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The duty to accommodate is critical to the fight for equality for the disadvantaged. In this paper, David Lepofsky provides an overview of the duty to accommodate and argues that it is vital to approach that duty in a purposive way. In Lepofsky's view, the purposes of the duty include overcoming systemic discrimination, protecting against direct and intentional discrimination, enhancing respect for the individual in society, and fostering public tolerance.

According to Lepofsky, the core of any accommodation is the tailoring of the work rule, practice, condition or requirement to the specific needs of the affected individual or group. The duty to accommodate has both procedural and substantive elements, requiring consideration of the validity of the substantive reasons for the failure to accommodate, as well as the sufficiency of the deliberative and investigative process in response to a request for accommodation. The critical factor, however, is undue hardship. This involves an examination of the substantive reasons for declining to accommodate, an evaluation of whether the adverse effects of accommodation are factually based and, if so, an assessment of whether the adverse impact amounts to undue hardship.

The author responds to what he identifies as six prevalent misconceptions about the duty to accommodate: contrary to what some may believe, he argues that the duty is not restricted to cases of indirect or adverse effect discrimination; that the duty produces benefits for employers; that differential treatment is necessary to attain the goal of equality of opportunity; that it is far less onerous to employers than many other regulatory burdens; and that the focus on individual rights does not run contrary to group rights.

Lepofsky concludes by stating that the duty to accommodate is a legal response which cannot, in and of itself, overcome all barriers to full participation in the community. It does, however, make an important contribution to advancing the goals of human rights legislation.

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INTRODUCTION

One of the greatest breakthroughs in the struggle for equality in Canada was the recognition that for discrimination to be effectively eradicated, it must be viewed through the eyes of its victims. This led to legislative and judicial recognition that human rights statutes ban both intentional and unintentional discrimination. An important corollary to this determination is the imposition under human rights legislation on employers, landlords, service providers and governments of a duty to accommodate the individual needs of women. disabled persons, religious minorities and others protected by human rights legislation, except where their accommodation causes undue hardship.

Even though the concept of a duty to accommodate in anti-discrimination laws can be dated in the United States back over two decades, and even though it has had some kind of a foothold in Canada for over ten years, this duty was the subject of few judicial pronouncements before the mid-1980s. Even as of now, it has been the focus of only minimal academic comment and exploration in Canada. This is regrettable, since the duty to accommodate in anti-discrimination law is a critical weapon in the fight to secure equality rights for disadvantaged individuals and groups. This inaugural volume of the Canadian Labour Law Journal is therefore an important milestone on the road to equality rights, as it contains perhaps the most exhaustive juridical exposition of the duty to accommodate in Canada to date.

As the introductory paper for this Journal, this article's purpose is to provide an overview of the duty to accommodate. The thesis of this article is that to construe and apply the duty to accommodate in individual cases, it is vital that it be approached in a purposive way, with an eye keenly focused on the goals and functions which the duty is aimed at advancing under human rights law. To this end, the discussion is divided into four parts. It begins with an illustration of some of the kinds of accommodation which are contemplated by the duty. This is followed by an elaboration of the purposes which the duty to accommodate serves. A delineation of a number of principles for the application of the duty which derive from these purposes is then provided. Thereafter, a number of common misconceptions about the duty to accommodate are discussed.

As an introductory piece, this discussion cannot, of course, be exhaustive. It will provide a framework within which the various articles in this Journal can be read, and against which their diverse points of view can be critically considered. It addresses the duty to accommodate largely from the perspective of principle. The articles which follow in tills Journal tackle in greater detail the specific jurisprudential developments in the accommodation case law.

The duty to accommodate applies to all of the activities which are governed by human rights legislation, such as employment, occupancy of housing, and access to goods, services and facilities. The following discussion refers for the most part, to the employment context. The analysis, however, applies with equal force to the other economic activities governed by anti-discrimination laws.

WHAT CONSTITUTES ACCOMMODATION?

Before exploring the purposes of the duty to accommodate, it is helpful to consider what kinds of measures are encompassed within the concept of "accommodation." It is impossible to provide an all-inclusive list of the kinds of accommodation which the duty entails. This is because the duty is in the final analysis a highly individualized one, whose application will often be tailored to the specific needs of the individual involved and the particular exigencies of the workplace. However, it is possible to provide some illustrations to contextualize the discussion which follows.

At the core of any accommodation is the tailoring of a work rule, practice, condition or requirement to the specific needs of an individual or group. The need may be associated with their religion, gender, disability or other human attribute enumerated in human rights codes. Any accommodation can include such steps as an exemption for the worker from an existing work requirement or condition applicable to others, the provision to the worker of a benefit not ordinarily or routinely provided to others, and the provision of some kind of job support or assistance which is ordinarily not routinely provided to others. At its core, it involves some degree of differential treatment. The litmus test of the accommodation's necessity is whether such a measure is needed to ensure that the worker can fully and equally participate in the workplace.

Several examples illustrate the kinds of measures which can constitute an accommodation. Later in this article, the ambit of the "undue hardship" constraint on the workability of these kinds of accommodation is considered.

One kind of accommodation involves the provision of adaptive technologies or equipment to the worker who needs accommodation. In a workplace where computers are used by employees, whether as simple word processors or as more sophisticated data processors, the computer's output is generally provided to the user through a video monitor, and through a hard-copy printer which produces inkprint text. This practice can pose a barrier to full and equal participation in the workplace for a blind or visually handicapped job applicant who lacks sufficient eyesight to read the print on the computer screen or inkprint hard copy. Yet, computers can be effectively used by blind and visually handicapped persons, if appropriate adaptations are provided. Many blind persons now use speech-synthesizers, connected to a computer, which "read" aloud the text on the computer screen in an artificial voice. They can obtain hard copy in Braille, by attaching a Braille printer to the computer. Persons with serious vision limitations can often visually read the text on a computer screen if special software is employed which displays the text on the screen in greatly enlarged letters.

A second kind of accommodation for disabled workers involves altering the physical premises to ensure that they are physically accessible to persons using a wheelchair for mobility. This may entail the retrofitting of existing premises to remove barriers to physical access. If circumstances so warrant (such as where the cost of retrofitting is absolutely prohibitive), it may include as an alterative to retrofitting the provision of an alternate work location for the disabled worker, such as a different office, or the offering of an opportunity to work at home, perhaps with a computer linkup to the office[1].

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[1] In such situations, these alternatives can be argued to be temporary, so that the cost of retrofitting can be spread over a longer period of time, such as a period of more

A third kind of accommodation involves alteration of job duties. Where, for example, a job description includes a large number of duties which a disabled person can effectively perform, but some nonessential duties which the worker cannot do on account of his or her disability, an accommodation may include a juggling of work duties with other workers. The duties which pose a problem can be assigned to other workers, while additional duties which the disabled worker can perform may be transferred from other workers. The same can be tried where a worker cannot perform a particular job duty on account of fundamental religious beliefs prohibiting its performance, or where a woman cannot perform a particular job duty on account of being pregnant.

A fourth category of accommodation entails alterations of work schedules. Tune off from regular work hours may be needed for a person who requires dialysis or other medical treatment during regular office hours. Members of certain religious groups may require time off on specific occasions to observe religious holidays, such as their Sabbath.

A fifth kind of accommodation includes the provision of part-time work, as an alternative to full-time work. Frequently, jobs are designed as being full-time. Parents with primary child-care responsibilities, who at present disproportionately tend to be mothers rather than fathers (especially in the case of the care of very young children), may be unable to undertake full-time employment. For them, part-time work is the only realistic way to participate in the workplace, particularly in light of the current difficulties in securing affordable daycare. For them, access to part-time work opportunities can be a vital accommodation.

In the case of the foregoing categories of accommodations as well as others, accommodation is most certainly not a static concept. A worker's accommodation needs can vary over time. For example, the rapid evolution of adaptive technologies for disabled persons may make this year's accommodation obsolete, and may yield a new, more effective and lower-cost accommodation in the future. As well, a particular accommodation may work for a time in the workplace, but may become more or less effective over time as workplace circumstances change. Accordingly, the duty to accommodate should be viewed as an ongoing obligation, replete with a strong "trial and error" component. It is not something which is simply tried or contemplated once, and which, if initially viewed as being unfeasible, can be simply disregarded thereafter.

PURPOSES AND FUNCTIONS OF THE DUTY TO ACCOMMODATE

For the duty to accommodate to be effectively and meaningfully expounded in individual cases, it is critical as a first step that the rationale or purposes for the duty's existence be delineated. Open-textured concepts such as "accommodation," "needs" and "undue hardship" must

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than one year. The cost of an accommodation such as retrofitting, where initially appearing to be prohibitive, might be argued to amount to undue hardship if it had to be borne entirely in one fiscal year. Yet it may fall within the scope of the duty to accommodate if this cost is distributed over more than one fiscal period.

be interpreted in light of the ultimate aims which the duty to accommodate is mandated to serve. Otherwise, a court's or human rights board of inquiry's interpretative latitude under these potentially discretionary terms could serve, unwittingly, to undermine rather than forward the ultimate goals of human rights legislation.

A "purposive approach" to the duty to accommodate derives from the traditional maxim of statutory interpretation holding that enactments should be construed in the manner which best achieves their purposes[2]. While applicable to all statutory interpretation, this doctrine has found its most recent and most thoroughgoing application in the Supreme Court of Canada's construction of the Canadian Chartered of Rights and Freedoms[3]. It also fulfils the Supreme Court's general approach to the construction of human rights legislation, by which such laws are viewed as virtually quasi-constitutional[4], and by which the rights guaranteed in them are construed broadly and liberally, with exceptions thereto interpreted strictly and narrowly[5].

What then are the purposes which the duty to accommodate serves? The duty to accommodate is ultimately intended to serve the overall objectives of human rights legislation, one of which is the protection of the equality of opportunity for all inhabitants of Canada to participate fully in a wide range of socio-economic fields such as employment, access to goods, services, facilities, housing, contracts and the like. These laws aim to ensure the maximum protection of the dignity and worth of the individual, by enabling him or her to feel like, and indeed to be, a full and equal participant in Canadian society. As well, human rights statutes aim to protect the egalitarian interests of groups, and can be linked to such important Canadian values as multiculturalism, and social diversity and pluralism.

These overall aims are of fundamental importance in Canadian society and Canadian law. They transcend the objectives of many other ordinary legislative enactments. This is reflected in the fact that, as indicated above, the Supreme Court of Canada has ruled that human rights legislation is extraordinary in nature, while not quite constitutional, certainly more important than other laws[6]. It also derives from the fact that in 1982, Canada's Constitution was amended to include a supreme constitutional guarantee of equality rights in s. 15 of the Canadian Charter of Rights and Freedoms[7]. Section 15 of the Charter shares the core objectives of human rights legislation,

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2 See e.g. *Maxwell on the Interpretation of Statutes,* 12th ed. by P. St. J. Langan (London: Sweet & Maxwell, 1969), pp. 92-93; E.A. Driedger, *Construction of Statutes,* 2nd ed. (Toronto: Butterworths, 1983), pp. 35-36. See also *The Interpretation Act,* R.S.O. 1990, c. I ii, s. 10.

3 See e.g. *Hunter v. Southam Inc.,* (1984) 2 S.C.R. 145.

4 See *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.,* (1985) 2 S.C.R. 536, at 547.

5 *Ontario Human Rights Commission v. Borough of Etobicoke,* (1982) 1 S.C.R. 202 at 208.

6 See notes 4 and 5, *supra.*

7 Section 15 of the Charter provides as follows:

namely, the securing of equality of opportunity for discrete and insular minorities in Canada, through their protection from discriminatory treatment and practices[8].

Within the context of the broader aims of human rights legislation, the duty to accommodate serves several specific and important goals. As a preliminary effort at the elaboration of these purposes, the following is not offered as an exhaustive list.

First and foremost, the duty of accommodation is a measure aimed at ensuring equality for disadvantaged persons in Canadian society. This duty is the central means for overcoming unintentional or systemic discrimination. Chief Justice Dickson has noted that systemic discrimination tends to be more prevalent than direct discrimination in Canada[9]. Thus, the elimination of systemic discrimination through enforcement of the duty to accommodate plays a critical role in the struggle for equality rights.

The centrality of the duty to accommodate to the securing of equality is at least as important for persons with disabilities as for any other disadvantaged group. One of the greatest obstacles confronting disabled Canadians is the fact that virtually all major public and private institutions in Canadian society were originally designed on the implicit premise that they are intended to serve able-bodied persons, not the 10 to 15% of the public who have disabilities. Absent a duty to accommodate the needs of persons with disabilities, equality guarantees would be entirely meaningless in such a world for this segment of our population.

Second, the duty to accommodate serves to enable individuals to have their qualifications and competence to contribute to the workplace evaluated in a fair and accurate manner. When an employer seeks to determine whether a particular candidate for a job is qualified to do that job, the aim of the exercise is to ascertain as effectively as possible the individual's true capabilities -- to identify what kinds of positive contributions this person could make to the workplace. It is vital that such an appraisal be carried out in a fair and accurate manner, both from the perspective of effective business decision-making and from the vantage point of the job applicant.

> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, programme or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

8 See, generally, *Andrews v. Law Society of British Columbia,* (1989) 1 S.C.R. 143; *R. v. Turpin,* (1989) 1 S.C.R. 1296.

9 *Taylor and Western Guard Party v. Canadian Human Rights Commission et al.,* (1990) 3 S.C.R. 892 at 931-32.

If a job applicant's abilities are appraised without taking into account his or her productivity when provided with accommodation to disability, gender, or religion, an inadequate and incomplete picture of the applicant's true capacity for product work will not be obtained. By analogy, it would be absurd to evaluate an extremely short-sighted applicant for a job as a lawyer by first requiring that he or she do the job without wearing needed reading glasses. To do so would be to grossly underestimate his or her abilities.

Third, the duty to accommodate serves the function of enhancing the respect for the individual in Canadian society. At the core of the duty to accommodate is a recognition that people are individuals, with individual needs as well as individual gifts. Norms and averages may be the basis on which workplaces and products are designed. However, specific jobs are not filled by norms or averages, nor are products purchased by statistical means. Workers, tenants and consumers deserve to have their individuality recognized and their differences respected, at the very least, in so far as this is necessary to ensure that they can fully and equally participate in such economic activities as work, occupancy of housing, and consumption of goods and services.

Fourth, the duty to accommodate serves the goal of fostering a climate of tolerance in the workplace, and particularly, tolerance towards those disadvantaged individuals and groups whose protection is the focus of human rights legislation, such as women, persons with disabilities and racial and religious minorities. Tolerance toward these groups is both an important means for achieving equality and a core component of the right to equality itself. Such tolerance tends to wear the thinnest where members of these groups appear different in some way from the perceived "average" member of the "majority"[10]. This can be a product of impatience, xenophobia, stereotyping, or simple ignorance.

The duty to accommodate serves to combat such intolerance at the point where it can wear the thinnest by placing an affirmative duty on the employer to take steps to accommodate the differences of the disabled, religious minority or otherwise excluded worker. It can require positive and constructive action, short of undue hardship, to replace potentially pre-existing stereotypes. It combats requirements of conformity by compelling creative efforts at protecting one's right to nonconformity. The fostering of the tolerance of differences among people is a principal ingredient in the formula needed to advance such human rights goals as multiculturalism, and social diversity and pluralism.

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[10] The concept of "average" and "majority" are inherently problematic and to many, rather offensive. There is probably no "average" person or profile in Canadian society. Any average that might statistically exist would likely not be shared by the majority of Canadians. It also likely changes by the month, as Canadian and local demographic conditions fluctuate. Yet, the existence of perceptions of "average," "normal," or "majority," however fallible or patently contrafactual, is not altogether uncommon on the part of may persons and institutions which make employment opportunities, goods and services available to the public. These can lead to the unintentional erection of systemic barriers to full participation in society by women, disabled persons, religious minorities and others protected by human rights legislation.

The duty to accommodate also fosters the fifth goal of public education on equality rights - which is so central to the mandate of human rights statutes - by implicitly motivating employers to educate themselves about the needs of women and disadvantaged minorities. While such self-education is always laudable in the human rights context, it is especially important to an employer from the practical perspective of its compliance with the duty to accommodate, since absent adequate efforts to learn about the special needs of the disabled and other minority workers, it cannot effectively discover workable accommodations which meet the legal requirements imposed on it by anti-discrimination statutes.

A sixth goal served by the duty to accommodate is effective protection of workers against intentionally discriminatory attitudes on the part of employers. As is further addressed later in this article, the duty to accommodate is most often discussed in the context of unintentional or adverse effect discrimination. In such situations, there is no requirement to prove an intent to discriminate on the part of the employer when making out a case of discrimination.

Yet, even in the case of claims brought under the rubric of adverse effect discrimination, and not as claims of direct or intentional discrimination, the duty to accommodate is not limited to rooting out systemic barriers to the full and equal participation in the workplace, where these barriers are unintentional, sincerely imposed, and not motivated by any discriminatory intent. As well, it actually can help to combat intentional discrimination.

With increasing public awareness of human rights statutes, and with decreasing public tolerance of discriminatory practices, it has become less fashionable to express discriminatory attitudes openly and publicly. Yet, such unfortunate attitudes clearly still persist in various quarters of Canadian society. In a world where it is less likely that anti-Semitic attitudes will be demonstrated through a window sign saying "No Jews allowed!" or where attitudes will be reflected in an overt workplace policy stipulating that certain jobs are not "woman's work," the practical detection of intentionally discriminatory practices rooted in discriminatory attitudes has become commensurately more difficult. It has become necessary to resort to a number of subtle legal mechanisms, such as establishing a *prima facie* case of intentional discrimination through purely circumstantial evidence[11], and the extension of human rights legislative protection beyond decisions about hiring and promotion to cover as well harassment in the workplace on account of one's sex, religion or race[12].

The duty to accommodate now plays an increasingly important role in the effort to root out discriminatory attitudes, particularly where they have gone further underground and do not readily admit of evidentiary proof. Where such attitudes contribute in some way to the adverse treatment of a worker or job applicant, in circumstances where accommodations are needed to ensure equality of opportunity in the workplace, the employer may never make a statement to the worker or to co-workers which clearly demonstrates a discriminatory attitude. It may not be possible to

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[11] See *Kennedy v. Mohawk College*, unreported, October 31, 1973 (Board of Inquiry - Borins).

[12] See, e.g. *Ontario Human Rights Code*, R.S.O. 1990, c. II.19, ss. 5(2), 7(2). See also s. 10(1) for the definition of "harassment."

prove the existence of such an attitude by direct evidence. However, if the worker's claim is presented as an allegation of adverse effect discrimination, where intent to discriminate need not be proven, the employer's reasons for refusing to accommodate can be held up to close scrutiny during proceedings before a human rights board of inquiry. If those reasons turn out to lack merit once subjected to cross-examination and perhaps to contrary evidence, their pretextual nature can become more apparent, as can the antithetical attitudes underlying the worker's adverse treatment.

It is, of course, entirely unnecessary to show that a refusal to accommodate was motivated by discriminatory attitudes in order for an employer to be held liable under human rights legislation. The employer's liability will flow from the simple fact that accommodation was not effected in circumstances where no undue hardship was posed by accommodation, and where such accommodation was required to ensure the worker's full and equal participation in the workplace[13]. However, as a practical matter, the effect of holding an employer liable in such a situation is to provide a worker or job applicant with effective relief under human rights legislation, when adverse treatment was motivated by discriminatory attitudes even though proof of such attitudes may be impossible to secure[14].

Finally, the duty to accommodate can serve a number of different discrete aims when applied to particular groups. When applied to religious minorities, the duty to accommodate serves the additional goal of fostering freedom of religion. In such settings, the duty is triggered when a work rule would preclude or impair a worker's exercise of a religious practice, such as Sabbath observance. Apart from the important right to freedom from discrimination based on religion, the right to freedom of religion, including the free exercise of religious beliefs and practices is a fundamental freedom in Canada, whose importance has led it to be independently entrenched as a constitutional right in the Canadian Charter of Rights and Freedoms[15]. While the Charter protects only against governmental intrusions into such constitutional rights, actions by private individuals and institutions, such as employers, can pose as serious and severe a threat to freedom of religion

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[13] If it is proven that the failure to accommodate was motivated by a discriminatory attitude, then this can be conclusive proof that concerns about undue hardship had nothing to do with the denial of equal employment opportunities. As well, if there is no proof of such attitudes, this can transform a claim of indirect or adverse effect discrimination into a parallel claim of direct or intentional discrimination.

[14] This is not to underestimate or downplay in any way the importance of the duty to accommodate as a means of rooting out systemic discrimination, unmotivated by any discriminatory intent or attitude. The duty to accommodate certainly serves that important goal as well. The point here is simply that, in addition to that objective, it also can serve to help root out *intentional* discrimination which is well disguised in seemingly neutral job rules and conditions.

[15] Section 1*(a)* of the *Charter* provides as follows:

> Everyone has the following fundamental freedoms:
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> *(a)* freedom of conscience and religion;...

as can official actions by the organs of state. The duty to accommodate helps protect a worker's freedom to choose his or her own religion, and to freely manifest and practice the religion's teachings and requirements by alleviating the adverse effects of work rules or practices which would preclude the worker from both working at a particular job and adhering to his or her religious beliefs and practices, short of undue hardship to the employer.

The duty to accommodate, when applied to persons with disabilities, serves as an important means for combatting the overwhelming unemployment rates confronting disabled persons in this country. The public finds it intolerable when unemployment for the public generally reaches 7, 8 or 9%. Working-aged disabled persons have confronted unemployment rates of 50 to 80% in Canada in recent years.

There have been a number of major advances aimed at increasing the employability of disabled persons. These include such measures as the invention of new adaptive technologies to augment their functional capacities, the provision of tax breaks and public subsidies for the cost of accommodating disabled workers, the creation of limited special public transit services in some urban centres for disabled persons who cannot use physically inaccessible public transit facilities, and increased public education on the employability of disabled individuals.

However, despite these advances, persons with disabilities still encounter massive barriers when seeking jobs. These are often attributable to employers' fears about the disabled person's capabilities, and exaggerated concerns about the cost of accommodating a disabled person in the workplace. The imposition on employers of a legal duty to accommodate the needs of disabled persons in the workplace, short of undue hardship, helps combat this major cause of the unemployment of disabled persons in Canada, both by making it a responsibility and not merely a discretionary option to accommodate, and by requiring an employer to provide solid proof of feared costs of accommodation where undue cost is offered as a reason for failing to accommodate. In so doing, the duty to accommodate helps eradicate a major cause of disadvantage facing disabled persons. It helps newly disabled persons come to grips with and effectively adjust to their disabling condition. It contributes to the success of government programmes aimed at getting disabled persons off the welfare rolls by transforming them from welfare recipients into taxpaying employees. It helps our economy by making available to it the talents and skills of one segment of the population which has historically had its talents left untapped.

ASSESSING CLAIMS OF UNDUE HARDSHIP- SOME GENERAL PRINCIPLES

Keeping these purposes for the duty to accommodate in mind, several general principles can be identified to guide the assessment of the validity of undue hardship claims advanced by a respondent employer, service-provider or landlord who has allegedly failed to comply with the duty to accommodate. There are generally three factors which can and should be assessed when evaluating an undue hardship claim. They are:

(i) the validity of the substantive reasons advanced by the respondent for failing to

accommodate;

(ii) the sufficiency of the respondent's deliberative and investigative process for responding to a request to be accommodated; and

(iii) the employer's sincerity or bona fides in responding to a request to be accommodated.

When assessing the substantive reasons advanced by an employer in opposition to a request to be accommodated, it is essential that these reasons be subjected to close and careful scrutiny. There is no reason for a board of inquiry or court to be deferential to employers in this context. Deference would give employers an undeserved shield behind which attitudes of intolerance or insensitivity, and inadequate efforts at accommodation could all be conveniently and effectively sheltered. It is easy for a creative lawyer to articulate seemingly compelling and attractive justifications or purposes after the fact for his or her client's failure to accommodate. When the tire meets the pavement - when the effectiveness of the duty to accommodate is put to its real test - is when these reasons are subjected to close and careful analysis to see if they bear up in the real world.

Of the substantive reasons which can be advanced to justify or explain a refusal to accommodate, some will simply not be sufficiently compelling to merit consideration, even if they are factually borne out in the evidence. Some may be compelling in theory, but may not be proven by sufficient evidence as actually flowing from the proposed accommodation. It must always be remembered that the ultimate test is that of undue hardship - a test which goes far beyond concerns about business inconvenience, and which clearly contemplates that required accommodations can impose some degree of hardship on an employer or other respondent.

Wilson J., in the Central Alberta Dairy Pool case[16], posted a non-exhaustive list of possible impacts which could in some circumstances constitute undue hardship. It should be emphasized that her comments in this regard were entirely *obiter* in that case, and hence, are open to reconsideration in future in a case where such grounds are actually advanced in claims of undue hardship. In her list, Wilson J. suggested that an accommodation's adverse impact on workers' morale, or its disruption of a collective agreement, may be among the relevant considerations[17]. This does not mean that *any* adverse impact of an accommodation whatsoever on worker morale *ipso facto* automatically excuses an employer from its duty to accommodate. For example, an uninformed or intolerant response of co-workers to a proposed accommodation cannot justify a refusal to accommodate, lest attitudes which are contrary to the spirit and goals of human rights legislation be allowed to frustrate the advancement of the goals of that legislation. Similarly, even if it were assumed that disruption of the collective agreement might be considered relevant in some situations, a respondent cannot be exempted from the duty to accommodate simply because accommodation conflicts with the terms of a collective agreement, no matter how inconsequentially. Otherwise, a party could contract out of its obligations under fundamental human rights legislation through the modality of a collective agreement.

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16 *Alberta Human Rights Commission v. Central Alberta Dairy Pool*, (199) 2 S.C.R. 489.

17 *ibid.*, at 521.

Accordingly, the evaluation of the employer's or other respondent's substantive reasons for declining to accommodate involves a three-step inquiry, including the following questions:

(1) What substantive reasons were in fact used for declining to accommodate?

(2) Are the adverse impacts of accommodation borne out in fact and sufficiently factually founded?

(3) If so, do the adverse impacts advanced as reasons for declining to accommodate amount to "undue hardship" in law?

An employer's proffered reasons for declining to accommodate should not be accepted unless they are supported by reliable, objective and persuasive evidence showing that its concerns are well-founded. The Supreme Court of Canada has rejected human rights defences based on impressionistic evidence[18]. Anticipated hardships caused by proposed accommodations should not be sustained if based only on a speculative or unsubstantiated concern that certain adverse consequences "might" or "could" result if a worker is accommodated. It is too easy for managers to conjure up a plethora of undesirable consequences of accommodations, if they put their minds to it. What human rights legislation aims to do is to have managers direct their creative attention to positive ways to achieve successful accommodations. It should not reward those managers who direct their creativity instead towards imagining why accommodations could not possibly work.

When the cost of accommodation is put forward as a reason not to accommodate, an application of these general principles would involve the following: An employer must prove by evidence that feared costs would in fact be incurred by a proposed accommodation. The costs involved must be directly and fairly attributed to the specific accommodation itself. Care should be taken to ensure that the employer is not trying to allocate to the party seeking an accommodation costs which in fairness are properly attributed elsewhere. To the extent that an accommodation would involve expenditures that the employer would have incurred in any event, such costs should not be attributed to the accommodation. Where there is more than one potential accommodation which can meet the needs of the worker in question, one should compute the price of the least-costly accommodation which can be employed to effectively and fully ensure that the worker is able to participate in the workplace.

Where the cost of accommodation is tax deductible as a business expense - which should virtually always be the case in the instance of profit-making employers - the true cost of accommodation must take into account the actual financial impact of the accommodation on the business. This would be the after-tax change in position of the business caused by the accommodation. For example, assume that a business is making a profit at the time the accommodation is requested, that the business pays tax at a corporate rate of 50%, and that an accommodation has a $1,000 price-tag. In this instance, the actual cost of the accommodation to the business, after tax, is only $500, since the accommodation expenditure is tax deductible, and would include a $500 reduction in tax liability. In this case, the dollar fixture which should be

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[18] See *Ontario Human Rights Commission v. Borough of Etobicoke, supra,* note 5 at 212-13.

subjected to the undue hardship test is $500, not $1,000.

An assessment of an employer's efforts at accommodation must go beyond the employer's substantive reasons for not accommodating. It should also include an evaluation of the sufficiency of the process by which the employer reached its decision on accommodation. The duty to accommodate has both substantive and procedural components. The duty is to take steps, short of undue hardship, to accommodate the individual's needs. One requisite step is for the employer or other parties under a duty to accommodate to undertake a thorough and adequate process of inquiry and deliberations on the request for accommodation. If an employer simply rejects a request for accommodation out of hand, without giving the matter adequate thought and attention, including thorough exploration of the possibilities, it can hardly be said to have taken adequate steps to accommodate.

An open-minded and creative deliberative process significantly increases the prospects for finding a feasible accommodation to the needs of a disabled employee, or other worker with needs whose accommodation is endorsed under human rights legislation. It is perhaps a regrettable reality in the workplace, that when a person asks for something out of the ordinary, the first knee-jerk response on the part of some is simply to say no. It is often only after the matter receives further thought and reflection that stereotypical concerns can give way to imaginative solutions. Investigation and deliberation can lead the parties to come up with new options for accommodation that had hitherto not been contemplated. The wider the range of discussions and inquiry, the greater the chance that a workable accommodation will be discovered. As well, such deliberations can produce a more thoughtful and critical reflection on alleged adverse consequences which initially were feared if the worker were to be accommodated. Such deliberations and inquiries do not just make sense from the perspective of effective enforcement of anti-discrimination statutes. They also make good business sense.

When inquiring into the adequacy of the deliberative process, matters that could be explored include the following:

(1) Who was involved in the original deliberations and decision on the accommodation request?

(2) What options for accommodation were considered? Did the employer seek to identify options for accommodation which the worker had not raised? After all, the duty to accommodate goes beyond an exploration of the options which workers seeking accommodation themselves advance. A company's potentially superior knowledge of its own business operations leads one to expect that even if the worker has trouble finding options which will work, the company may well find possibilities worthy of exploration if the matter is given sufficient attention.

(3) Was sufficient effort employed to solicit the views of the worker requesting the accommodation and of those managerial staff who might have ideas on how the problem can constructively be solved?

(4) If proposed accommodations could impinge upon the terms of a collective

agreement, what efforts were attempted to elicit the union's views on point, and to secure its agreement to waive the contract's provisions to secure an effective accommodation?

(5) If there is a union involved, what efforts if any were made to bring representatives of the union, the company and the worker who requested the accommodation together, to try to collectively find solutions which had hitherto evaded these parties when they operated separately from each other?

(6) If a company or union opposes an accommodation on the grounds that it might impinge on other legal requirements, whether under a collective agreement or otherwise, did these parties take sufficient steps to obtain expert advice on these matters? Inquiries could include the obtaining of legal opinions if needed, or the soliciting of advice from relevant government and regulatory agencies.

(7) Did any of the parties who are under a duty to accommodate make an effort to find out how other organizations have dealt with similar accommodation requests, and what impact such accommodations have had on the workplace?

At the same time as scrutiny is applied to a company's substantive reasons for not accommodating, and to its efforts at exploring possible accommodations, it is also important to examine the *bona fides* of a party's claim that it could not accommodate a worker's needs short of undue hardship. Where it appears that a company, union or other respondent did not act sincerely and in good faith *vis à vis* its duty to accommodate, this will create a very strong inference that the duty was not fulfilled. As a practical matter, good faith is a vital first ingredient of the success of the duty to accommodate. Absent good faith, it is easy to conclude that accommodation is simply not feasible. With good faith, it is more likely that efforts at accommodation will succeed.

How can a party's good faith be evaluated in this context? Several factors may be considered, including:

(1) Does the evidence establish that the respondent adopted a good faith attitude when considering the request for accommodation? Through an appraisal of the testimony, a human rights board of inquiry or an arbitration board can receive direct evidence of the respondent's general attitude towards the accommodation request. This includes consideration of whether the respondent believed that it was under a duty to accommodate, whether it felt that this duty should be taken seriously at the time of the request, and whether its actual conduct corresponds with its claims of good faith.

(2) Has the respondent exaggerated the costs or other adverse consequences flowing from an accommodation? Whether such exaggeration occurred at the time the accommodation was actually being considered in the workplace, or during subsequent proceedings before a human rights board of inquiry, it is reasonable to infer that good faith was not applied in implementing the duty to accommodate.

(3) Has the respondent attempted to rely on hardships which were never considered at the time of the accommodation request? The substantive reasons for not accommodating that should be scrutinized by a board of inquiry are only those that were *in fact* considered by the company or other respondent at the time that the accommodation request was actually being considered in the workplace. It should not be open to a party before a board of inquiry to rely upon reasons for not accommodating which have been fashioned after the fact, and which did not actually play a role in the accommodation decision. The fact that the respondent did not base its actual decision on accommodation on a particular *post hoc* reason gives rise to the strong inference that this after-creation is not *bona fide* and lacks merit. Had it been a valid concern, it would surely have been thought of at the time the accommodation requested was being considered in the workplace, especially in the case of a respondent which has in fact concluded that accommodation will not be provided.

(4) As was considered at length above, what deliberations did the respondent undertake in response to the accommodation request? The scope of the respondent's deliberations can bear upon the respondent's *bona fides* as well. If the request was turned down out of hand or after inadequate efforts to explore and investigate different options for accommodating, an inference can readily be drawn that the duty to accommodate was not taken seriously and sincerely.

SIX MISCONCEPTIONS ABOUT THE DUTY TO ACCOMMODATE

A number of misconceptions exist with respect to the duty to accommodate. It is important to identify and correct these misunderstandings, lest they lead to the misapplication of the duty in actual cases.

(i) The duty to accommodate arises only in case of "indirect" or "adverse effect" discrimination, never in cases of "direct" or "intentional" discrimination.

In fact, the duty to accommodate may arise, as the Ontario Human Rights Code (discussed below) demonstrates, in the case of direct discrimination as well.

For many years, discrimination claims have been divided into two categories in the case law and academic literature. The first is usually called direct or intentional discrimination. The second is called indirect, unintentional, constructive or "adverse effect" discrimination.

The first category, direct or intentional discrimination, includes claims that one was deliberately singled out for worse treatment in employment or some other protected activity on account of one's race, religion, handicap, or other prohibited ground. There are two constituent elements to a *prima facie* case of direct discrimination. First, it must be established that one suffered adverse treatment with respect to employment or other Code-protected activity. This can include loss of a job, demotion or other hostile treatment. Second, it must be established that one

of the reasons leading to this adverse treatment is a prohibited ground of discrimination, such as race or gender. The requisite "intent" to discriminate need not be a hostile, malicious or prejudiced antipathy. It need only be the presence in the employer's mind of a prohibited ground as a causal factor in adverse treatment.

In the second category, variously called unintentional, indirect, constructive or adverse effect discrimination, an aggrieved person has suffered disadvantageous treatment *vis à vis* employment. However, this is not because he or she was deliberately singled out and subjected to different, more onerous requirements than others on account of gender, religion or handicap. Rather, the worker's exclusion from work or other disadvantageous treatment was caused by the application to him or her of a neutral job rule, practice or consideration which is equally applicable to all, but which has the unintended effect of precluding his or her full and equal participation in the work place. For example, a work rule requiring shift work on Saturdays can be applied equally to all workers at a place of employment without any intent to discriminate. Yet, if applied to Seventh-Day Adventists or Orthodox Jews, it would make it impossible for such religious adherents to work at that establishment, since they adhere to a religious tenet which forbids Saturday work. The Saturday work rule is neutral on its face, but has a discriminatory or disparate impact on certain religious minorities.

The duty to accommodate can arise in the instance of indirect, unintentional or adverse effect employment discrimination in several ways. If an employer imposes a work rule with discriminatory effects, the duty to accommodate is initially imposed on the employer. If the discriminatory work rule is imposed by virtue of a collective agreement between the employer and a union, the duty to accommodate is imposed on both the employer and the union. Even if the duty to accommodate arises at first instance only for the employer -- for example, where the work rule is imposed unilaterally by the employer -- a contemporaneous duty to accommodate could also be imposed on the union at the workplace if barriers to effective accommodation are posed by the collective agreement.

The duty to accommodate can also arise in the case of direct or intentional discrimination. If a *prima facie* case of direct discrimination is made out, there may be a defence open to the respondent under the terms of the applicable anti-discrimination statute where the respondent employer can prove that handicap, gender or other relevant protected attribute is a *bona fide* occupational requirement (BFOR). In accordance with the terms of the Ontario *Human Rights Code*, at least since its 1986 amendments, a determination as to whether a BFOR has been established shall include consideration of whether the needs of excluded individuals or groups could otherwise have been accommodated in the workplace short of undue hardship[19]. In cases where an employer wishes to show that a person's differential treatment on account of disability is justified because the handicap precludes effective performance of the job's essential duties, the Act now specifically requires that the abilities of the handicapped person be assessed in light of accommodations which could be provided to him or her without undue hardship[20]. At least a plurality of the members of the Supreme Court of Canada presiding on the *Central Alberta Dairy*

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[19] See S.O. 1986, c. 64, s. 18(8), (9), (15).

[20] See now *Ontario Human Rights Code,* R.S.O. 1990, c. II.19, s. 17(2).

Pool case would interpret a human right code's BFOR provisions in this way, even absent an explicit statutory requirement to do so[21].

It is important for the legal differentiation between direct and adverse effect discrimination not to be overstated, or for it to pose a formalistic barrier to the effective implementation of human rights legislation. The line between the two legal categories of discrimination cases is becoming increasingly blurred. An example demonstrates this. Assume that a school board operates public schools which are inaccessible to wheelchairs. A mobility-impaired child who cannot attend such a school on account of its physical inaccessibility could bring a human rights complaint alleging discrimination because of handicap with respect to access to the public service of education. This would traditionally be classified as a garden-variety case of adverse effect discrimination. The building was not designed with staircases out of any intent to keep disabled children out.

However, assume further that the problem of inaccessibility is repeatedly brought to the school board's attention, and that year after year the board appropriates no funding to provide needed retrofitting of existing schools. Indeed, the board continues expanding into inaccessible facilities. At some point, this conduct becomes a matter of intentional discrimination.

(ii) The duty to accommodate is a duty of "reasonable accommodation."

Although often used, this is an incorrect description of the concept. Properly expressed, the requirement is a duty to accommodate short of undue hardship, and not simply a duty of reasonable accommodation. While the terminology of "reasonableness" does appear on occasion in juridical pronouncements on this duty, the key qualifier that has been enunciated to delimit the outer limits of the duty is the standard of undue hardship, and not simply that of reasonableness. This is significant because the "undue hardship" standard presupposes in explicit terms that an employer, landlord or service provider is clearly expected to bear some hardships when fulfilling the duty to accommodate. This duty does not stop when hardships are encountered. It only stops when such hardships, once encountered, reach the onerous standard of "undue" severity. The "reasonable" qualifier, if employed, could dilute the duty and render it less effectual. It could also lead to greater discretion on the part of human rights adjudicators, and hence, potentially to more ad hocracy in their rulings.

(iii) The duty to accommodate is somehow onerous or burdensome on employers and conflicts with productivity and efficiency in the workplace.

The duty unquestionably can impose costs and burdens on employers, and these costs and burdens can well exceed trivial dimensions. However, these expenditures must be assessed in the proper context before such pejorative connotations can fairly be attributed to the duty to accommodate.

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[21] *Supra*, note 16, at 528 *per* Sopinka, J. with LaForest and McLachlin JJ. concurring. Only seven justices presided on this appeal. Of the four who did not join with Justice Sopinka, two, Chief Justice Dickson and Madam Justice Wilson, have since retired from the Court. It is this possible that the Sopinka viewpoint may ultimately carry a majority of the Court's members if this issue is squarely raised on a new appeal.

Accommodations produce not only costs but benefits as well. They enable employers to have access to the talents and abilities of those disabled persons, religious minorities and the like who, but for such accommodations, could not participate meaningfully in their establishments. Indeed, employers who now do not fulfil their duty to accommodate suffer the costs and burdens of being denied access to a valuable labour pool on account of the barriers to access which commonly inhere in workplaces.

Moreover, accommodation provided for a group designated under human rights statutes can produce unexpected benefits for an employer. For example, a retail establishment might be required by the duty to accommodate to make its stores more physically accessible to persons with mobility handicaps who seek jobs there. Once the premises are made accessible, this will allow similar disabled customers to shop at the stores in question. Elderly customers who do not need wheelchairs, but whose mobility or strength is somewhat reduced, will also gain access to the store, potentially increasing its sales. The same can be said for customers who have responsibility for small children, and who must bring a baby stroller with them when shopping.

Additionally, a workplace can benefit from measures which increase the opportunity for workers' individual needs to be recognized, respected and accommodated. Workplace productivity depends on the extent to which employees feel that their dignity and worth as human beings is being respected by their employer. In a workplace where employees are simply expected to "fit in," and where human individuality must submit to unwavering conformity, the result can only be a reduction in worker morale and productivity. Pluralism in the workplace is valuable in its own right, as well as for the benefits which it brings along with it.

(iv) The duty to accommodate involves special treatment for disabled persons, women, religious minorities and others seeking workplace accommodation.

While accommodation may include the provision to certain individuals of something (such as changes in work duties and schedules, adaptive equipment and the like) which other workers do not get at all, or as readily, it is inappropriate to view this critically as unwarranted or special treatment. It is vital to evaluate the duty in the context of the real world in which it is to operate.

The very essence of the duty to accommodate, viewed close up, is some form of different treatment. It arises from a powerful rejection of the out-of-date and highly formalistic conception of equality as a requirement that persons be treated similarly if they are similarly situated[22]. Indeed, at the very heart of the duty to accommodate is the proposition that different treatment is *required* as a means to attain the ultimate goal of equality of opportunity. Such accommodation becomes no less necessary or compelling, nor the goal of equality any less vital, because the treatment required by the duty to accommodate is different than that given to other workers, or because other workers may well desire the same accommodation out of personal preference.

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[22] See M.D. Lepofsky and H. Schwartz, "Constitutional Law - Charter of Rights and Freedoms - Section 15 - An Erroneous Approach to the Charter's Equality Guarantee"; *R. v. Ertel (1988)*, 67 Can. Bar Rev. 115. See also *Andrews Law Society of British Columbia, supra,* note 8.

There are two answers which can be given to those who oppose "different treatment." First, to oppose any sort of different treatment is in effect to oppose the duty to accommodate itself, and hence, to tolerate indirect, systemic or adverse effect discrimination. Second, to focus on the "differentness" of the treatment of a worker which the duty to accommodate entails is to suffer from acute analytical myopia. A purposive approach to the duty compels that its application be viewed from the broader perspective of the search for equality. Viewed up close, and without adequate context, it is true that a worker, when accommodated, tends to be treated "differently" from some or all other coworkers, in the sense that he or she may be provided with equipment, work schedules, pay arrangements or other working conditions that some or all other workers may not receive and, indeed, which they may wish to have as well. However, viewed in the overall context of the workplace, this apparent different treatment is but a modest means for attaining for the accommodated worker *equality* of treatment in the workplace -- that is the same opportunity to obtain and retain a job at that place of employment that other workers enjoy. Indeed, this prerequisite is a *sine qua non* of the duty to accommodate.

(v) The duty to accommodate is difficult for employers to implement.

It has been suggested that the duty to accommodate is "one of the most difficult obligations to define" in the workplace[23]. As a practical matter, this duty is far less complex than many of the regulatory burdens placed on employers by such administrative regimes as tax law, trade policy, health and safety legislation and so on. In the context of the duty to accommodate the employer is called upon to ask a series of rather simple questions:

(1) Does this employee or job applicant require some sort of accommodation in order to participate effectively in my workplace on account of his or her disability, religion, gender or other Code-protected characteristic? If not accommodated, will this person be unable to work here at all, or on an equal footing with others?

(2) What are the specific work rules or job requirements or conditions which pose a barrier to this individual's full and equal participation at my workplace?

(3) What accommodations could effectively remove the barriers to this individual's participation in my workplace?

(4) What benefits and hardships would be caused by making such accommodations, which would not have been incurred but for this individual's need to be accommodated?

(5) Does the removal of these barriers require the involvement of others such as a union? If so, what position have these other parties taken *vis à vis* the accommodation of the worker in question?

(vi) The duty's focus on the individual runs contrary to the recent trend in both human

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[23] W.K. Winkler and P.J. Thorup, "The Duty of Accommodation and its Implications for the Employer" infra.

rights and labour law towards respecting and protecting group rights.

In fact, human rights legislation concurrently serves both individual and communitarian goals. From the individual's perspective, anti-discrimination laws seek to provide the individual with the opportunity to live his or her life to its fullest potential. From the collective perspective, human rights laws seek to achieve a community which is tolerant and respectful of its members, and which allows for the increased productivity, wealth and happiness that flows from social tolerance, pluralism and harmony.

CONCLUSION - TOWARDS A SPIRIT OF CHANGE AND FLEXIBILITY

The crux of the duty to accommodate is a spirit of flexibility and change. Both of these can trigger in some a preliminary negative reaction. It is hardly surprising, for example, that some employers and their advocates initially react to the duty to accommodate by characterizing it as onerous, burdensome, and inconsistent with their efforts at profit-seeking. Other employers will see flexibility in the workplace as an important means for improving productivity. For them, the duty to accommodate furthers business success, instead of undermining it.

It is similarly not surprising that some union advocates might at first see the duty to accommodate, when applied to the operations of a workplace governed by a collective agreement, as posing a potential threat to the existing individual or collective contractual rights of workers for which unions have fought long and hard. Other labour advocates will see accommodation of the needs of individual workers as one salutary part of the overall goals of the trade union movement -- the improvement of the working conditions of employees.

It may well be inevitable that change, such as that which is inherent in the duty to accommodate, will trigger disapproving reactions from some, particularly from some of those who are specifically required by law to fulfil that duty. However, a purposive approach to the duty to accommodate requires one to carefully and critically scrutinize and indeed to look far beyond such pessimistic rhetoric. Change invariably threatens some, and flexibility inescapably disrupts the convenience and equanimity of routine. Yet, in a society where women are still relegated in large numbers to lower-paying job ghettoes, where intolerance of racial and ethnic differences is still too pervasive, and where disabled persons increasingly overcome the initial barriers posed by their handicapping conditions only to find that employers do not recognize their potential, change pursuit of equality. A legal duty to be flexible and to institute changes, short of undue hardship, is a legal response which cannot singlehandedly overcome all of the barriers to full participation in society for Canada's disadvantaged individuals and groups in one fell swoop. However, it can go a long way to this end, and can meaningfully contribute to much needed attitude change which is indispensable to the ultimate goals of anti-discrimination legislation.