the ethics of responsibility. It requires other important aspects to be taken into consideration, such

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9 See : *British Columbia (Public Service Employee Relations Commission)* v. *B.C.G.S.E.U.*, [1999] 3 S.C.R. 3.

10 *Commission des droits de la personne* c. *Lingerie Roxana*, [1995] R.J.Q. 1289 (T.D.P.).

11 *Desroches* c. *Commission des droits de la personne du Québec*, [1997] R.J.Q. 1540 (C.A.).

12 *British Columbia (Superintendent of Motor Vehicles)* v. *British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868; *Commission des droits de la personne du Québec* c. *Collège Notre-Dame du Sacré-Cœur*, [2002] R.J.Q. 5 (C.A.); *Centre de la communauté sourde du Montréal métropolitain* c. *Régie du logement*, [1996] R.J.Q. 1776 (T.D.P.); *Commission des droits de la personne du Québec* c. *Emballages Polystar*, (1997) 28 C.H.R.R. D/76 (T.D.P.); *CEGEP John-Abbott* c. *Blouin*, C.S. Montréal, n° 500-17-018750-045, 10 June 2004.

13 See : Muriel GARON and Pierre BOSSET, "Le droit à l'égalité : des progrès remarquables, des inégalités persistantes", in *Après 25 ans, la Charte québécoise des droits et libertés*, vol. 2 (*Études*), Commission des droits de la personne et des droits de la jeunesse, 2003, pp. 81-82 (women) and 91-92 (the disabled).

14 See : Christian BRUNELLE, *Discrimination et obligation d'accommodement raisonnable en milieu de travail syndiqué*, Éditions Yvon Blais, 2001.

15 See the decisions cited in notes 9 and 11. See also : *Commission des droits de la personne* c. *Restaurant Scampinata*, T.D.P. Laval, n° 540-53-000002-935 (access to commercial premises). See also : *Eldridge* v. *British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, concerning the government's duty to take the necessary steps to ensure that deaf persons benefit equally from health services.

16 CONSEIL DU STATUT DE LA FEMME, *Réflexions sur la question du port du voile à l'école* (1995). The UN Committee on the Rights of the Child has recently reaffirmed the importance of this aspect. Commenting on the French law prohibiting the wearing of "ostensible" signs of religion affiliation in public schools, the Committee is concerned at the impact the law may have on the best interests of the child and the right of the child to access to education. The Committee recommended that France closely monitor the situation of girls being expelled from school as a result of the new legislation and that, when evaluating the effects of the legislation, France use the enjoyment of children's rights as a crucial criteria in the evaluation process. See : UNITED NATIONS (COMMITTEE ON THE RIGHTS OF THE CHILD), *Consideration of Reports Submitted by State Parties Under Article 44 of the Convention : Concluding Observations (France)*, UN Doc., CRC/C/15\Add.240, 4 June 2004 (§§ 25-26).

as integration into society and the role that key public institutions must play in promoting integration[17].

Last, it is important to note that taking action to obtain reasonable accommodation can, itself, promote integration. For minority groups, recourse to legal concepts and the court system tends to encourage political participation and integration, since it provides a forum in which citizenship can be exercised democratically using generally-accepted rules[18]. To quote from José Woehrling, recourse by minority religious groups to the charters of rights and, especially, the duty of reasonable accommodation encourages them to "*use and gradually assimilate the individualistic, rationalistic and secular values of liberal society*"[19].

As both a component in the integration strategy and a legal duty that forms an integral part of the right to equality, reasonable accommodation is part of the framework within which the management of religious diversity must, in Québec[20], be considered. This does not mean, however, that there is no need to examine the scope of the key concepts in this area, or the limits on the duty to accommodate.

2 RELIGION AS A CONCEPT

Religion, a key concept, can be understood in the strictest sense with reference to the major "historic" religions : Christianity, Islam, Judaism and Buddhism, for example. Protection under the Charter extends to the rites and precepts of religion, and the related rules of conduct. Freedom of religion includes not only the right to hold such religious beliefs as a person chooses, but also the right to *declare* religious beliefs openly, and the right to *manifest* religious belief by worship and practice or by teaching and dissemination[21]. Freedom of religion covers, for example, the right to observe a religious festival[22] or day of rest[23], or to wear distinctive clothes or headwear in public[24].

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17 On this topic, see the thoughts of Yves Lafontaine, then President of the Commission : "Égalité et pluralisme dans les institutions publiques : le rôle de la Commission des droits de la personne", in *Pluralisme, citoyenneté et éducation*, F. Gagnon, M. McAndrew and M. Pagé, eds., Paris, L'Harmattan, 1996, p. 228.

18 Pierre NOREAU, "Le droit comme vecteur politique de la citoyenneté", in *Citoyenneté et droits fondamentaux*, *op. cit*., pp. 323-359.

19 J. WOEHRLING, *op. cit.*, p. 401.

20 Compare with France, where the legal duty of reasonable accommodation, as known in Québec, seems to be incompatible *a priori* with the constitutional principle of a secular State, at least as put forward in recent official French documents (See : FRANCE (COMMISSION DE RÉFLEXION SUR L'APPLICATION DU PRINCIPE DE LAÏCITÉ DANS LA RÉPUBLIQUE), *Rapport au Président de la République*, December 2003 ("Rapport Stasi")). The dissimilarity of the legal contexts in Québec and France would make it difficult to transpose, in Québec, the French approach exemplified by the Act of March 15, 2004, "[translation] *to circumscribe, pursuant to the principle of a secular State, the wearing of signs or clothing to show religious affiliation in public schools, secondary schools and colleges*" (J.O. no. 65 dated 17 March 2004). On this point, see the expert opinions cited in: "Un texte de loi difficilement exportable", *Journal du Barreau* (Québec), vol. 36, no. 5 (15 March 2004), pp. 14-15.

21 According to the definition in *R.* v. *Big M Drug Mart*, [1985] 1 S.C.R. 295, at p. 336.

22 *E.g.*, *Commission scolaire régionale de Chambly* c. *Bergevin*, cited above, note 8.

However, a definition of religion that restricts it to the established precepts of the "major religions" does not take into account the divergences that may exist in the interpretation of those precepts. The question of whether a given religious practice matches a religious precept, codified or not in a sacred text, is highlighted in some of the Commission's investigations, as well as in the jurisprudence. For example, is the hidjab required, or not, by the Koran? Are Sikhs required to carry an authentic Kirpan[25]? Are Catholics forbidden to work on a Sunday[26]?

A definition based on the major religions also fails to take into account the fact that religious observance is increasingly influenced by modern values (individualism, freedom of conscience, a critical attitude towards authority, a focus on self-realization, etc.[27]), reflected in the existence of many different religious currents[28] and increasingly syncretic religious practices. Micheline Milot describes the situation as follows :

> "[Translation] An individualization of religious sentiment can be observed. In other words, for most people religious experience is no longer a group or community matter, but rather a personal quest. […] Traditional points of reference (God, the prayer, rituals) are reapplied freely by individuals, and merged, sometimes in unexpected ways, with spiritual content from a range of sources. Belief in God is one example of this. Over 80% of people, whatever their initial religious background, state that they believe in God or a higher being, but few rely on an image or meaning close to the official doctrine of the religion to which they belong."[29]

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23 *E.g.*, *Smart* c. *Eaton*, cited above, note 8; *O.H.R.C. (O'Malley)* v. *Simpsons-Sears* (1985), cited above, note 3.

24 These last two examples are mentioned in *General Comment 22* of the UN Human Rights Committee, which focuses on freedom of thought, conscience and religion (UN Doc. CCPR/C/21/Rev. 1/Add. 4 (20 July 1993), § 3. For an illustration in Canadian law, see: *Grant* v. *Canada (Attorney General)*, [1995] 1 F.C. 158 (authorization to wear a Sikh turban as a member of the Royal Canadian Mounted Police).

25 *E.g.*, *Commission scolaire Marguerite-Bourgeoys* c. *Singh Multani*, [2004] R.J.Q. 824 (C.A.), application for leave granted by the Supreme Court of Canada. See also *Pandori* v. *Peel Board of Education*, (1990) 12 C.H.R.R. D/364 (Ont. Bd. Inq.).

26 *E.g.*, *Smart* v. *Eaton*, (1994) 19 C.H.R.R. D/446 (T.D.P.).

27 On evolving values in Western society, see : François FOURNIER and Michel COUTU, "Le Québec et le monde 1975-2000 : mutations et enjeux", in *Après 25 ans, la Charte québécoise des droits et libertés de la personne* (vol. 2), *op. cit*., pp. 7 to 10.

28 Apart from traditional Christianity and the other major religions, over one thousand new religious and spiritual groups can be found in Québec : Louise GAGNÉ, "Nouvel âge, nouvelles croyances", *Santé Société*, vol. 12 (1990), no. 4, p. 43 (quoted in : COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Les symboles et rituels religieux dans les institutions publiques* (1999), pp. 1 and 2).

29 Micheline MILOT, *Laïcité dans le Nouveau Monde : le cas du Québec*, Éditions Brepols (Belgique), 2002, p. 116.

Last, a definition based solely on the major religions ignores some traditional forms of spirituality, such as Native spirituality[30].

Given the diversity of current forms of religious practice and the many different ways in which religious precepts can be interpreted, how should the concept of religion be defined in connection with a charter of rights?

Some clues can be found in a major judgment recently handed down in the case *Syndicat Northcrest* v. *Amselem*[31] by the Supreme Court of Canada.

In this case, the Supreme Court allowed apartment co-owners to install temporary succahs on their balcony in accordance with their religious beliefs, despite contrary rules contained in their declaration of co-ownership.

The appellants, all Orthodox Jews, were divided co-owners of units in luxury buildings. The appellants set up succahs on their balconies for the purpose of fulfilling the biblically-mandated obligation of dwelling in small enclosed temporary huts during the annual nine-day Jewish religious festival of Succot. The religious obligation to dwell in a succah during the festival of Succot was not contested. The syndicate of co-owners offered to allow a temporary succah to be set up in the gardens of the building, but challenged the view that the erection of a succah, even temporarily, on the balcony of each appellant constituted an obligation.

The Superior Court granted the injunction requested by the syndicate of co-owners[32]. The judge, relying on the testimony of a rabbi, concluded that the construction of a succah on the appellants' own balconies was not a religious obligation and that, as a result, the declaration of co-ownership could not be considered to infringe on their freedom of religion as guaranteed by the Québec Charter. This judgement was confirmed by the Court of Appeal[33].

In a split decision (5-4), the Supreme Court overturned the decisions of the lower courts, and confirmed the appellants' right to erect succahs on their balconies.

The majority decision of the Supreme Court, delivered by Iacobucci J., was essentially based on the provisions of the Québec Charter that guarantee fundamental freedom of religion (section 3).

The majority opinion focuses on the "*personal and subjective*" nature of religion. A claimant need not show some sort of objective religious obligation, requirement or precept to invoke freedom of religion, but simply that the action he intends to perform has religious[34] or spiritual signi-

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30 See : Ghislain OTIS, "La protection des religions autochtones : les trajectoires de l'action normative internationale", (2001) 42 *Droit et cultures* 29-37.

31 *Syndicat Northcrest* v. *Amselem*, Supreme Court of Canada, 30 June 2004 (2004 SCC 47, REJB 2004-66513).

32 [1998] R.J.Q. 1892.

33 [2002] R.J.Q. 906.

34 According to the Supreme Court, "*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-*

(… suite)

ficance for him. It is not necessary to prove the belief is based on a religious precept recognized by the religious authorities, or shared by a majority of believers. In the view of the Supreme Court, even a practice that may be considered a custom or cultural tradition rather than a religious precept is protected by the Charter[35] if the person claiming it sincerely believes in its religious nature (paragraph 68 of the decision).

A court may, however, rule on the sincerity of a claimant's belief where sincerity is in fact at issue : *Amselem*, paragraph 51. Clearly, the Supreme Court wished to avoid making religious freedom an excuse for neglecting contractual obligations.

Inquiring into a claimant's sincerity, however, does not mean that a court can rule on the validity of a religious belief. According to the Supreme Court, sincerity of belief implies an honesty of belief, in other words that the belief is "*neither fictitious nor capricious*" and "*is not an artifice*" (paragraphs 51 and 52 of the decision). In the Supreme Court's view, sincerity is a question of fact. The claimant's previous religious practices do not need to be proved. An individual's religious beliefs can change over time, since they are fluid and rarely static (paragraph 53). The fact that a claimant's religious beliefs are contradicted by his previous conduct is irrelevant. The Supreme Court does not consider that a claimant's sincerity needs to be attested by a religious expert giving evidence on the established practices of a given religion. Such a requirement would provide support for an "objective" vision of religion, an approach that, as we have seen, the Supreme Court rejects.

The idea of religion promoted by the Supreme Court in this case is similar to that defined in earlier decisions that emphasized the personal sincerity of the person who invoked freedom of religion[36]. The restraint exercised by the Supreme Court when dealing with individual beliefs is similar to that displayed by the Commission with regard to practices whose validity is sometimes challenged in terms of compliance with sacred texts, such as the right to wear an Islamic veil[37]. As pointed out by the Supreme Court (*Amselem*, paragraph 41), in philosophical terms, this way of considering freedom of religion is based on the ideas of personal choice, autonomy and freedom of the individual. By stressing these ideas, the Supreme Court has shown that it will not inquire into, and even less judge, by way of a sort of religious inquisition, the intimate beliefs of human beings.

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definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith" (paragraph 39 of the decision). In short, religious beliefs are beliefs whose origin is not secular or social, or are a manifestation of personal conscience : *ibid.*

35 Subject, of course, to the restrictions relating to democratic values, public order and the general well-being of the citizens of Québec (section 9.1 of the Charter). For example, the cultural practice of excision, which infringes the individual right to personal inviolability, is prohibited by the *Criminal Code* (section 248), since it goes directly against the principles of the Charter. On this point, see : COMMISSION DES DROITS DE LA PERSONNE, *Sexual Mutilation : unlawful interference with personal inviolability* (1994).

36 See especially : *R.* v. *Big M Drug Mart*, cited above, note 22; *R.* v. *Edwards Books and Arts Ltd.*, [1986] 2 S.C.R. 713; *R.* v. *Jones*, [1986] 2 S.C.R. 284.

37 See : COMMISSION DES DROITS DE LA PERSONNE, *Le port du foulard islamique dans les écoles publiques* (1994), in *Religious pluralism in Québec : a social and ethical challenge*, COM-389-4.1 (1995). See also : COMMISSION DES DROITS DE LA PERSONNE, *Recevabilité des plaintes de discrimination fondée sur la religion* (1985).

Clearly, the way in which the Supreme Court interprets freedom of religion can be validly applied to any form of religious discrimination prohibited by section 10 of the Charter. Freedom of religion and the right to protection against discrimination based on religion are largely interchangeable and, in practice, often overlap[38].

In short :

- Religion, within the meaning of section 10 of the Charter, covers not only established religions but also non-traditional or minority religions[39]. It also extends to any practices and beliefs connected to a given religion.
- A religious practice is protected by the Charter if the person claiming the practice sincerely and honestly believes in its religious nature. It is not necessary to show that the practice is based on a precept recognized by established religious authorities, or that it is shared by a majority of believers.
- Where the claimant's sincerity with regard to the religious belief or practice is challenged, the claimant's prior religious practices or the opinion of the relevant religious authorities can be relevant as proof, but are not required.

3 UNDUE HARDSHIP

In the field of religion, as in other areas, the duty of accommodation does not require unconditional compliance with all the particularities of an individual or group. The Preamble to the Charter specifies that the rights and freedoms of the human person are inseparable from the rights and freedoms of others and from the common well-being. This need to preserve reciprocal social links was demonstrated by the Commission as early as 1995 in a discussion paper on religious pluralism as a social and ethical challenge. The Commission invoked the spirit of the Charter :

> "The spirit of the Charter is the spirit of a social contract stating that individual rights and freedoms must be guaranteed by the collective will and, in return, must be exercised with proper regard for democratic values, public order and the general well-being.
>
> […]
>
> In our view, no valid, fair and realistic solution to conflicts of rights can possibly emerge from the current trend, where individuals and institutions alike are quick to claim the rights and freedoms to which they are entitled, but will not accept the responsibility for organizing a shared space and renewing the social bond so that others, too, can exercise their rights and freedoms.
>
> […]
>
> In the case of religion, rights and freedoms can soon be transformed into sacred absolutes placing constraints on society as a whole. If the limits of private choice and the need for reciprocity cannot be acknowledged, practised and managed by

[38] J. WOEHRLING, *op. cit.*, p. 364.

[39] Native spirituality should also be considered under the "religion" heading.

> individuals and institutions able to consent to arrangements of daily life without plunging into endless legal procedure, the chances are high that we will all lose.
>
> We therefore believe that religious pluralism should be treated like any other form of pluralism and subjected to certain limits established by the demands of life in society."[40]

The Supreme Court reached a similar conclusion when it introduced the duty of reasonable accommodation into Canadian law while stating that :

> "In any society the rights of one will inevitably come into conflict with the rights of others. It is obvious then that all rights must be limited in the interest of preserving a social structure in which each right may receive protection without undue interference with others."[41]

The duty of accommodation is limited, in legal terms, by the notion of undue hardship. No institution or corporation is required to provide "unreasonable" accommodation, in other words accommodation that would cause it undue hardship. As initially defined by the Supreme Court (with reference to the employer/employee relationship), undue hardship was based on two factors : undue interference in the operation of the employer's business and undue expense to the employer[42]. A third factor, the effect on the rights of other employees, was added later[43].

Christian Brunelle has proposed the following categorization of the factors currently taken into account in jurisprudence, doctrine or legislation, once again in the area of employer/employee relations. Clearly, the notion of undue hardship can cover a broad range of factors[44] :

1) The limits of financial and material resources

- the actual cost of the accommodation requested;
- sources of outside funding (loans, subsidies, tax credits and deductions, government assistance or compensation, personal contribution from the victim of the discrimination, etc.);
- the nature of the business or institution (size, workforce composition, organizational structure, production structure, private or public status, etc.);
- the total operating budget of the business (parent company and subsidiaries) or institution;
- the financial health of the business or institution;
- the economic context.

2) Infringement of rights

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40 COMMISSION DES DROITS DE LA PERSONNE, *Religious pluralism in Québec : a social and ethical challenge*, *op. cit.*, at p. 14.

41 *O.H.R.C. (O'Malley)* v. *Simpsons-Sears* (1985), cited above, note 3, pp. 554 and 555.

42 *O'Malley*, paragraph 23.

43 *Central Okanagan School Board District* v. *Renaud* and *Commission scolaire régionale de Chambly* c. *Bergevin*, cited above, note 8.

44 C. BRUNELLE, *op. cit.*, pp. 248-251 (references omitted).

- § risks for the health or safety of the employees, other employees or the general public;
- § the collective agreement;
- § the negative impact of the accommodation on other employees;
- § conflicts of interest.

3) Proper operation of the business or institution

- § relative interchangeability of employees;
- § adaptability of workplace, facilities and equipment;
- § impact on business productivity;
- § number of employees affected by the accommodation;
- § beneficial effect of the accommodation on other employees;
- § duration and scope of the accommodation.

Brunelle also lists other elements that should be excluded because of their lack of weight, including administrative inconvenience, alleged customer preferences and the fear of setting a precedent, as well as the risk of being the subject of a union complaint designed to prevent the implementation of the accommodation[45].

It is clear that, until now, the duty of reasonable accommodation and the counterbalancing criterion of undue hardship have mainly been applied in the area of employer/employee relations. However, many other situations of accommodation exist. As illustrated by recent jurisprudence and investigations at the Commission, service providers have also received requests for accommodation from their clients.

The list of factors used to assess undue hardship – which is, of course, non-exhaustive[46] – must be adapted to the particular situation of service providers, and reflect the fact that many of them are public institutions that have responsibilities towards the community as a whole[47]. The case of public schools provides an illustration of this point. Public schools must ensure compliance with legislative provisions dealing with compulsory school attendance, the number of days in the school year, program content and the language of instruction. These elements must be taken as fundamental and non-negotiable, as pointed out by the Commission in a little-known passage from its previous discussion paper on religious pluralism[48]. Another fact that must be taken into account is that accommodation does not always involve simply "tolerating" a given religious practice, but sometimes requires a *positive action*. The undue hardship caused by acceptance of the hidjab, for example, is not necessarily of the same nature or degree as that cased by a requirement to provide material facilities for use in worship by certain groups.

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45 *Central Okanagan School District N° 23* v. *Renaud*, cited above, note 8. See : C. BRUNELLE, *op. cit.*, at pp. 251 and 252.

46 In *Commission scolaire régionale de Chambly* v. *Bergevin*, cited above, note 8, p. 546, the Supreme Court stresses that the factors used to assess undue hardship "*are not engraved in stone*".

47 Pierre BOSSET, "Pratiques et symboles religieux : quelles sont les responsabilités des institutions?", in *Les 25 ans de la Charte québécoise*, Formation permanente du Barreau (no. 142), Éditions Yvon Blais, 2000, p. 61.

48 COMMISSION DES DROITS DE LA PERSONNE, *Religious pluralism in Québec : a social and ethical challenge*, *op. cit.*, p. 10.

Some public institutions have a captive or vulnerable clientele whose religious practices require changes that go beyond mere tolerance. Examples include public schools, detention centres and some institutions in the health and social services network, since their clientele is, by definition, vulnerable and, sometimes literally, captive. The *Education Act*, which states that public schools must "*facilitate the spiritual development of students*"[49], provides support for the idea that, in this area, school can be required to take positive action. The same is true of detention centres and health care institutions, which are required to provide services (or, in the case of detention centres, perform duties) while respecting the rights and freedoms of the individuals in their custody, in particular by taking their religious beliefs into account[50].

Where an institution's clientele is neither captive nor vulnerable, the underlying rationale for public institutions should be taken into account. They are generally created by a legislative act that defines their role, sets limits on their autonomy and specifies how their actions will be reviewed[51]. Although the duty of reasonable accommodation created by the Charter requires them to *tolerate* the exercise of certain religious practices, they are not places of worship. On these grounds, it is possible to suggest that public institutions other than those mentioned in the preceding paragraph, together with any similar institutions, are not required to implement *positive actions* in this regard, such as the creation of places of worship for their clientele[52]. On the other hand, it is not always easy to assess the "captive" nature of the clientele concerned. Whereas a religion that imposes weekly prayers does not seem to create a problem of "captivity" for its believers (in the sense that they do not have to abandon their everyday activities to attend worship), the same is not necessarily true of a religion that requires believers to worship several times a day. In addition, if an institution tolerates a ceremony that some people must observe, how can it ignore the material conditions in which it takes place? Does this not lead to a risk, not only of diminishing the dignity of the individuals concerned, but also of creating attitudes of disrespect or contempt that make it in actual fact impossible for them to practise their religion? The application of a distinction between "tolerance" and "positive action" makes it necessary, as demonstrated here, to take into consideration all the relevant factual elements, including the approach taken in comparable institutions.

4 THE CASE OF NON-PROFIT INSTITUTIONS

Section 20 of the Charter states as follows :

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49 *Education Act*, R.S.Q., c. I-13.3 (section 36).

50 For institutions in the health care network : *Act respecting health services and social services*, R.S.Q., c. S-4.2 (sections 2(8), 3(2) and 3(3)). For detention centres : *Act respecting correctional services*, R.S.Q., c. S-4.01 and : United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, reproduced in *Human Rights : A Compilation of International Instruments*, UN Doc. ST/HR/Rev.2 (1983), pp. 81-89 (rule no. 6). Consideration for the religious beliefs of prisoners may extend, for example, to an obligation to provide them with food that complies with their beliefs COMMISSION DES DROITS DE LA PERSONNE, *Le régime alimentaire des détenus de foi hébraïque : obligations des autorités carcérales* (1991).

51 René DUSSAULT and Louis BORGEAT, *Traité de droit administratif* (2e éd.), Presses de l'Université Laval, 1984, t. 1, p. 39.

52 In some cases non-legal considerations, such as a desire to extend a courtesy to its clientele, may encourage an institution to adapt policies in a way that resembles accommodation. Such policies are not called into question here.

> "20. A distinction, exclusion or preference […] justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution […] is deemed non-discriminatory."

Section 20 has a precise function : to promote the fundamental right of individuals to "*freely associate in groups for the purpose of expressing particular views or engaging in particular pursuits*"[53]. Individuals who join together to exercise this right are authorized by section 20, where it applies, to discriminate in a way that would otherwise be prohibited by the Charter. For example, a political party is authorized to hire only its own supporters to work at a party convention, despite the provisions of section 10 of the Charter that prohibit discrimination based on political grounds[54]. The rights of the group (in this case, the political party) would take precedence over the rights of an individual claiming discrimination[55].

What is the impact of these special provisions for non-profit institutions on the duty to accommodate, especially as it applies in the field of religion?

Before the provisions of section 20 that apply to non-profit institutions can operate, several conditions must be met.

First, the non-profit status of the institution must be verified.

Second, special attention must be paid to its underlying character. Only institutions of a charitable, philanthropic, religious, political or educational nature can avail themselves of section 20. In *Brossard (Town)* v. *Québec (Commission des droits de la personne)*, the Supreme Court of Canada stresses that this requirement must be read in the light of the underlying reason for the existence of section 20, which is to allow certain forms of discrimination that would otherwise be prohibited :

> "As I have said, s. 20 protects the right to associate freely in groups for the purpose of expressing particular views or for engaging in particular pursuits. Section 20 has, however, a limited legislative purpose : it is intended as an answer for "distinctions, exclusions or preferences" which would otherwise be discriminatory under s. 10. It is logical that s. 20 protection only be extended to groups for which the mere fact of associating results in discrimination founded on a s. 10 ground. The institution must have, as a primary purpose, the promotion of the interests and welfare of an identifiable group of persons characterized by a common ground under s. 10 : race, colour, sex, pregnancy, sexual orientation, civil status, age, religion, political convictions, language, ethnic or national origin, social condition, or handicap."[56]

In the view of the Supreme Court, then, a university that would normally be considered as a non-profit institution of an educational nature would not be able to rely on section 20 to justify a discriminatory distinction, exclusion or preference unless its primary objectives included promot-

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53 *Brossard (Town)* v. *Québec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279, p. 324.

54 *Brossard*, p. 331.

55 *Id.*, 324.

56 *Brossard*, p. 335 (emphasis added).

ing the interests and well-being of an identifiable group of individuals characterized by one of the grounds listed in section 10 on which discrimination is prohibited[57].

Similarly, in another case, a private school, even though it was a non-profit institution, was not able to rely on section 20 of the Charter to exclude a disabled student on the grounds that the student was allegedly unable to complete the school's physical education program. The Québec Court of Appeal noted that the development of the body through physical education was one of the objectives of the school's educational program, but it nevertheless considered that the primary mission of the school was to provide general academic instruction for its students :

> "[Translation] The College is still governed by the Government's basic school regulations and, unlike other schools that have applied for exemptions in order to provide intensive physical education, dance or music programs, the College does not benefit from any exemption of this kind. Its primary mission remains to provide academic instruction for its students. It does not offer a specialized sports program, and is not a sports school whose main object is to train elite sports players.
>
> The College does not therefore possess a particular mission connected to one of the grounds of discrimination listed in section 10."[58]

A non-profit institution without a specific mission connected to an identifiable group sharing a characteristic listed in section 10 of the Charter cannot, therefore, seek protection under section 20.

In any case, the Court of Appeal also highlighted the obligation incumbent on non-profit institutions to which section 20 applies to take into account, in their standards, the characteristics of the groups affected. The Court pointed out that, in accordance with the jurisprudence of the Supreme Court, employers and other groups governed by the Charter are required, in all cases, to take the characteristics into account when drafting their standards[59]. By incorporating the accommodation in the standard itself, each individual can be assessed on the basis of his or her personal abilities, instead of being judged on the basis of the presumed characteristics of the group. Reasonable accommodation, short of undue hardship, is an integral part of section 20, which cannot be relied on unless a reasonable accommodation is already provided for in the standards of the non-profit institution concerned[60].

In short :

- A non-profit institution without a specific mission connected to an identifiable group sharing a characteristic listed in section 10 of the Charter cannot seek protection under section 20.

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57 For an example of such a university, see *Trinity Western University* v. *British Columbia College of Teachers*, [2001] 1 S.C.R. 772. The university involved was affiliated with an evangelical church.

58 *Commission des droits de la personne* c. *Collège Notre-Dame du Sacré-Cœur*, cited above, note 12, pp. 9-10.

59 *British Columbia (Superintendent of Motor Vehicles)* c. *British Columbia (Council of Human Rights)*, cited above, note 12, pp. 880-881. (See : *Collège Notre-Dame*, cited above, p. 10.)

60 *Collège Notre-Dame*, cited above, p. 10.

- Non-profit institutions to which section 20 applies are, in any case, required to provide for reasonable accommodation, short of undue hardship, in their standards, in a way that takes into account the characteristics of the groups affected by the standards. The provisions of section 20 do not, therefore, make any substantial change to the duty of reasonable accommodation incumbent on the institutions.

CONCLUSION

The duty of reasonable accommodation, short of undue hardship, is an integral part of the right to equal treatment, as defined and applied by courts in Québec and Canada over the last two decades. It underlies the way in which many different institutions, both public and private, manage the question of diversity. It is also a component in Québec's immigration and integration policies[61].

In the field of religion, the application of the duty of reasonable accommodation, short of undue hardship, raises questions that the Commission must sometimes deal with in the pursuit of its mission. This study attempts to circumscribe the extent and limits of the duty of accommodation.

Three important, and often neglected, themes run through the study. As a conclusion, it seems appropriate to highlight them here[62] :

- All citizens enjoy the rights and freedoms guaranteed by the Charter, regardless of whether or not they belong to a minority group.
- Equality does not always mean equal treatment. Sometimes treatment must be differentiated to ensure equality between individuals.
- Reasonable accommodation must be based on individual rights. It does not create a recognized collective right for religious groups.

The elements presented here for analysis and discussion will, we hope, enable the notion of reasonable accommodation to be used in a way that takes into account the three themes outlined above, the role played by reasonable accommodation as a tool for social integration, and the scope and limits of the legal concepts analyzed here.

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61 MINISTÈRE DES COMMUNAUTÉS CULTURELLES ET DE L'IMMIGRATION (QUÉBEC), *Plan d'action gouvernemental en matière d'immigration et d'intégration* (1991).

62 See : CONSEIL DES RELATIONS INTERCULTURELLES (QUÉBEC), *Laïcité et diversité religieuse : l'approche québécoise* (2004), p. 52.