Police and the Duty of Reasonable Accommodation

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I. INTRODUCTION

I thank you for inviting me to speak on this emerging and important topic. In our increasingly diverse society, with a growing consciousness of the right to equal treatment by law and equal benefits of the law as a central tenet of democratic citizenship, there is a need to explore the role that the state has in giving meaning and substance to people's right to equality. I hope that this forum will make a significant contribution to such an exploration.

I must begin with two disclaimers.

First, the views that I am going to express are my personal views, and not those of the Toronto Police Services Board. I hope, though, that my colleagues will agree with what I have to say!

Second, I will be speaking as a lay person, not as a legal scholar or expert. However, having had the opportunity and the privilege to grapple with the complex issue of reasonable accommodation in a number of capacities, I hope I will have some meaningful thoughts to offer this afternoon.

II. THE FRAMEWORK OF EQUALITY

My point of departure is the conception of a democratic society proposed by the great American scholar, John Dewey. In his 80th year, by way of a summation of his life-long engagement with the idea of a democratic society, Dewey said:

> Intolerance, abuse, calling of names because of differences of opinion about religion or politics or business, as well as because of differences of race, color, wealth or degree of culture, are treason to the democratic way of life. For everything which bars freedom and fullness of communities sets up barriers that divide human beings into sets and cliques, into antagonistic sects and factions,

> and thereby undermines the democratic way of life. Merely legal guarantees of the civil liberties of free belief, free expression, free assembly are of little avail, if in daily life freedom of communication, the give and take of ideas, facts, experiences, is choked by mutual suspicion, by abuse, by fear and hatred.[1]

Dewey uttered these words in 1940, about eight years before the Universal Declaration of Human Rights was proclaimed by the United Nations. The vision of a democratic way of life based on certain freedoms, that he articulates here, anticipates the Declaration in some sense and reminds us of the ideal of equality that had begun to take shape in his time.

This concept of an associative social order based on free transaction among people presupposes a relationship of equality. By referring to factors such as intolerance, abuse and calling of names as "treason to the democratic way of life," Dewey signaled the fundamental importance of equality for ensuring a democratic society. And the equality that underpinned his notion of a democratic way of life was not between individuals but groups that constituted a society. When groups experienced a relationship of equality, the free association and communication between individuals that his remark quoted earlier became possible.

I believe that the developments in legal theory, political theory and jurisprudence in the fifty years since the proclamation of the Universal Declaration of Human Rights have focused very much on clarifying what constitutes equality, the conditions that help or hinder equality in all its forms, and the ways and means to achieve, foster and protect equality.

In my mind, the concept of reasonable accommodation is very much an integral component of this ongoing exploration of equality as a vision and a condition of democracy.

It is not necessary for me to go into international or Canadian legislation and jurisprudence on this question. I would, however, like to discuss the framework of equality that has emerged in Canada because it is within this framework that we need to consider the duty of the police to provide reasonable accommodation to particular members of the public.

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[1] John Dewey, "Creative Democracy – The Task Before Us" in *The Philosopher of the Common Man: Essays in Honor of John Dewey to Celebrate His 80th Birthday* (New York: G. P. Putnam's Sons, 1940) at 225.

In Canada, our conception of equality is best articulated in the *Canadian Charter of Rights and Freedoms*, the *Quebec Charter of Rights and Freedoms*, and the human rights codes. Marc Gold, a former associate dean at Osgoode Hall Law School, remarked in a paper in 1985:

> If anything is clear about the subject, it is that conceptions of equality change over time .... In truth, the evolution of our conceptions of equality mirror [sic] our changing views about the proper relationships between individuals, groups and government. All that can be predicted with confidence is that the legal community will be wrestling with these issues for a long time to come. It falls on all of us to ensure that this struggle yields just and sensible results.[2]

Your deliberations are a part of this process of arriving at a "just and sensible" conception of equality. From our vantage point today, we can make certain observations on where we are on this issue.

First, our equality laws enumerate specific grounds for protection in recognition of past unequal treatment based on stigma as well as out of concern that legislative decisions may continue to burden the politically powerless if they are not explicitly protected.

Second, our conception of equality requires that no discriminatory impact flow from the content of the law, application or administration of the law as well as benefits of the law.

Third, our conception of equality recognizes the relevance of positive and/or compensatory action to ensure that the content, administration and benefits of the law are experienced equally by groups and members of groups protected under the enumerated grounds.

Fourth, accommodation is a form of positive and/or compensatory action to ensure that particular groups and members of those groups are not treated unequally by the content and administration of the law and are enabled to enjoy equal benefit of the law. It is based on the understanding that true equality does not mean treating everyone the same without regard for the fact that members of enumerated groups are unable to enjoy equal benefits for reasons having to do with differences between their and

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2 Marc Gold, "Equality: What Does It Mean?" in *Equality Rights and Employment Law: Preparing for Fundamental Change* (Toronto: The Canadian Institute for Professional Development, 1985) at A-28.

the dominant social groups' culture, norms, practices, expectations and assumptions, etc. as reflected in the ways in which social institutions function.

Fifth and finally, accommodation in the provision of services is expected to be reasonable because, as the Supreme Court of Canada noted in the *Gismer* decision of 1999, there may be "legitimate" organizational or institutional "objectives" which cannot be sacrificed "without incurring undue hardship."[3]

This is the framework of equality within which I propose to explore the challenge of providing reasonable accommodation in the delivery of policing services. For obvious reasons, experience of policing in Toronto is my frame of reference.

III. CHALLENGE OF POLICING A DIVERSE COMMUNITY

As Toronto's Chief of Police William Blair and I state in our Business Plan for 2009-2011:

> Toronto is Canada's largest and one of its most dynamic and diverse municipalities, with an enviable international reputation. We are not, however, complacent about the future. Shifts in City demographics, crime, the economy, our urban environment, technology, and a wide variety of international pressures all combine to create complex challenges for policing …
>
> Our commitment to non-biased, non-discriminatory and accountable practices in the delivery of policing services and management of human resources, and to community policing, are common threads woven throughout the Priorities and goals [of the Business Plan].[4]

Policing in Toronto is required to confront challenges in providing accommodation based on virtually every ground enumerated in the *Charter* or protected under the province's *Human Rights Code*.

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

4 Toronto Police Service, *2009–2011 Business Plan*, at 2, online: <http://www.torontopolice.on.ca/publications/files/brochures/2009-2011business_plan.pdf>.

Obviously, Toronto is not unique in this respect, except in terms of the scope of the challenge.

Thus, reviewing the trends and prospects in the 21st century related to policing our diverse society in the book *Contemporary Issues in Canadian Policing*, Stephen Nancoo notes "an increased recognition in the policing community that a shift from the predominantly traditional form of policing to a new paradigm of policing is necessary."[5] Although Nancoo devotes a section to the troubling phenomenon of racial profiling, curiously absent from his unproblematized review and proposals is any notion of equality and its concomitant, the need for positive and/or compensatory measures, such as accommodation, in police response to diversity.

IV. ACCOMMODATING SPECIAL NEEDS – SOME RESPONSES

Nevertheless, police organizations have begun to provide certain types of reasonable accommodation in their interactions with the public without much difficulty or resistance. Underlying these is the fact that delivery of police services is subject to the *Canadian Charter of Rights and Freedoms* and the *Ontario Human Rights Code*, as the province's *Police Services Act* makes clear. According to the *Act*, police services in Ontario will be provided in accordance with a set of principles, which includes the following two principles:

> 2. The importance of safeguarding the fundamental rights guaranteed by the *Canadian Charter of Rights and Freedoms* and the *Human Rights Code*.
>
> …
>
> 5. The need for sensitivity to the pluralistic, multiracial and multicultural character of Ontario society.

Police services must, therefore, order their activities so as not to contravene the rights guaranteed under the *Charter* and the provincial *Human Rights Code*.

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5 Stephen E. Nancoo, "The Police and the Diverse Society: Trends and Prospects in the 21st Century." in Stephen E. Nancoo, ed., *Contemporary Issues in Canadian Policing* (Mississauga: Canadian Educators' Press, 2004) at 491.

In accordance with its legislated mandate under Section 31 of the *Police Services Act*, our Board has adopted policies that, directly or by implication, provide for the accommodation of special needs of members of enumerated and protected groups. At the same time, the Service has implemented a number of procedures that set out the scope of accommodation to be provided on certain grounds.

These include, for example, accommodation of special needs of those in police cells related to meal requests or access to prescription medication, and, in interactions with members of the public generally, these include avoidance of events involving the community on certain days of the year and provision of translation and interpretation to those who cannot communicate in English.

In relation to all of the types of accommodation listed above, the Police Services Board and the Police Service have put in place policies and procedures to ensure routine compliance by Service personnel. Thus, the Service procedure on "Meal Provision for Persons in Custody" directs that alternate food be provided if a person's religious beliefs so require, while the procedure on "Interpreters" requires Service members to make their best effort to ascertain the need for and to obtain interpreter service when dealing with members of the public. As the procedure points out, regular contractual arrangements exist with interpreter and language service providers, which can be called upon if an interpreter is not available at the scene. It is to be noted that neither of these procedures identifies a threshold for undue hardship. The procedure for dealing with a request for access to prescribed medication from a person in custody, on the other hand, sets out a number of conditions clearly intended to ensure safety and to guard against misuse or harm—and, by implication, the organization's liability.

Voluntary provision of accommodation, however, has not always been the case. Certain types of accommodation for women and transgender/transsexual persons were, for example, preceded by considerable, prolonged and highly public community advocacy, with initial police response marked by denial and resistance. I am referring to the settlement in 2004–2005 of a human rights complaint filed by the Toronto Women's Bathhouse Committee and a number of individuals against the Toronto Police Services Board and several individual police officers.

The complaint arose from a police raid in September 2000 on a women's bathhouse called the Pussy Palace. The incident caused a good

deal of public outcry and led to the formation of the Toronto Women's Bathhouse Committee. It took almost five years of advocacy and effort for the resulting human rights complaint to be settled. The comprehensive settlement committed the Board and the Service to develop certain new policies and procedures as well as to provide training to Service members related to the grounds of the complaint. These policies and procedures are an example of entrenching a far-reaching form of accommodation into the daily practice of a police organization.

The first policy is entitled "Police Attendance at Locations Occupied Solely by Women in a State of Partial or Complete Undress." It requires that the Chief of Police shall develop and maintain procedures and processes to ensure that police officers attending "locations occupied solely by women in a state of partial or complete undress shall conduct themselves in a manner consistent with human rights principles, giving consideration, in particular, to issues of gender sensitivity and women's right to privacy."

The settlement produced a second policy related to the specific needs of transgendered or transsexual individuals, and it concerned their search and detention. The policy requires that when dealing with transgendered or transsexual individuals, police officers shall make every effort to be sensitive to human rights, privacy issues and stated preference as to the gender of the officer(s) conducting the search.

In order to ensure that the accommodation provided for by this policy was reasonable and did not cause undue hardship, the complainants and the Human Rights Commission agreed that such accommodation will not jeopardize officer safety or safety of the individual, and will take into account the need to conduct the search. These considerations are addressed in the Service procedures related to the search and lodging of transgender/transsexual persons.

Lastly, one of the most significant initiatives in Toronto is the development of a comprehensive Race and Ethnocultural Equity Policy. I consider it to be a key building block in dealing with the community concern about racial discrimination in the delivery of police services, including racial profiling. The policy declares the Board's commitment to ensuring that "The Toronto Police Service will provide services… in a way that is equitable, respectful, inclusive and culturally competent."

According to this policy, "Discriminatory treatment of members of the public or of the Service based on race, sex, place of origin, sexual

orientation, disability and socio-economic status will not be tolerated." And it requires the Chief of Police to develop procedures to implement this policy in a number of areas, including service delivery, which is defined as follows:

> Service delivery includes all those ways in which members of the Toronto Police Service interact with the public. This includes, but is not limited to stops, searches, execution of warrants, response to 911 calls, participation in public events, membership of police-community committees, partnership and outsourcing arrangements.

While the Race and Ethnocultural Equity Policy does not explicitly address the issue of accommodation, I submit that by setting out a clear expectation as to how services will be provided and by declaring a zero tolerance for discriminatory treatment based on grounds that it enumerates, the policy establishes the framework for providing accommodation. I would further suggest that by introducing the tests of equity, respect, inclusion and cultural competence, it establishes a bar for undue hardship that is quite high.

In conjunction with the Race and Ethnocultural Policy, the Board also approved a Culturally Significant Days Policy, which is very directly related to police interactions with the community. It named nineteen days as "culturally significant." Given the Board's commitment "to respecting and embracing the racial and cultural diversity of the community," it declared that "the Board and the Chief of Police shall take these dates into consideration when scheduling meetings involving the community."

I regard this policy to be an important element in our effort to transform the Police Service from a monocultural to a multicultural organization. The need for this policy became apparent to me when I attended our annual conference of community-police liaison committees one year and realized that Muslim members of these committees were absent because the event was being held during the month of Ramadan. It is, to me, an example of anticipating the need for accommodation based on creed and proactively providing for it.

It is significant that the Toronto Police Services Board and the Toronto Police Service have undertaken many of these changes voluntarily. The fact is that while there is a growing consensus that the changing demographics of cities like Toronto call for "a new paradigm of policing," it has been difficult for police organizations to accommodate all

types of special needs of people from the enumerated and protected groups, except through settlement of human rights complaints or orders of tribunals—as in the case of our Bathhouse settlement.

Police organizations have found it difficult to voluntarily provide for or proactively create the conditions for accommodation. To some extent, this has been due to failure or refusal to understand the concept. But more importantly, the difficulty has stemmed from inability to objectively determine in every instance what constitutes reasonable accommodation and to establish the parameters of undue hardship in the context of policing. There may be a tendency to invoke the defence of undue hardship too easily or too quickly. Conversely, since undue hardship in a policing context may have to do with operational imperatives rather than resources, it may be quite difficult to set the right bar.

V. ACCOMMODATING SPECIAL NEEDS – SOME CHALLENGES

Let me use a few examples to illustrate the point I am making. These examples show the range of special needs that police organizations are called upon to accommodate, and some of the complexities involved in them from a policing perspective. Even the accommodation provided by our Board and the Service related to meals, prescription medication, culturally significant days and language interpretation that I have described earlier, while apparently simple, can pose difficult issues.

My first example concerns accommodation related to prescription medication. The Service procedure balances the individual's right to prescription medication against safety considerations. In certain circumstances which give rise to doubt in the mind of the Booking Officer, the procedure provides for consultation with a physician. Consider a situation in which a person in custody informs the Booking Officer regarding a medical condition such as diabetes, which would be considered a disability. The person produces medication that appears to be prescribed. However, the container does not have any name on it, for which there can be any number of reasons. Under the procedure, the medication cannot be provided even though the condition, if true, requires that it be taken regularly. At some point during custody, the person's condition deteriorates.

Should the Booking Officer exercise discretion and provide the medication even though doing so would contravene procedure? What if

the deterioration had nothing to do with denial of medication? What if the medication did not actually belong to the person concerned, was stolen or being taken for purposes other than that for which it is meant?

Would denial of the medication for these and similar reasons constitute denial of accommodation?

My second example concerns another disability, namely, Post-Traumatic Stress Disorder (PTSD). During investigation of a complaint of sexual assault, the complainant requests to be interviewed by a woman police officer and in a space that is not too confining. She claims to suffer from PTSD and informs that, as a result, she is intimidated by men in authority and feels suffocated by proximity of bodies in confined spaces.

Her request is not met for reasons of investigative exigencies and practicality. She must be interviewed promptly, and by the officers who are charged with the investigation. Therefore, the investigators, who are two men, proceed with the interview in one of the designated interview rooms, which is quite small and windowless.

Later, when she recalls details that appear to vary from the information provided in the original interview, her credibility is called into question. She responds that the failure to accommodate her request triggered her PTSD. It caused her to be disoriented and confused.

Do the reasons of investigative exigencies and practicality in this example outweigh the request for accommodation?

My final example has to do with accommodation based on creed. An individual of the Sikh faith seeks to enter a courthouse bearing the kirpan. The Service procedure on court security bans anyone from carrying a gun or any edged weapon into the building, and gives no discretion to court security officers. As such, the officer on duty denies this person entry, but offers certain alternatives. The individual rejects them on the ground that his religion requires him to wear the kirpan. He alleges that refusal to let him wear his kirpan into the courthouse constitutes discrimination, given that the kirpan is a religious symbol and there is no evidence of its ever having been used as a weapon.

By way of rejoinder, it is pointed out that he was offered options that would have allowed him entry to the premises. The man happens to belong to a sect of the Sikh faith which does not permit alternatives such as the wearing of a symbolic kirpan-shaped pin on the lapel or the turban,

or wearing a small version of the kirpan in a sheath under one's clothing. These alternatives are acceptable to other sects of the faith.

Is the application of a uniform standard justified in this specific case because of safety considerations?

I have mentioned earlier that Ontario's *Police Services Act* calls upon police agencies to conduct their business in a way that safeguards the fundamental rights guaranteed by the *Canadian Charter of Rights and Freedoms* and the *Human Rights Code*, and that is sensitive to the pluralistic, multiracial and multicultural character of Ontario society. As the above examples suggest, in adhering to these two principles of the *Act* and dealing with the requirement to accommodate special needs arising from them, police organizations must take into consideration matters of safety to the community, the individual concerned as well as themselves, of investigative exigencies and of practicality in determining the parameters of undue hardship in the context of policing.

It is my view that it is this challenge of operational imperatives rather than resources, on one hand, and refusal or failure to understand the concept of accommodation, on the other, that has stood in the way of police organization's ability to proactively and voluntarily accommodate a broad range of special needs.

This is not to deny that lack of knowledge, skills and understanding, resistance, stigmatization of certain groups, and inherent biases of police culture may also not be factors to be considered. Therefore, it is incumbent upon police services boards and police services, as a first step, to critically examine their assumptions, policies, procedures, training and education in order to discharge fully their obligations under the *Charter* and the human rights laws of Canada. As I shall now point out in the final part of my presentation, this is what we are attempting to do in Toronto.

VI. ACCOMMODATING SPECIAL NEEDS – A PROACTIVE APPROACH

I believe that an important element of the duty to accommodate is the elimination of or changing of rules, policies, practices and behaviours that may have a discriminatory impact on protected or enumerated grounds. The seminal case in this regard is the 1999 Supreme Court decision in the case of *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* (also known as

the *Grismer* case),[6] to which I have already made reference. In deciding on the *Grismer* case, the Supreme Court extended to the area of receipt of service a unified test related to the defense of bona fide justification from its earlier decision in the employment related case of *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union* (or the *Meiorin* case)[7].

In this case, the Supreme Court clarified the responsibility of employers and service providers to ensure that all barriers to participation for people protected under human rights law are eliminated from their policies, rules, standards, practices, and services at the design stage. Thus, employers and service providers must ensure that they incorporate accommodation into their policies and practices as far as possible, up to the point of undue hardship.

In Toronto, we are attempting to make the changes consistent with this understanding through our Human Rights Project.

Upon examining public complaints to the Ontario Human Rights Commission related to policing services in Toronto, particularly complaints of race-based discrimination such as racial profiling, it became apparent to the Board and the Chief of Police that we needed to bring about a culture change in the way the organization had historically dealt with questions of bias in policing. Consequently, we explored with the Ontario Human Rights Commission the possibility of working as partners rather than as adversaries to identify and remove any systemic practices related to service delivery, human resources, training and education, and accountability that could have a discriminatory impact.

As a result, on May 17, 2007, on behalf of the Toronto Police Services Board, the Toronto Police Service and the Ontario Human Rights Commission, I, along with Chief Blair and Chief Commissioner Barbara Hall signed a Human Rights Project Charter document formalizing a three-year collaborative approach to incorporate human rights and anti-racism perspectives in all policing activities. The project aims to develop tools and processes to identify and eliminate discrimination in all areas, including the delivery of services to the larger community.

I believe that this project is noteworthy for several reasons. First, it acknowledges the responsibility of police organizations to take an

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6 [1999] 3 S.C.R. 868.

7 *Supra* note 3.

affirmative approach to issues of equality in the provision of services. Accommodation of special needs, in my mind, is integral to this affirmative approach. Second, it recognizes that ensuring the delivery of equitable and inclusive police services with full regard for the protected and enumerated grounds involves a process of changing the organizational culture. And third, it accepts that in order to provide equitable and inclusive police services, there must be comprehensive systemic change, necessary training and education across the organization, and effective systems of accountability. These, I believe, are essential ingredients of any effort to create the systemic conditions and the institutional climate for a receptive attitude to accommodation, based on knowledge and understanding.

VII. CONCLUSION

Policing performs a very important service in our communities, and police leaders recognize that our changing society requires "a new paradigm of policing." As part of that new paradigm, they are called upon to ensure that the practices of their organizations as service providers ensure that every member of the society is treated equally in terms of the content of the law, application or administration of the law as well as benefits of the law. Understanding the concept of accommodation of special needs as well as willingly and affirmatively providing for it without invoking the defence of undue hardship too quickly are integral to the challenge of developing the new paradigm of policing based on principles of equality. As I hope to have shown, police organizations are dealing with this challenge. Yet, considerable work remains to be done. I am confident that your work will greatly assist police organizations in meeting the challenge successfully.