THE DUTY TO ACCOMMODATE: WHO WILL BENEFIT?

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This article describes the development of the duty to accommodate in Canadian jurisprudence, attempts to untangle to doctrinal knots associated with it, and considers the conceptual weaknesses inherent in the idea.

Although much has happened in human rights jurisprudence in the last twenty years, the concept of accommodation is not yet fully developed. So far, the Supreme Court of Canada has dealt with accommodation in religious and age discrimination cases only. It is not clear whether the duty to accommodate will apply to other grounds, such as disability, race, and sex similarly. Nor is it clear that it should. The authors argue that the "reasonable accommodation" framework lacks the capacity to address inequality and foster inclusive institutions. It is flawed by implicit acceptance that social norms should be determined by more powerful groups with manageable concessions being made to those who are "different".

The authors posit that accommodation jurisprudence can be rescued but only if adjudicators and courts reject a "sameness/difference" paradigm as inadequate to address issues that in fact concern group-based inequalities in power.

Cet article décrit le développement du devoir d'accommodement dans la jurisprudence canadienne et essaie de résoudre les problèmes doctrinaux qui s'y rattachent. Enfin, il examine les faiblesses conceptuelles de cette idée.

Même s'il s'est produit beaucoup de choses dans la jurisprudence sur les droits de la personne depuis vingt ans, le concept d'accommodement n'est pas encore pleinement développé. Jusqu'à maintenant, la Cour suprême du Canada a traité du devoir d'accommodement seulement dans des affaires de discrimination en fonction de l'âge et de la religion. Il n'est pas sûr que ce devoir s'appliquera à d'autres types de discrimination, tels que le handicap, la race et le sexe. Il n'est pas sûr non plus qu'il doive le faire. Les auteurs sont d'avis que le concept «d'accommodement raisonnable» est inapte à traiter des problèmes d'inégalité et à favoriser le développement d'institutions ouvertes à tous. Il est vicié par l'acceptation implicite que les normes sociales devraient être déterminées par les groupes plus puissants, avec des concessions pouvant être aménagées concrètement en faveur de ceux qui sont «différents».

La thèse des auteurs est que la jurisprudence sur l'accommodement peut être sauvée mais seulement si les tribunaux et les autres décideurs rejettent le paradigme «pareil/différent», car il est inadéquat pour résoudre des problèmes qui en fait concernent des inégalités de pouvoir entre des groupes de personnes.

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Introduction

Accommodation is emerging as a central concept in human rights thinking. It is considered one of the answers to the question: how can a society, characterized by inequality and diversity, fulfill its commitments to equality and inclusion?

Madam Justice Beverley McLachlin has said:

> Diverse societies face two choices. They can choose the route of no accommodation where those with power set the agenda and the majority rules prevail. The result is the exclusion of some people from useful endeavours on irrelevant, stereotypical grounds and the denial of individual dignity and worth....
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> The other route is the route of reasonable accommodation. It starts from the premise of each individual's worth and dignity and entitlement to equal treatment and benefit. It operates by requiring that the powerful and the majority adapt their own rules and practices, within the limits of reason and short of undue hardship, to permit realization of these ends.[1]

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[1] "Reasonable Accommodation In A Multicultural Society," Address to the Canadian Bar Association Continuing Legal Education Committee and the National Constitutional and Human Rights Law Section, April 7, 1995, Calgary, Alberta at 1.

Though accomodation is becoming a central concept, it is not yet fully developed. So far the Supreme Court of Canada has dealt with accomodation principally in cases dealling with religious discrimination. It is not clear yet whether the duty to accomodate will, or should, apply to race, sex, disability, and other grounds in the same way.

Also, though the jurisprudence is still relatively new, it is already seriously tangled, and those who adjudicate and apply the law in practical circumstances are experiencing technical difficulties.

Most importantly, the idea of accommodation is fundamentally flawed at a deeper conceptual level. In our view, the developing reasonable accommodation framework lacks the capacity to effectively address inequality and foster truly inclusive institutions. It is flawed by its implicit acceptance that social norms should be determined by more powerful groups in the society, with manageable concessions being made to those who are "different". As long as this is the framework for accommodation, less powerful groups cannot expect much from it, since accommodation discourse will serve primarily as a means of limiting how much difference "the powerful and the majority"[2] must absorb.

Though we do not consider this easy, we believe that the idea of accommodation can be rescued. Accommodation could be reconceived as entitling all groups to participate as equals in the negotiation of social norms. If adjudicators could conceive of accommodation in this way, it could facilitate the rejection of the notion that "difference" is an accurate way of denoting the problem which human rights law addresses. "Difference" would be understood as relational rather than as a characteristic of certain groups. This version of accommodation could help us understand that the concern of human rights law should be the socially constructed inequalities that are associated with difference, rather than difference itself; and to call into question the presumptive legitimacy of limits on the duty to accommodate. In short, accommodation reconceived could assist us to reject a "sameness/difference" framework as inadequate for thinking about issues which are in fact about group-based inequalities in power.

Accordingly, this paper is an exploration and critique of the accommodation jurisprudence and the ideas underlying it.

I. *Supreme Court of Canada Doctrine on Accommodation: O'Malley, Bhinder, and Central Alberta Dairy Pool*

Accommodation is the adjustment of a rule, practice, condition or requirement to take into account the specific needs of an individual or group. Accommodation can take many forms, including altering work schedules, changing job duties, altering a building or worksite to make it accessible, providing interpreters or technical aides, or varying tests or eligibility requirements.

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2 *Ibid.*

The terrain within which the duty to accommodate is located has been mapped out in a trilogy of major Supreme Court of Canada decisions on employment-related religious discrimination: *O'Malley*,[3] *Bhinder*,[4] and *Dairy Pool*.[5] This jurisprudence is complex, and can be best understood by examining each of its developmental stages.

Also, in order to understand the duty to accommodate, it is necessary to place it in the context of its connections to other human rights concepts, in particular to the *bona fide* occupational qualification defence (hereinafter BFOQ), and to the ideas of direct and adverse effect discrimination. Only through examining its connections with these other concepts can the duty to accommodate be fully explained, and the weaknesses of the current jurisprudence be revealed.

One way to understand the connections between the duty to accommodate and other human rights concepts is to ask the question: in what circumstances does the duty to accommodate arise?

These are the more particular questions:

1. Does the duty to accommodate apply to both direct and adverse effect discrimination, or is it instead restricted to adverse effect discrimination?

2. Does the BFOQ defence apply to both direct and adverse effect discrimination, or, is it instead restricted to direct discrimination?

3. Does the existence of a BFOQ defence eliminate the duty to accommodate, or is the duty to accommodate incorporated within the BFOQ defence?

a) *O'Malley: Adverse Effect Discrimination Triggers the Duty to Accommodate*

In 1985, in the *O'Malley* decision, the Supreme Court of Canada endorsed the concept of adverse effect discrimination, and a corresponding duty to accommodate, in the absence of an express statutory provision requiring it to do so. It was the first decision of the Court which recognized adverse effect discrimination. *O'Malley* was widely regarded as an important step forward for human rights jurisprudence.[6]

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[3] *Ont. Human Rights Commission* v. *Simpsons-Sears*, [1985] 2 S.C.R. 536 [hereinafter *O'Malley*].

[4] *Bhinder* v. *CN*, [1985] 2 S.C.R. 561 [hereinafter *Bhinder*].

[5] *Alta (HRC)* v. *Central Alberta Dairy Pool*, [1990] 2 S.C.R. 489 [hereinafter *Dairy Pool*].

[6] See, for example: Madam Justice Beverley McLachlin, *supra* footnote 1. Justice McLachlin traces the development of various stages of thought concerning legal concepts of discrimination. At p. 7, she refers to the recognition that it was not enough to concentrate on the act of discrimination; that requiring consideration of the effects of discrimination must be looked at as a "great advance." She says, "This ushered in the third stage of development of our modern notion of combatting discrimination through requiring accommodation — *adverse impact discrimination*."

The complaint in *O'Malley* was based on discrimination in employment on the ground of creed, and the impugned rule was a requirement to work on Saturdays, notwithstanding a conflict with a religious commitment. The employee, Theresa O'Malley, was required by her religious faith to observe a Sabbath from sundown Friday to sundown Saturday. Her employment was terminated because of her refusal to work on Saturdays. The Court held that Simpsons-Sears' rule discriminated on the basis of creed, and that Theresa O'Malley was entitled to accommodation.

The Court in *O'Malley* distinguished adverse effect discrimination from direct discrimination, indicating that direct discrimination refers to practices or rules which discriminate on their face, such as "No Catholics or no women or no blacks employed here."[7]

Adverse effect discrimination, "...arises where an employer for genuine business reasons adopts a rule or standard which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force."[8]

The Court in *O'Malley* held that in a case of adverse effect discrimination based on religion or creed the respondent has a duty "to take reasonable steps ... short of undue hardship: in other words to take such steps as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer."[9]

The Court said further that, "Where there is adverse effect discrimination on account of creed the offending order or rule will not necessarily be struck down. It will survive in most cases because its discriminatory effect is limited to one person or to one group, and it is the effect upon them rather than upon the general work force which must be considered. In such cases there is no question of justification raised because the rule, if rationally connected to the employment, needs no justification; what is required is some measure of accommodation. The employer must take reasonable steps towards that end which may or may not result in full accommodation."[10]

The clear implication of the *O'Malley* reasoning is that the duty to accommodate applies to adverse impact discrimination, but not to direct discrimination. The Court says, "Where direct discrimination is shown, the employer must justify the rule, ... or it is struck down."[11]

O'Malley also established that the employer bears the onus of proving that it has taken such reasonable steps toward accommodation as are open without

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7 *Supra* footnote 3 at 551.

8 *Ibid.*

9 *Ibid.* at 555.

10 *Ibid.*

11 *Ibid.*

undue hardship.[12] The difficulty of discharging the burden of proof will vary, depending on the facts of the case.

O'Malley did not address the issue of the interface between a *bona fide* occupational qualification and a duty to accommodate because it was decided under *Ontario Human Rights Code* provisions which, at the time, did not provide for a BFOQ defence in cases of religious discrimination. Stated very generally, the BFOQ defence provides that a requirement is not discrimination if it is necessary to the efficient performance of the job. The Supreme Court has said that to be a BFOQ a rule must be "reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public."[13] Currently, human rights statutes throughout Canada contain some form of BFOQ defence.

In short, *O'Malley* established that in a case of adverse effect discrimination there is a duty to accommodate, up to the point of undue hardship.

b) *Bhinder: BFOQ Cancels Duty to Accommodate*

O'Malley, and a second human rights decision, *Bhinder*, were released simultaneously by the Supreme Court. In *Bhinder* the complaint fell under the jurisdiction of the *Canadian Human Rights Act* which explicitly provided for a BFOQ defence in the case of religious discrimination in employment. *Bhinder* is important for the content that it gave to the BFOQ defence.

Mr. Bhinder was a maintenance electrician for CN Rail and electricians were required to wear hard hats. Because Mr. Bhinder was a practicing Sikh and wore a turban, he could not comply with the hard hat rule. His employment was terminated.

A majority of the Court held in *Bhinder* that the employer could only be required to establish that a BFOQ, such as the hard hat rule, was reasonably necessary on an occupation-wide basis, not an individual employee basis. The Court held further that once a BFOQ defence was made out on this basis no duty to accommodate individual employees could be imposed on the employer.

However, for the original Tribunal, and for Dickson C.J. who dissented in the Supreme Court of Canada (Lamer J. concurring), the BFOQ provision did not eliminate the duty to accommodate where a rule, otherwise *bona fide*, had a discriminatory effect on an individual. In their view, a duty to accommodate should be incorporated into the test for a BFOQ. Dickson C.J. described the ruling of the Tribunal, which he endorsed, in this way:

> The root of the *bona fide* exception is "...the ability of an employee to perform his or her duties," and the definition of what is a *bona fide* occupational requirement must

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12 *Ibid.* at 558.

13 *Ontario Human Rights Commission et al* v. *The Borough of Etobicoke*, [1982] 1 S.C.R. 202 at 208.

> be determined on a case by case basis according to the demands of particular jobs. A policy which discriminates against an individual on religious grounds will not...be a *bona fide* occupational requirement unless the risks and costs incurred by the employer in accommodating the religious requirements of the individual outweigh the individual's freedom from religious discrimination. Where the practice of an employee's religious beliefs does not affect his or her ability to perform the duties of the job, nor jeopardize the safety of the public or other employees, nor cause undue hardship to the employer, either in a practical or economic sense, then a policy which restricts that practice is not a *bona fide* occupational requirement.[14]

In short, Dickson C.J.'s approach required an examination of the relationship between two variables: the individual's need for accommodation and the degree of inconvenience to the employer or the public of accommodating that particular employee.

However, the majority in *Bhinder* rejected this approach to the BFOQ defence. McIntyre and Wilson JJ. held in concurring opinions that the plain words of the BFOQ provision, in their reference to an "occupational requirement," precluded the type of individual response advocated by the Chief Justice.

The difference between these two approaches is illustrated by the outcome. Viewed on an occupation-wide basis, the requirement upon CN Rail electricians to wear a hard hat was accepted by the majority as a BFOQ. If, instead, the Court had focused on Bhinder and the particularities of *his* job duties as an electrician they might have come to a different conclusion. The evidence was that if Bhinder did not wear a hard hat he posed no risk to others and little risk to himself.[15]

The combined effect of *O'Malley* and *Bhinder* seemed to be that human rights law recognized a duty to accommodate, except where there was an explicit statutory BFOQ. An explicit BFOQ would relieve the employer of any duty to accommodate. Subsequent to its release, *Bhinder* was widely criticized for undercutting the duty to accommodate recognized in *O'Malley*.[16]

c) *Central Alberta Dairy Pool: BFOQ Defence Restricted to Complaints of Direct Discrimination*

In 1990, in *Central Alberta Dairy Pool*, the Supreme Court set out to undo the damage of *Bhinder*, based on two different analyses, one adopted by four judges in a majority opinion and the other preferred by three judges who, in a

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14 *Supra* footnote 4 at 567-68.

15 In *Dairy Pool*, Wilson J. writes for the majority: "The Tribunal found as a fact that the failure of Mr. Bhinder to wear a hard hat would not affect his ability to work as a maintenance electrician or pose any threat to the safety of his co-workers or to the public at large." *Supra* footnote 5 at 512-13.

16 This is acknowledged by Madam Justice Wilson in *Dairy Pool* in which she refers explicitly to concerns raised by the Canadian Human Rights Commission in a 1986 report to Parliament, *supra* footnote 5 at 512.

minority opinion, express agreement with the majority's conclusions but not its reasoning.

In *Dairy Pool*, Jim Christie, a member of the World Wide Church of God, complained of religious discrimination when his employment was terminated because he refused to work a Monday shift which fell on one of his holy days. The Church recognized a Saturday sabbath and ten other holy days throughout the year. The Court held that, though Mondays were particularly busy days, the Dairy Pool had a duty to accommodate Mr. Christie's religious beliefs which it had not discharged.

The majority opinion authored by Wilson J., and concurred in by Dickson C.J., L'Heureux-Dubé and Cory JJ. adopts a bifurcated approach. Depending on whether the discrimination is characterized as direct or as adverse effect discrimination, different consequences will ensue. This bifurcated approach, which now makes the jurisprudence tangled and difficult to apply, may be summarized in the following way.

In a case of direct discrimination:

1. If the employer fails to make out a BFOQ defence, the offending rule is struck down.

2. To succeed in establishing the BFOQ defence, the employer must show that the generalization upon which a rule is based is valid in its application to all members of the group. If a "reasonable alternative" exists to burdening members of the group with a given rule it will not be *bona fide*.

In this connection the Court's holdings in *Brossard*[17] and *Saskatoon Fire Fighters*[18] are referred to by Wilson J.[19] In *Brossard*, the Court ruled that an anti-nepotism rule was "disproportionately stringent" because it was not tailored to combat real or potential conflicts of interest that could arise in municipal employment, but instead unduly burdened all employees of the Town of Brossard with a blanket "no relatives will be hired" rule. In *Brossard* it was held that a rule which is cast more broadly than reasonably necessary to accomplish its legitimate objectives cannot be justified as a BFOQ.

In *Saskatoon Fire Fighters* it was held that a rule of general application may not meet the BFOQ test of reasonableness unless the employer demonstrates that its concerns cannot possibly be addressed by individualized assessment and that a rule of general application is therefore necessary.

3. If the employer succeeds in establishing a BFOQ on an occupation-wide basis, there is no duty to accommodate.

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[17] *Brossard (Town)* v. *Québec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279. See Beetz J. at 311-12 and at 315. See also Wilson J. at 344 [hereinafter *Brossard*].

[18] *Saskatchewan (Human Rights Comm.)* v. *Saskatoon City*, [1989] 2 S.C.R. 1297 [hereinafter *Saskatoon Fire Fighters*].

[19] In *Dairy Pool, supra* footnote 5, the reference to these decisions is made at 518-19.

In a case of adverse effect discrimination:

1. The BFOQ defence is not available.

2. The rule will stand, provided it has a rational connection to the employment, *and* the employer has accommodated up to the point of undue hardship.

The majority also revisited *Bhinder*, saying that, in retrospect, the Court had erred for two reasons: 1) because the facts did not support the conclusion that the rule was a BFOQ because it was not necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public;[20] and 2) because the Court applied the BFOQ defence in a case of adverse effect discrimination.[21]

The minority opinion, authored by Sopinka J. and concurred in by La Forest and McLachlin JJ., supports the majority's conclusion, but not the bifurcated approach upon which the majority opinion rests. The minority opinion makes no distinction between direct discrimination and adverse effect discrimination. In the view of the minority judges, the BFOQ defence and the duty to accommodate apply to both forms of discrimination. Further, the duty to accommodate must be dealt with in the context of the BFOQ defence. A prerequisite to establishing the BFOQ defence is a demonstration that there was no reasonable alternative to a rule that does not take into account the individual circumstances of those to whom the rule applies.

An employer who wishes to avail itself of a general rule having a discriminatory effect on the basis of religion must show that the impact on the religious practices of those subject to the rule was considered, and that there was no reasonable alternative short of causing undue hardship to the employer. What is reasonable in these terms is a question of fact. If the employer fails to provide an explanation as to why individual accommodation cannot be accomplished without undue hardship, this will ordinarily result in a finding that the duty to accommodate has not been discharged and that the BFOQ has not been established.

Although the minority opinion does not differentiate between direct and adverse impact discrimination, in so far as the BFOQ defence and the duty to accommodate are concerned, it does make a distinction between legislation in which the BFOQ defence is express, and legislation which does not contain an express BFOQ defence.

The distinction is this. There is a duty to accommodate in religious discrimination cases, by reason of the general intent and spirit of the *Code*.[22]

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20 *Dairy Pool, supra* footnote 5 at 512.

21 *Ibid.* at 517.

22 The Court is referring to the *Ontario Human Rights Code*. The general intent and spirit of human rights legislation in other jurisdictions in Canada does not differ from that of Ontario. Therefore, it is reasonable to assume that the statement of the minority concerning the duty of religious accommodation would apply to human rights legislation throughout Canada.

The existence or non-existence of an express BFOQ defence is relevant to the discharge of the duty to accommodate. Where the human rights statute in question contains no BFOQ defence, the employer can discharge the duty to accommodate, only by showing that all reasonable efforts have been made to accommodate individual employees short of creating undue hardship for the employer.

Where there is an express BFOQ defence, the employer can discharge the duty to accommodate by establishing that it has a general policy with respect to the accommodation of the religious beliefs of its employees that is a reasonable alternative to a practice that entails *ad hoc* accommodation of individual employees.[23]

The minority notes that while *Bhinder* precludes an individual application of the BFOQ, subsequent jurisprudence of the Court, articulated in *Saskatoon Fire Fighters* makes it clear that an employer may fail to establish a BFOQ defence if the employer is unable to provide an acceptable explanation as to why it was not possible to deal with employees on an individual basis.[24]

d) *Conclusions Concerning the Law After O'Malley, Bhinder, and Dairy Pool*

After *O'Malley*, *Bhinder*, and *Dairy Pool*, what can be said about the relationship between different forms of discrimination, the BFOQ defence, and the duty to accommodate? Let us return to the questions posed in the beginning of this part: 1) Does the duty to accommodate apply to both direct and adverse effect discrimination, or, instead, is it restricted to adverse effect discrimination? 2) Does the BFOQ defence apply to both direct and adverse effect discrimination, or, instead, is it restricted to direct discrimination? 3) Does the existence of a BFOQ defence eliminate the duty to accommodate or, instead, is the duty to accommodate incorporated within the BFOQ defence?

In brief, the answers to these questions are: 1) the duty to accommodate applies only to adverse effect discrimination; 2) the BFOQ defence applies only to cases of direct discrimination, and 3) while the duty to accommodate is said

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[23] See also Sopinka J. writing for a unanimous *Court in Central Okanagan School Dist. No. 23* v. *Renaud*, [1992] 2 S.C.R. 970 at 986-87 [hereinafter *Renaud*].

[24] In *Saskatoon Fire Fighters* Sopinka J., writing for a unanimous Court, ruled that: While it is not an absolute requirement that employees be individually tested, the employer may not satisfy the burden of proof of establishing the reasonableness of the [*bona fide* occupational] requirement if he fails to deal satisfactorily with the question as to why it was not possible to deal with employees on an individual basis, by *inter alia*, individual testing. If there is a practical alternative to the adoption of a discriminatory rule, this may lead to a determination that the employer did not act reasonably in not adopting it. *Supra* footnote 18 at 1313-14.

not to be incorporated into the BFOQ defence, nonetheless there is a duty to explore reasonable alternatives to burdening the group with a given rule. In practice, it is difficult to distinguish the duty to explore reasonable alternatives from the duty to accommodate.

Before proceeding to an examination of the implications of these answers, it is worth noting that, like *Bhinder* and *O'Malley*, *Dairy Pool* does not purport to deal with all grounds of discrimination. It is a religious discrimination case. The Court characterizes an attendance rule as adverse effect discrimination. The decision also refers, in passing, to jurisprudence concerning age discrimination, without differentiation. Whether *Dairy Pool* applies to all grounds of discrimination in exactly the same way remains an open question which the Court does not address. It may be that different considerations could arise in cases involving other grounds such as disability, race or gender, which the Supreme Court has not yet addressed. Therefore, interpreters of human rights legislation should be somewhat cautious about leaping to the conclusion that *Dairy Pool* provides the definitive word on accommodation in regard to all forms of discrimination.[25]

II. *Doctrinal Knots*

a) *Duty to Accommodate vs. Duty to Explore Alternatives: A Sustainable Distinction?*

What do the *Dairy Pool* answers mean? First and foremost, *Dairy Pool* stands for the proposition that in cases of adverse effect discrimination based on the ground of religion, the BFOQ defence does not apply. In such cases the neutral rule or practice will not be struck provided it has a "rational connection" to employment. There is a duty to accommodate to the point of undue hardship.

The majority's holding that in cases of adverse effect discrimination the threshold question to be asked is whether there is a "rational connection" between the rule and the performance of the job creates some confusion.[26] Does this represent a retreat from the standard of "reasonably necessary" established in *Etobicoke* and still applicable in cases of direct discrimination? Possibly; but the messages are mixed. In *Dairy Pool*, Wilson J. found that the attendance rule passed the test of "rational connection." Manifestly, she did not apply the *Etobicoke* criteria. However, in another part of the

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[25] Further discussion of this issue appears in Part II of this paper.

[26] Academic commentator Brian Etherington criticizes the bifurcated approach of *Dairy Pool* on several bases. A principal concern is that the rational connection threshold may prove too lenient in cases of adverse impact discrimination. B. Etherington, "*Central Alberta Dairy Pool*: The Supreme Court of Canada's Latest Word on the Duty to Accommodate" (1992) 1 Canadian Labour Law Journal 311 at 324.

judgment, concerning direct discrimination, Wilson J. notes that the terms "reasonably necessary" and "rationally connected" have been used somewhat interchangeably in previous jurisprudence.[27] Thus, it is not absolutely clear that Wilson J.'s decision mandates a departure from the "reasonably necessary" standard. Nonetheless, at least one commentator has expressed concern about the majority's departure from the reasonably necessary standard.[28]

Dairy Pool purports to carve out an exception to *Bhinder* for cases of adverse effect discrimination only, leaving the *Bhinder* principle to apply in cases of direct discrimination. That is, according to the majority in *Dairy Pool*, in cases of direct discrimination, where there is an express BFOQ defence, that defence applies on an occupation-wide basis. This effort to separate the concepts which underlie the BFOQ defence and the duty to accommodate is problematic.[29] If the BFOQ defence is interpreted to include a duty to accommodate, as was suggested by Dickson C.J. in *Bhinder*, economic costs of accommodation and employer hardship become germane to the BFOQ defence, creating an interaction between the concepts underlying each.[30]

The question of whether there is or is not a duty to accommodate in cases of direct discrimination is actually somewhat complicated. On the one hand, the majority said in *Dairy Pool* that accommodation is not a

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[27] *Supra* footnote 5 at 518. See for example Beetz J. in *Brossard*, *supra* footnote 17 at 311-12. Here he provides this explanation of the reasonably necessary test first set out in *Etobicoke*:

> "McIntrye J. suggested in *Etobicoke* that the purpose of the objective test is to determine whether the employment requirement is "reasonably necessary" to assure the performance of the job. In the case at bar, I believe that this "reasonable necessity" can be examined on the basis of the two following questions:
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> 1) Is the aptitude or qualification rationally connected to the employment concerned? This allows us to determine whether the employer's purpose in establishing the requirement is appropriate in an objective sense to the job in question. In *Etobicoke*, for example, physical strength evaluated as a function of age was rationally connected to the work of being a fireman.
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> 2) Is the rule properly designed to ensure that the aptitude or qualification is met without placing an undue burden on those to whom the rule applies? This allows us to inquire as to the reasonableness of the means the employer chooses to test for the presence of the requirement for the employment in question. The sixty-year mandatory retirement age in *Etobicoke* was disproportionately stringent, for example, in respect of its objective which was to ensure that all firemen have the necessary physical strength for the job."

[28] See Etherington, *supra* footnote 26 at 324-26.

[29] This concern is identified by Brian Etherington, *supra* footnote 26.

[30] It may be noted that post-*Bhinder* 1986 changes to the Ontario *Human Rights Code* expressly incorporate into the definition of the BFOQ defence a duty of accommodation to the point of undue hardship, confirming that the concepts underlie the BFOQ defence and the duty to accommodate need not be separated from one another.

component of the BFOQ test and that once a BFOQ is proven, the employer is under no duty to accommodate.[31] On the other hand, the only plausible purpose for Wilson J.'s inclusion of references to *Brossard* and *Saskatoon Fire Fighters* is to suggest that the harshness of the *Bhinder* approach to the BFOQ has been softened by the requirement in *Brossard* and *Saskatoon Fire Fighters* that, in determining whether a proposed BFOQ is reasonably necessary, the Court should look to whether there are reasonable alternatives to burdening members of a group with a general rule.[32] In other words, *Dairy Pool* appears to have modified the BFOQ defence to include a requirement on the employer to ask whether there are reasonable alternatives to a given rule, including other "less stringent" means (*Brossard*) or individualized assessment *(Saskatoon Fire Fighters)*.

It is difficult to resist the conclusion that the distinction which the Court purports to establish between the duty to accommodate to the point of undue hardship (in the case of adverse effect discrimination) and the obligation to show that there is no reasonable alternative to a rule (in the case of direct discrimination) will, at the very least, create confusion, and, in the long run, be hard to sustain. There are several factors pointing to this. Conceptually, it is not easy to grasp the difference between having a duty to consider reasonable alternatives to burdening members of a group with a group-wide rule, and having a duty to accommodate the needs of an individual or group that is adversely affected by a rule. Adjudicators will not necessarily be able to make the distinction a meaningful one. Even if they think it could be meaningful, when applied to real fact situations, the lines are likely to blur.

This is confirmed by subsequent decisions which attempt to apply and refine the earlier jurisprudence. In *Thwaites* v. *Canada (Armed Forces)*,[33] a post-*Dairy Pool* decision reviewing the case law, the view is expressed that there really is no difference between the duty to accommodate and the duty to pursue reasonable alternatives to a discriminatory rule. The Tribunal said:

> The logical conclusion from this analysis is that there is very little, if any, meaningful distinction between what an employer must establish by way of a defence to an allegation of direct discrimination and a defence to an allegation of adverse effect discrimination. The only difference may be semantic...In the case of direct discrimination, the employer must justify its rule or practice by demonstrating there are no reasonable alternatives and that the rule or practice is proportional to the end being sought. In the case of adverse effect discrimination, the neutral rule is not attacked but the employer must still show that it could not otherwise reasonably accommodate the individual disparately affected by the rule. In both cases, whether the operative words are "reasonable alternative" or "proportionality" or "accommodation" the inquiry is essentially the same: the

[31] Majority opinion in *Dairy Pool, supra* footnote 5 at 516.

[32] This argument is advanced by Brian Etherington, *supra* footnote 26.

[33] (1993), 19 C.H.R.R. D/259 at D/282 (Can.Trib.)..

> employer must show that it could not have done anything else reasonable or practical to avoid the impact on the individual.[34] [35]

Recently, the Supreme Court has attempted to address this confusion in its decision in *Large* v. *Stratford (City)*.[36] *Large* is a case dealing with the mandatory retirement of police officers at age 60. The Board of Inquiry ruled that because individual police officers over the age of 60 could be accommodated by having their duties adjusted, being less than 60 was not a *bona fide* occupational qualification for police officers. The Board of Inquiry said that in the assessment of a *bona fide* occupational qualification or requirement, the question of reasonableness should include consideration of the possibility of accommodation.

Sopinka J. writing for the Court says, however:

> [It] was an error to equate individual accommodation with the requirement relating to reasonable alternatives. The latter is a requirement that is fundamental to the concept of a BFORQ defence. Justification of a general rule that treats all employees as having the same characteristics, notwithstanding that some will not, is dependent on proof that it was not practical to identify and exempt from the general rule those who lacked the requisite characteristics....
>
> The alternative of individual accommodation by adjusting the duties of individual police officers is not an alternative that would serve to justify the rule on an

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[34] The Federal Court Trial Division reviewing this decision in May 1994 *(Canada (Attorney General)* v. *Thwaites* (1994), 21 C.H.R.R. D/224 at D/243) and this conclusion in particular, found that the Tribunal had not erred in law in its analysis. It said:

> While the Tribunal did from time to time adopt the language of the standard in relation to adverse effect discrimination when dealing with the reality of a case of direct discrimination, the Tribunal not only examined individual assessment of the case of Thwaites..., it further examined whether the CAF had considered reasonable measures to lessen the risk in the event that Thwaites were retained in the CAF and whether other alternatives to the release of Thwaites had been effectively canvassed. In short, whatever may have been the strengths or weaknesses of the Tribunal's legal analysis, and I am of the view that the strengths of that analysis far outweigh the weaknesses that are only apparent if the decision is read microscopically, in the final analysis the Tribunal effectively and correctly applied a "reasonably necessary" standard to the review of the BFOR here in issue...."

In other words, though the Tribunal may have used a mixture of terms, the Federal Court Trial Division did not find the distinction between the tests for accommodation and the test for reasonable alternative to be so dissimilar as to conclude that the Tribunal considered the wrong factors and that an error of law was made.

[35] Marceau J. of the Federal Court of Appeal made a similar comment in *Attorney General of Canada* v. *Levac* (1992), 22 C.H.R.R. D/259 at D/267 (F.C.A.). He notes that the *Dairy Pool* judgment by introducing the possibilities of exceptions or individualized assessment as reasonable alternatives to a general rule... "introduced, with respect to a BFOR, a notion not completely alien to a duty to accommodate, thereby, ironically, rendering almost meaningless and irrelevant the distinction between a rule of aptitude or qualification discriminating on its face, and a simple work rule having some adverse effect discrimination."

> individual basis by identifying those who do not share the characteristics which the rule addresses and to whom the underlying rationale of the rule *does not apply*. It is an alternative that requires that the circumstances of each employee to whom the rationale of the rule *does* apply be examined and that each employee's duties be adjusted so as to render the rule unnecessary. This is not an alternative which responds to the question as to why a general rule was necessary which includes some who do not share the common characteristic or characteristics. It is, therefore, an impermissible extension of the principles in *Bhinder*, *Saskatoon*, and *Alberta Dairy Pool* and is inconsistent with the concept of a BFORQ defence as explained in those cases.[37]

In this case age 60 has been used as a proxy for "unfit to perform the duties of police officer." For some officers, age 60 will be an accurate cut-off date. However, there will be some officers over the age of 60 who are still capable of performing the full duties of their jobs. Deciphered, Sopinka J.'s comments seem to mean that when adjudicators are considering whether there is a reasonable alternative, they should consider whether there is a reasonable alternative that would allow those who can still perform their jobs to do so (such as, individual assessment), rather than considering whether there is a reasonable alternative that would allow those who cannot still perform their jobs to do so (such as, individual accommodation).

Frankly, this distinction is not very persuasive. If it can be shown that those who cannot perform the full duties of the job after 60 can be accommodated, is the mandatory age-60 retirement rule reasonably necessary? L'Heureux-Dubé J. in a separate judgment concurred in by McLachlin J. takes this position. She says:

> ...the appellants argue that the Board erred in law in considering the possibility of accommodation.
>
> While I believe such an argument can be made on a narrow reading of *Alberta Dairy Pool*, I also believe that *Alberta Dairy Pool* can be read as permitting consideration of the possibility of accommodation in determining whether a restriction is reasonably necessary and thus qualifies as a BFOR. In other words, I agree that accommodation is not relevant once a BFOR is established; however, it may be relevant in determining whether or not a BFOR has been established.[38]

b) *Direct Discrimination vs. Adverse Effect Discrimination: Another Chimerical Distinction?*

In addition to the problems created by making arcane distinctions between "reasonable alternative" and "accommodation", there is a further complication inherent in the notion that one form of discrimination gives rise to a duty to accommodate whereas another form of discrimination is subject to the BFOQ

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[36] *Large* v. *Stratford (City)*, [1995] 3 S.C.R. 733 [hereinafter *Large*].

[37] *Ibid.* at 750-52.

[38] *Ibid.* at 761.

defence. The dichotomy depends on making an initial distinction between direct and adverse effect discrimination. But this threshold distinction is not always easy to draw. Whether a given rule constitutes an instance of direct discrimination or adverse effect discrimination can be an extremely difficult question.

This difficulty is identified by Anne Molloy who says, "If an employer advertises a position for an office receptionist and stipulates that no blind persons will be accepted, this is clearly direct discrimination. But this is a case that almost never arises. In practice what happens is that the requirement for the position will contain no obviously discriminatory exclusion but will require the successful applicant to use existing office computer equipment that is not adapted for use by a blind person. Is this direct discrimination because no blind persons could ever meet the requirement? Or is it adverse impact discrimination because it is a neutral requirement for all job applicants that adversely affects persons with visual disabilities?"[39]

Indeed, it is not glaringly obvious why the rule in *Dairy Pool* itself should be characterized as adverse effect discrimination and not direct discrimination. The description of the rule was disputed by the parties, with the employer contending that the rule was regular attendance in general and attendance on Monday April 4th, 1984 specifically. The Alberta Human Rights Commission argued that the rule was mandatory attendance on Mondays. The employer knew that the complainant had requested the day off because of his religious commitments. Wilson J. held that the accurate description of the rule was, mandatory attendance on Mondays except in cases of illness or emergencies, religious obligation not being included as an emergency for this purpose. She held further that there was every indication that the employer would have refused to give the complainant Monday off for religious reasons under any circumstances.

Given such a direct link between religion and the refusal to grant a day off, it would not be unreasonable to characterize the fact pattern in this case as direct discrimination. On the one hand the rule is not as overtly discriminatory as: "No Catholics or no women or no blacks employed here." On the other hand, Alberta Dairy Pool, the enforcer of the rule, is not neutral in the sense that it is unaware of the reason for the proposed absence or unconscious of its consequences for the employee. It is a rule that the employer has knowingly applied in a circumstance of religious obligation which would not be applied to other circumstances including, "cases of illness, unspecified emergencies, and, one supposes, annual vacations."[40]

Wilson J. sees the rule as constituting adverse effect discrimination because it has negative effects on members of religious minorities notwithstanding the absence of explicit reference to a religious group. She says,

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[39] "Disability and the Duty to Accommodate" (1992) 1 Canadian Labour Law Journal 23 at 37.

[40] *Supra* footnote 5 at 501.

> The rule at issue in the case at bar pertains to mandatory Monday attendance subject to exceptions that do not include religious obligation. It bears the form of a neutral condition of general application and as a practical matter would be unlikely to impose any hardship on employees who adhere to the majority religious faiths. The adverse impact of the rule would be confined to adherents of minority religions or sects such as, in this case, a follower of the World Wide Church of God.[41]

This is not an unreasonable characterization of the rule. Wilson J. is to be commended for avoiding unnecessary abstraction, and she has focused on the issue of who actually suffers because of the rule. However, it could be argued that any work or school schedules that designate Sunday as the regular day of rest, and Christmas and Easter as annual holidays, are religion-centered schedules based on the calendar of the major Christian religions, and that they constitute a form of direct discrimination against members of other faiths whose days of religious observance are different.

The point is that there are different ways of characterizing a scheduling rule, depending on whether it is seen as part of an overall schedule that is based on religious belief or tradition and which discriminates against non-Christian employees, or as a secular rule that is general in its application to all employees but offensive because of its adverse effect on employees who have conflicting religious commitments, in all likelihood because of their adherence to minority faiths.

It matters how the complaint is framed. If the complaint is framed as a claim of discrimination based on a discretionary refusal to authorize a religion-related absence it will look more like direct discrimination than if it is framed as a challenge to a formal attendance rule of general application.

For example, a complaint in a case like *Dairy Pool* may look more like direct discrimination if it is framed in the following way: "My employer has the discretion to grant leave in various circumstances where there may be a conflict between the work schedule and an employee's important personal needs. Other employees have been granted leave in such circumstances, including unspecified emergencies. In my life a highly important personal need which occasionally conflicts with work is religious observance. I have explained this to my employer, but have been told that religious observance is not in the same category as an emergency over which an employee has no control. What this amounts to is a refusal by my employer to recognize that religious commitment can be a key element of a person's identity, and to respect the priority it has for the person who has made the commitment. This is the attitude of someone for whom religious commitments do not count as an important personal need. My employer knows that the company's work schedule prevents me from upholding the tenets of my faith, but is deliberately indifferent, and unwilling to equate

[41] *Ibid.* at 519.

my personal needs with non-religious needs which are of no greater importance. In addition, my colleagues who have more mainstream religious commitments are adequately accommodated by the civic calendar. I experience this as religious discrimination, and claim that my right to be free from religious discrimination has been directly infringed."

In this framing of the complaint the adjudicator is asked to focus on the employer's informed exercise of discretion and to compare the treatment of the religiously observant employee with the treatment of other employees who need time off for other reasons. This contrasts with identifying the problem as a facially neutral work schedule that conflicts with certain minority religious commitments.

The problem of how to differentiate between direct discrimination and adverse effect discrimination is not hypothetical. In some cases, tribunals and courts, in fact, have been uncertain about how to draw the distinction. For example, in *Canadian Civil Liberties Association* v. *Toronto Dominion Bank*,[42] the Tribunal offers two parallel analyses and outlines the differing results.

In *Toronto Dominion Bank*, the Canadian Civil Liberties Association alleged that the drug-testing policy of the Bank constituted discrimination based on disability, in this case a perceived dependence on drugs.[43] The practice of the Bank was to require new and returning employees, after they were hired or rehired, to provide a urine sample for drug testing. Willingness to be tested was a condition of employment. The testing identified use of cannabis, cocaine, codeine, morphine, or heroin. An employee who tested positive was required to take a second test, and if they tested positive a second time they could, at the Bank's discretion, be referred for assessment and treatment. An employee who refused to be tested, or who tested positively three times, would be terminated from employment with the Bank.

The Tribunal ruled first that there was no discrimination by the Toronto Dominion Bank on the basis of a prohibited ground of discrimination because both persistent casual users who are not dependent and, therefore not protected by the Act, and dependent users who are protected by the Act are terminated under the policy for persistent use of an illegal substance. The Tribunal considered that termination was not based on drug dependence, but on an actual professional diagnosis of drug use. The Tribunal also found that termination only occurred when an employee was found to be using a drug persistently, and after treatment at the Bank's expense had been offered. Thus the Tribunal concluded that there was no discrimination on the ground of disability and the complaint was dismissed.

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[42] (1994), 22 C.H.R.R. D/301 (Can.Trib.), rev'd (1996), 25 C.H.R.R. D/373 (F.C.T.D.).

[43] The *Canadian Human Rights Act* prohibits discrimination on the basis of a disability including on the basis of "a previous or existing dependence on alcohol or a drug."

It is disappointing that the Tribunal did not grapple with the possibility that mandatory drug-testing is in itself discriminatory. It could be argued that the whole group of new and returning employees are negatively and directly affected by the drug-testing policy, not only the sub-group of employees who are ultimately fired for persistent drug use. All new and returning employees are required to submit to an invasive testing procedure as a condition of employment because they may have the disability of drug dependency. An analogous rule would be requiring all new and returning women employees to submit to a pregnancy test. Such a testing requirement would likely be considered direct discrimination based on the ground of sex, notwithstanding that only a smaller sub-group of employees who were pregnant might have additional negative conditions imposed on them.

Though this ruling is open to criticism because it focuses exclusively on termination and not on testing itself as a possibly discriminatory act, what is most interesting, for our purposes, is the Tribunal's reasoning when it proceeds to consider whether, if the Tribunal is wrong and there is discrimination, the discrimination is adverse effect, or direct discrimination. The Tribunal finds that the discrimination, if any, would be adverse effect discrimination because the drug-testing policy applies to a whole class of employees (new and returning employees), but only some are negatively affected - that is, only those who test positive for use of an illegal drug on three successive occasions.

The Tribunal also finds that the Bank has taken steps to accommodate the employees who are adversely affected to the point of undue hardship by making assessment and treatment available to them at the Bank's expense.

The Tribunal finds further that if the discrimination were direct discrimination, as the Commission contended, the Bank could not establish a defence of *bona fide* occupational requirement for the drug testing policy, because in instituting the policy the Bank acted on some very impressionistic assumptions. There is no evidence to show that there is a drug problem among employees of the Bank, nor any evidence to show a connection between theft problems at the Bank and drug use, or performance problems and drug use. If mandatory testing were reasonably necessary as a means to assure job performance, then, the Tribunal reasoned, it would be necessary for all employees, not just for new and returning employees.

The Tribunal also finds that the method chosen by the employer to deal with potential problems of criminal behaviour or poor job performance — urinalysis — is intrusive, and would only be reasonable if the Bank could demonstrate a serious threat to the Bank's other employees and the public. Thus, if direct discrimination were involved, the Tribunal finds that the Bank could not establish a *bona fide* occupational requirement defence for its policy.

It is disturbing that such very different results could depend on whether the discrimination is considered direct or adverse effect discrimination. If, put to the BFOQ test, the policy fails because it is not necessary to job performance, why should it survive merely because the discrimination is not explicit on the face of the policy?

Interestingly, in an application for judicial review, the Federal Court decided that there was adverse effect discrimination involved because there is a sub-group of drug dependent persons who are adversely affected by the policy. It also found that the Tribunal erred because it failed to consider whether the policy is rationally related to job performance, and remitted the case back to the Tribunal for a further hearing on this question. We agree with the Court's disposition on the question of rational connection. However, this raises the question: when the Tribunal considers whether the policy is rationally connected to job performance what test will it apply? Will it be indistinguishable from a BFOQ test?

In summary, cases reveal a number of problems in the distinction between adverse effect and direct discrimination. First, the indicators given by the Supreme Court of Canada to distinguish direct discrimination from adverse effect discrimination are not, in practice, easy to apply. Theoretically, it should be possible to identify direct discrimination because it 1) discriminates on its face and 2) affects all members of the group to whom it applies. Conversely, we should be able to identify adverse effect discrimination because it 1) is neutral on its face and 2) negatively affects only a smaller sub-group of the group to whom it applies.[44]

However, what constitutes discrimination on the face of a policy? Does a rule have to explicitly name the group that it excludes (for example, persons with mobility impairments not employed here) in order to be directly

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[44] In *O'Malley* (*supra* footnote 3 at 551) McIntyre J. said this:

"A distinction must be made between what I would describe as direct discrimination and the concept already referred to as adverse effect discrimination in connection with employment. Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, 'No Catholics or no women or no blacks employed here.'...On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristics of the employee or group, obligations, penalties or restrictive conditions not imposed on other members of the work force. For essentially the same reasons that led to the conclusion that an intent to discriminate was not required as an element of discrimination contravening the *Code* I am of the opinion that this Court may consider adverse effect discrimination as described in these reasons a contradiction of the terms of the *Code*. An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply.

discriminatory,[45] or is a policy discriminatory on its face if it is evident upon reasonably casual reflection that it will exclude or penalize a particular group, based on a ground enumerated in human rights legislation? Is a rule really neutral when a group, such as women has worked persistently and vociferously to raise consciousness about the gendered harm of the rule? Can the characterization of a rule change over time?

The example of direct discrimination given by McIntyre J. in *O'Malley* is a rule which states: "No Catholics or no women or no blacks employed here."[46] But is a practice of requiring all job candidates to climb a flight of stairs to apply for a job any less directly discriminatory than a sign that says "no mobility-impaired person need apply"? Is a policy that requires new and returning employees to provide a urine sample for drug testing not explicitly targeted at persons who are perceived to be prone to drug dependency with the goal of making it possible to impose conditions on their employment? If yes, how is it a neutral rule?

As there can be different views about what constitutes discrimination on the face of a policy, there can be different ways of defining the group that is affected. In the *Toronto Dominion Bank* case the Tribunal decided that if there was any discrimination, it was adverse effect discrimination because the policy applied to all new and returning employees but only the smaller group, namely those employees who are drug dependent, were negatively affected. However, as we have already noted, there is an equally strong argument to be made that the whole group of new and returning employees was discriminated against by being subjected to invasive drug-testing because they might be drug dependent. Seen this way, the facts of the *Toronto Dominion Bank* case do not fit the "smaller sub-group" element of the adverse effect discrimination formula, and can instead been seen as more consistent with a direct discrimination characterization.

More examples could be provided to illustrate the fuzziness of the distinction between direct and adverse effect discrimination.[47] It is possible for a policy to be characterized as direct discrimination, or adverse effect discrimination, or both, depending on how "neutrality" and the group affected are defined by the adjudicator.

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[45] The issue of intention, strictly speaking, is separate from the direct vs. adverse effect distinction. Nonetheless, it lurks in the background as an element of direct discrimination.

[46] *Supra* footnote 3 at 551.

[47] Blanket medical examinations of all new employees, visual acuity standards, and height and weight requirements can all be characterized as either direct or adverse effect discrimination. Looked at one way, each of these policies discriminates directly against persons with disabilities, persons with less than 20/20 vision, or women and members of some racial or ethnic minorities, because it is evident *prima facie* that, depending on how stringent the standard, they will screen out all or some members of these groups. Looked at another way, they are neutral rules of general application which apply to everyone but have an adverse impact on persons with disabilities, persons with less than 20/20 vision, or women and members of some racial or ethnic minorities.

While binary categorization of discrimination as direct or adverse may be attractive in theory because of its apparent simplicity, it is dangerous in practice. Real discrimination cannot always be so neatly boxed, and the appropriate remedies for it so neatly assigned.

That drawing the line between direct and adverse effect discrimination is sometimes difficult might not matter if it did not have such significant consequences. But as the majority decision in *Dairy Pool* indicates, identifying the type of discrimination determines the remedy that is available. In cases of direct discrimination, where a BFOQ defence is not made out, the rule will be struck down; in cases of adverse effect discrimination, those affected negatively will be accommodated, but the rule will *not* be struck down.[48]

Because the distinction determines the remedy available, adjudicators can be drawn into making a decision about which form of discrimination is involved based on the result they believe is appropriate.[49] This can lead to the kind of manipulation of facts and definitions that has been involved in the application of the "similarly situated" test, where sometimes unconvincing distinctions

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[48] In *Dairy Pool*, (*supra* footnote 5 at 506-07) Wilson J. reviews the previous decisions of the Court in *Etobicoke* and *O'Malley*. She says:

> "Where the rule established by the employer fits into the category of 'direct discrimination' and is not saved by any statutory justification, it is simply struck down. The example cited by McIntyre J. [in *O'Malley*] was *Etobicoke*, [*supra* footnote 13]. In that case the mandatory retirement rule discriminated directly on the basis of age and the employer's evidence was inadequate to establish a BFOQ. The rule was struck down. Where a neutral rule has an adverse discriminatory effect, the same result does not obtain. [In *O'Malley*] McIntyre J. contrasts the approach taken to direct discrimination with that taken to adverse effect discrimination:
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> No question arises in a case involving direct discrimination. Where a working rule or condition of employment is found to be discriminatory on a prohibited ground and fails to meet any statutory justification test, it is simply struck down...In the case of discrimination on the basis of creed resulting from the effect of a condition or rule rationally related to the performance of the job and not on its face discriminatory a different result follows. The working rule or condition is not struck down, but its effect on the complainant must be considered, and if the purpose of the *Ontario Human Rights Code* is to be given effect some accommodation must be required from the employer for the benefit of the complainant.

At 514-16 Wilson J. elaborates further on the rationale for the distinction and its consequences.

[49] Anne Molloy argues that it will also affect how respondents and complainants argue cases where disability discrimination is at issue: She says:

> "If the test actually develops this way, we will be faced with the ridiculous situation of victims of discrimination arguing that the employer was acting unintentionally in applying a general neutral rule which had an unfortunate disparate effect on persons with disabilities (so that the duty of accommodation will clearly apply). On the other hand, employers will seek to establish that the rule in question was direct discrimination against disabled people (so that the duty to accommodate is less clear)." *Supra* footnote 39 at 36.

between who is "like" and who is "unlike" appear to determine whether a remedy for discrimination can be obtained.[50]

In the Supreme Court's decision in *Chambly*[51] there may be evidence of this tendency. Cory J., writing for a unanimous Court,[52] deals with the question of whether a Quebec school schedule, which requires Jewish teachers to work on Yom Kippur, is direct or adverse effect discrimination. He says:

> Here the schedule of work is based upon the Catholic calendar of holidays. Nonetheless, I think the calendar should be taken to be secular in nature and thus neutral or non-discriminatory on its face. It will be remembered that the majority of the Court of Appeal determined that since the calendar did not have any religious aims, it was not discriminatory. With respect, I think this was an erroneous conclusion. It is true that this approach can properly serve to determine that there has been no direct discrimination. However, the analysis cannot stop there. Consideration must still be given to the *effect* of the calendar to determine if there is indirect or adverse effect discrimination.

The fact that Cory J. decides in such an apparently off-hand way that though the schedule is based on a Catholic calendar of holidays, it is nonetheless secular, and therefore neutral, should raise eyebrows, particularly when work or school schedules are the central issue in most religious discrimination cases dealt with by the Supreme Court so far.[53] It is probably most accurate to say that originally the schedule was intentionally based on a Catholic calendar of holidays because this was the schedule of the dominant religious group in Quebec, and that over time Canadian society has become increasingly secular to the point that many people are indifferent if not oblivious to the historic roots of the civic calendar. If this is true, then it is possible to make a good case for the schedule being directly discriminatory, or for it being both directly and indirectly discriminatory. The claim would be that the schedule is directly discriminatory on the ground of religion in that it was designed with the requirements of a

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[50] For discussion of this problem see G. Brodsky and S. Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989) at 147-71.

[51] *Régionale de Chambly, Comm. scolaire* c. *Bergevin*, [1994] 2 S.C.R. 525 [hereinafter *Chambly*].

[52] *Ibid.* at 540. L'Heureux-Dubé writes a concurring judgment giving separate reasons on the issue of the appropriate standard of review to apply to an arbitration decision. Her decision is concurred by Gonthier J.

[53] The Court's holding in *Chambly* that the Québec school schedule is not directly discriminatory is consistent with its holding in *R.* v. *Edwards Books and Art*, [1986] 2 S.C.R. 713 that Ontario's *Retail Business Act* which prohibited retail stores from opening on Sundays did not have a religious purpose. The *Act* was challenged as an unconstitutional exercise of the province's legislative authority over property and civil rights in the province, and as a violation of the *Charter*. It survived both challenges, unlike the *Lord's Day Act* which in *R.* v. *Big M Drug Mart*, [1985] 1 S.C.R. 295, was held to have the religious purpose of preserving sanctity of the Christian sabbath, in violation of the *Charter*.

particular religious group in mind, and that group continues to benefit while other religious groups do not. If the schedule is considered neutral, it nonetheless excludes those of minority religious faiths from the benefit of enjoying religious holidays, and, in this sense there is adverse effect discrimination.[54]

But is the Court more comfortable treating the schedule as an instance of adverse effect discrimination because of the possible outcome? If the schedule is not direct discrimination, the Court will not be faced with the choice of having to uphold it or strike it down. It will only need to ensure that the teachers of minority religious faiths are accommodated, a remedy that is much less disruptive to the status quo.

Further, it is not clear that decisions regarding the type of discrimination involved *should* determine the outcome of a case. Reconsidering the 1979 Board of Inquiry decision in the case of *Colfer* v. *Ottawa Board of Police Commissioners*[55] is instructive. That Board of Inquiry found that requiring all Ottawa police officers to be at least five feet ten inches tall and weigh one hundred and sixty pounds had "the effect of precluding virtually all female persons from employment as police officers...."[56] The Board found that the discrimination against women was not intentional, but the result of a generally applied rule which had an adverse effect. As a remedy, it ordered that the rule be abandoned, or refashioned so that neither men nor women applicants would be discriminated against.

Had the Colfer Board of Inquiry been following subsequent rulings, it would seem that this result would be unavailable, since the discrimination involved was deemed to be adverse effect discrimination. The question today would be how to accommodate Ann Colfer without abandoning the rule, even though this is not a sensible solution.[57]

Another example where striking the rule is the appropriate remedy in a case of adverse effect discrimination is employment benefit schemes. Restricting employment benefits to legally married and common-law couples has an adverse effect on lesbian and gay employees. Whether or not such exclusive policies are always intended to discriminate against gay men and lesbians could be a matter of dispute, centering on the facts and the definition to be accorded to intent. No matter what the outcome of such a dispute, such policies cause considerable harm to the dignity, morale, and job satisfaction of lesbians and gay men.[58] It is arguable, that the most appropriate response to such policies

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[54] *Supra* footnote 51 at 540-41.

[55] *Colfer* v. *Ottawa Board of Commissioners of Police* (1979), unreported, Ontario Board of Inquiry [hereinafter *Colfer*].

[56] *Ibid.* at 84.

[57] Of course, one can also argue that any rule fashioned like this is directly discriminatory since it is evident on its face that it will exclude women.

[58] As well, it might be asked what rational connection there is between differentiations among employees based on their sexual orientations and marital status, and their employment.

is to strike the discriminatory eligibility criteria, thereby eliminating the discrimination, rather than attempting to accommodate on an individual basis.[59]

In short, the distinction between direct and adverse effect discrimination has significant drawbacks as an analytical tool because: 1) the distinction cannot always be clearly made; 2) when different outcomes are attached to the different forms of discrimination, the analysis may be manipulated to ensure the desired result; and 3) the most appropriate remedies may be precluded.

If it is the case that this hard and fast distinction between direct and adverse effect discrimination may be complicating and confusing human rights analysis, rather than clarifying it, it is important to ask where the distinction arises from and what underlies it.

c) *Questionable Assumptions Underlying the Distinction Between Direct and Adverse Effect Discrimination*

It seems apparent that the distinction between direct and adverse effect discrimination is based on the need to maintain that there is a difference between intentional discrimination and unintentional discrimination, even though tribunals and courts, including the Supreme Court of Canada, have repeatedly ruled that unintentional discrimination is no less a violation of human rights laws, and that it is the effects of discrimination which matter. There remains a holdover sense that direct discrimination is more loathsome, morally more repugnant, because the perpetrator *intends* to discriminate, or has discriminated *knowingly*. By contrast, adverse effect discrimination is viewed as "innocent",[60] unwitting, accidental, and consequently not morally repugnant.

In *O'Malley*, McIntyre J. articulated the original proposition that neutral rules are not driven by discriminatory motive. McIntyre J. says:

> ...adverse effect discrimination...arises where an employer for genuine business reasons adopts a rule...which has a discriminatory effect upon a prohibited ground...in

[59] *Canada (Attorney General)* v. *Mossop*, [1993] 1 S.C.R. 554 is one case in which a gay employee was offered a form of accommodation which he regarded as unacceptable. The facts are as follows. Employees living in heterosexual relationships were entitled to bereavement leave upon the death of a family member, as a matter of right, pursuant to a collective agreement. Upon the death of the father of his male lover Brian Mossop requested and was refused bereavement leave. Mossop initiated grievance proceedings and ultimately appealed to the courts. The employer, the Department of Secretary of State offered Mossop a special leave in lieu of the family bereavement leave provided to other employees. While this might be regarded as a form of accommodation, Mossop rejected it because his goal was inclusion. This could only be accomplished through a change in the policy. Mossop's case was the first case concerning heterosexual benefit schemes to be heard by the Supreme Court of Canada. The accommodation question was never addressed. The Supreme Court ruled against Mossop on other grounds. Gradually such discriminatory schemes are being amended through collective bargaining and legislative processes.

[60] In *Chambly*, Cory J. states that "Adverse effect discrimination can occur quite innocently..." *supra* footnote 51 at 541.

> that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.

He characterizes this discrimination as flowing from "an employment rule honestly made for sound economic or business reasons...."[61]

Wilson J. echoes this in *Dairy Pool* where she says:

> ...the good faith of the employer is a central concern where the rule singles out a particular group for adverse treatment. There is less reason to be suspicious of the employer's motives in the case of a rule which is neutral on its face and generally applicable to all employees.[62]

In retrospect, this seems too simple. Sometimes discrimination is submerged in well-accepted patterns of thought and practice. Should we accept that discrimination is innocent, unwitting, accidental because it is socially so ordinary that many take it for granted and consider it "neutral"? Some of the most important forms of discrimination to address are those rules and practices that are the institutionalized expressions of norms established by dominant groups. Such policies and practices can be seen to be generalized descriptions of those who are the dominant and traditional participants in a particular institution, and of the conditions that will best support them. Given what we know now about systemic discrimination and how it operates it seems disingenuous to accept that rules like the Ottawa Police Commission's height and weight requirements were not "intended" to discriminate against women. These requirements described the people who had always done the job, that is, tall, heavy men, and would ensure that tall, heavy men continued to do the job.[63]

One of the reasons for moving to effects-based analysis in human rights cases was to avoid having to find "the guilty mind" behind the act in order to prove that discrimination had occurred. But, this does not mean that the discriminatory effects of all policies are accidental. They are often the expression of an institutional intention to protect privileges of long standing. Even granting that some discrimination is innocent or even mistaken but well-intentioned, the legal response should be to try and eliminate it, not to navigate around it.

In *Dairy Pool*, Wilson J. assumes further that "neutral" rules usually affect only a few employees adversely, perhaps only the complainant.[64] But this is not necessarily the case. As Brian Etherington points out, not just height and weight requirements but other physical tests can result in adverse impact on

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[61] *Supra* footnote 3 at 551.

[62] *Supra* footnote 5 at 516.

[63] The Board of Inquiry decision in *Colfer* is interesting on this point. On the one hand, the Board decides that the discrimination was unintentional. On the other hand, it says that the Board of Police Commissioners "knew or should have known" that the height and weight requirement would discriminate against women.

[64] *Supra* footnote 5 at 514.

numerous women and significant numbers of some racial groups.[65] Also, recent reports on the legal profession indicate that practices, such as constructing performance standards and payment protocols based on norms for practitioners who do not have child-bearing and child-rearing responsibilities have an adverse impact on parents, and on women in particular.[66] These are neutral-seeming practices that do not affect a few, or one individual, but women as a group.

Thus, neither one of these assumptions seems to bear close scrutiny. Some "neutral" rules are not as innocent as they may seem, and they often affect more than a few.

The faulty assumptions underlying the distinction between direct and adverse impact discrimination are also more problematic if they are used to justify a reduced standard of scrutiny in cases of adverse impact discrimination, or a less stringent response to them. It seems now that the distinction may be used to require a showing that discrimination is "intentional" before system-wide rules or practices will be struck down. This is ironic, given the Supreme Court of Canada's own record and statements. As the Court acknowledged recently in *Chambly*, "When adverse effect discrimination occurs, it can, just as surely as direct discrimination, confront employees with harsh conflicts between employment and religious beliefs and just as surely it will infringe human rights legislation."[67]

d) *Setting Our Course Again*

Looking at recent developments closely, it appears that, notwithstanding a purported shift of focus from intention to effects, the notion lingers that "intentional" discrimination is the worst violation of human rights laws and that it is the standard against which the seriousness of any violation should be measured. Clinging to this notion will undermine our ability to treat effectively the systemic discrimination which affects whole groups in our society. And since "intention" may be both difficult to detect and more difficult to define than was previously thought, it should not be a submerged, unacknowledged standard that determines outcomes.

The case law that reinforces the distinction between direct and adverse effect discrimination may therefore represent an error in charting the course of human rights jurisprudence. It will be more fruitful to focus on the common character of all forms of discrimination, that is, their negative impact on their victims. The point is not to deny the insight that discrimination can occur in various ways, but rather to recognize that this is so, resist the impulse to confine

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[65] *Supra* footnote 26 at 324-25.

[66] For discussion of this issue see *The Legal Duty to Accommodate Lawyers with Family Responsibilities*. The Canadian Bar Association Working Group on the Legal Duty to Accommodate, Chair: Dr. Sheilah Martin, (Ottawa: Canadian Bar Association, 1995).

[67] *Supra* footnote 51 at 541.

discrimination to only two categories, and provide effective antidotes for the effects of all forms of discrimination.

There should also be a common defence to discrimination. The duty to accommodate should be incorporated into the BFOQ defence. Looking back on *Bhinder*, it is unfortunate that the opinion of Chief Justice Dickson did not prevail at the time. In *Dairy Pool*, both the majority and the minority sought to soften the harshness of *Bhinder*, but neither opinion reflects the simplicity and clarity of the Dickson dissent. Dickson C.J. encouraged adjudicators to incorporate a duty to accommodate into the BFOQ defence, and to avoid confusing distinctions between direct discrimination and adverse effect discrimination.

Finally, the form of remedy should not be dictated by whether the discrimination is deemed to be direct or adverse effect discrimination but by the real circumstances of the discrimination, the situation of the victim or victims, and an assessment of what will remedy the situation now and in the future. Whether the discrimination is direct or adverse effect discrimination, it will sometimes be most effective and most appropriate to strike down the rule. Where a rule has a discriminatory effect on a group, striking down the rule may be the only remedy that will work, notwithstanding that from certain perspectives that rule may be regarded as a neutral rule of general application. In other circumstances, it will be most effective to require that the rule be refashioned.[68] And sometimes group or individual accommodation will be the best solution.

The three crucial questions for the interpreters of human rights should be:

1) Does the challenged practice or rule have a discriminatory effect on an individual or group?

2) Can the employer show that it could not avoid the adverse impact on the individual or group?

3) What will be an effective remedy?

Making a straight-line connection between the form of the discrimination and the form of the remedy, as *Dairy Pool* seems to dictate, presumes that discrimination and its effects can be neatly categorized. The development of human rights will not benefit from this kind of rigidity; it requires that analysis

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[68] In *Zurich Insurance Co.* v. *Ontario (Human Rights Comm.)*, [1992] 2 S.C.R. 321 at 391-92, McLachlin J. found that the company failed to show that it had no reasonable alternative in 1983 but to calculate its automobile insurance premiums based on age, sex, and marital status. She agreed with Sopinka J. that the insurance industry must be allowed time to restructure its system. But found that this could be reflected in the remedy granted by the Board of Inquiry. "Its remedial powers are broad" she wrote, "and contemplate situations such as this where time may be required to effect compliance with the *Act*." She indicates that the Board of Inquiry could set a time for readjustment, during which no penalty would accrue. After this period the Board of Inquiry could impose an appropriate penalty or other remedy. In McLachlin J.'s view, human rights legislation can encompass the framing of procedures and deadlines for refashioning rules and practices. McLachlin J.'s judgment is a dissent, but not on this issue.

remain open to real circumstances, with all the ambiguities and variations they present, and that adjudicators do not become merely rule-bound.

III. *The Idea of Accommodation*

a) *The Link to Formal Equality*

Having considered the connections between the duty to accommodate and other human rights concepts, including the *bona fide* occupational qualification defence and direct and adverse effect discrimination, the next question is: what *is* the idea of accommodation and is it compatible with the aspirations of disadvantaged groups to overcome their inequality?

Human rights law embodies two competing equality principles. Whereas the principle of formal equality is concerned with like treatment of like individuals, the principle of substantive equality is concerned with conditions of inequality experienced by groups, and with the imbalance in power among groups in society that is at the root of inequality. In the human rights context, the ideal implicit in formal equality is to eliminate differential treatment of individuals in relation to employment, housing, and public services. The ideal implicit in substantive equality is to eliminate systemic factors that produce conditions of inequality for disadvantaged groups, recognizing that that may mean altering systems that facially treat everyone the same.

Because of this difference in focus — on differential treatment of individuals as opposed to inequality of conditions for disadvantaged groups — there is a significant difference between how much change is envisioned by formal and substantive equality theories. The formal model of equality implies that the existing frameworks are acceptable, except that there are occasional incidents of prejudice, and perhaps some marginalization of minority groups. The solution is to conciliate between individuals when there are incidents of prejudice and to ensure that all groups are included in existing institutions by being treated the same as those already inside. In other words, this version of equality anticipates little change in the functioning of institutions.

A substantive model of equality, which considers inequality in conditions and imbalances of power among groups, anticipates a deeper level of change. It posits that the functioning of institutions and the structure of relationships among groups must change significantly, and that working towards equality is a process of transformation, not minor adjustment.

In human rights jurisprudence, religious minorities and people with disabilities have presented a challenge to the formal model of equality, and its obsession with same treatment. They are often not well-served by facially neutral policies that have been designed with the needs of dominant groups in mind.

Responding to cases brought forward by members of these groups, Canadian tribunals and courts have concluded that equality is not simply a matter of

identical treatment, that some individuals and groups will have to be treated differently, either sometimes or regularly.[69] "Accommodation" has been introduced to answer the "difference problem."

But from a conceptual point of view there is a problem with identifying "difference" as the problem which human rights law should be trying to address, and with the image of equality that accommodation projects. It endorses the idea that some people are "the same" and some people are "different," and that those who are "the same" are, deservedly, dominant. This sameness-difference approach assumes that there are "normal" people and "others," who are by definition "abnormal," and that a world full of barriers to the "abnormal" people is normal. The status quo is normal but some will need adjustments made to this normal world because they are not normal. These adjustments are said to "accommodate" them.

The difficulty with this paradigm is that it does not challenge the imbalances of power, or the discourses of dominance, such as racism, ablebodyism and sexism, which result in a society being designed well for some and not for others. It allows those who consider themselves "normal" to continue to construct institutions and relations in their image, as long as others, when they challenge this construction are "accommodated."

Accommodation, conceived this way, appears to be rooted in the formal model of equality. As a formula, different treatment for "different" people is merely the flip side of like treatment for likes. Accommodation does not go to the heart of the equality question, to the goal of transformation, to an examination of the way institutions and relations must be changed in order to make them available, accessible, meaningful and rewarding for the many diverse groups of which our society is composed. Accommodation seems to mean that we do not change procedures or services, we simply "accommodate" those who do not quite fit. We make some concessions to those who are "different", rather than abandoning the idea of "normal" and working for genuine inclusiveness.

In this way, accommodation seems to allow formal equality to be the dominant paradigm, as long as some adjustments can be made, sometimes, to deal with unequal effects. Accommodation, conceived of in this way does not challenge deep-seated beliefs about the intrinsic superiority of such characteristics as mobility and sightedness. In short, accommodation is assimilationist. Its goal is to try to make "different" people fit into existing systems.

As the discussion of the cases suggests, the concept of accommodation may lead to discriminatory rules being upheld, rather than struck down. The fact that accommodation may be available to those who complain about being negatively affected seems to encourage tribunals and courts to be less stringent in their analysis of discriminatory policies and practices. If this is so, then again, the

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[69] See, for example, *Canadian Odeon Theatres* v. *Huck* (1985), 6 C.H.R.R. D/2682 (Sask. C.A.), *O'Malley*, *supra* footnote 3, *Dairy Pool, supra* footnote 5, *Renaud, supra* footnote 23, *Chambly, supra* footnote 51.

concept discourages transformation, and facilitates only minor adjustments to the status quo.

Consequently, one problem is that the idea of accommodation keeps intact the focus on sameness and difference. The second problem is that it continues to privilege those who "fit" or who can benefit from existing norms, while making mere concessions to those who are deemed to be "different." Those labeled "different" are those with less power, and their "difference" is penalized.

b) *The Duty to Accommodate is Always Qualified by the Defence of Undue Hardship*

The duty to accommodate which arises in cases of adverse impact discrimination is always modified by the defence of undue hardship. In cases of direct discrimination, where there is no duty to accommodate, the defence of undue hardship is not available. Instead the discriminatory practice must justified as necessary or eliminated.

Limits on the right to be free from discrimination are an integral part of the accommodation/hardship analysis. Thus, the idea of accommodation encourages two different lines of analysis — one for those who can obtain an effective remedy for discrimination through identical treatment, and one for those whose remedy depends on being treated differently. For those who can obtain equality by being treated alike, there are no limits, no undue hardship defences. For those who cannot obtain equality by being treated alike, there are constraints and limits, because their right to equality is modified by the defence of undue hardship. To be accommodated, it is necessary for a person to claim "difference", and accommodation then, by definition, may provide less than equality of results.

For example, it may be possible to eliminate the discrimination in access to service experienced by a black person in a restaurant by ensuring that that person is treated the same as a white person.[70] A person with a disability, however, who is discriminated against with respect to service in a restaurant because it is not accessible for persons who use wheelchairs cannot obtain equality by being treated the same as a non-disabled person. Alterations to the restaurant will need to be made, and a restaurant owner can refuse to make those alterations if they will create an undue hardship.

The concept of "accommodation short of undue hardship" has introduced economic considerations as a defence to discrimination claims. Costs, disruption, interference with collective agreements, and effects on the morale of other employees can, according to case law, constitute legitimate limits on the right to equality.[71]

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[70] However, same treatment will not always be an effective remedy for race discrimination, and it cannot overcome entrenched patterns of racial inequality.

[71] See Wilson J. in *Dairy Pool, supra* footnote 5 at 520-21.

Accommodation seems to envision only marginal participation by those who are a little bit "different." People who are very different from dominant norms may be ineligible for accommodation because of the consequent hardship for the accommodators. In other words, some people can be discriminated against because it is considered efficient and economical. Again, this establishes two categories of equality claimants: those whose equality we decide we can afford and those whose equality we decide we cannot.

Canada's highest Court has not taken the narrow approach to interpreting undue hardship that has been taken by the United States Supreme Court. The Supreme Court of Canada specifically rejected the *de minimus* test for undue hardship which the United States Supreme Court adopted in *Trans World Airlines, Inc.* v. *Hardison* in 1977. In *Hardison* the United States Court held that to require an employer to bear more than a *de minimus* cost in order to accommodate the religious faith of an employee was an undue hardship.

Sopinka J. writes in *Renaud* that this test for undue hardship in a case of religious discrimination is inappropriate to the Canadian context since it is based on the prohibition in the American constitution against the establishment of religion. The Supreme Court of Canada, he writes, has approached the issue of accommodation in a more purposive manner:

> More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term 'undue' infers that some hardship is acceptable; it is only 'undue' hardship that satisfies this test. The extent to which the discriminator must go to accommodate is limited by the words 'reasonable' and 'short of undue hardship.' These are not independent criteria but are alternate ways of expressing the same concept. What constitutes reasonable measures is a question of fact and will vary with the circumstances of the case. Wilson J., in *Central Alberta Dairy Pool, [supra* footnote 5], listed factors that could be relevant to an appraisal of what amount of hardship was undue...
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> > ...financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those that bear it are relevant considerations.
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> She went on to explain [that]:
>
> [t]his list is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case....
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> The concern for the impact on other employees which prompted the Court in *Hardison*, [432 U.S. 63 (1977)] to adopt the *de minimus* test is a factor to be considered in determining whether the interference with the operation of the employer's business would be undue. However, more than minor inconvenience must be shown before the complainant's right to accommodation can be defeated. The employer must establish that actual interference with the rights of other employees, which is not trivial but substantial, will result from the adoption of the accommodating measures. Minor

> interference or inconvenience is the price to be paid for religious freedom in a multicultural society.[72]

While it is encouraging that Canada's courts have not adopted a *de minimus* standard for undue hardship, we should not lose sight of the fact that, nonetheless, undue hardship is a substantial qualifier on the duty to accommodate. The danger remains that the concept of accommodation, because it always modified by the defence of undue hardship," may function not as a particular articulation of any idea of equality but as a limit on the right to it.

Indeed, in some Supreme Court decisions accommodation has itself been characterized as a defence for employers rather than an entitlement of employees. Sopinka J. writes that in *O'Malley* the Court accepted the idea of accommodation as a limit on the liability of employers in cases of adverse impact. He says:

> This Court accepted the proposition that intention to discriminate was not a requirement for a finding of discrimination....Without more, this would have made the liability of employers absolute once it was found that a rule neutral on its face had a discriminatory effect. Based on the United States experience, it was submitted by... [O'Malley] that the employer could still escape liability if the employer established that it was not in breach of its duty to accommodate. From this perspective, the duty is more in the nature of an exception from liability than an additional obligation.[73]

The idea of accommodation, therefore, may be developing into a protection for employers that will provide only a second class version of equality for those who are discriminated against. As the case law evolves there should be serious concern about where the "duty to accommodate short of undue hardship" will lead, and particularly about the potential of this concept to be interpreted in ways that will not assist in dismantling structural discrimination against groups, but rather reinforce it.

IV. *Accommodation and Different Grounds*

a) *Religion and Employment Have Structured the Paradigm*

To date, Supreme Court decisions on accommodation deal principally with discrimination on the basis of religion. However, because the concept of accommodation is attached to the idea of "difference" and to adverse effect discrimination it is already assumed by some that the duty to accommodate applies to all grounds, and applies to all grounds in a similar way.[74] There are

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[72] *Renaud, supra* footnote 23 at 984-85.

[73] *Dairy Pool, supra* footnote 5 at 523. Sopinka J. reiterates this characterization of accommodation in *Renaud, supra* footnote 23 at 989.

[74] See, for example, *The Legal Duty to Accommodate Lawyers with Family Responsibilities, supra* footnote 66 at 86-87.

tribunal and lower court decisions dealing with disability, national origin, and pregnancy where the duty to accommodate has been applied.[75]

But *should* the duty to accommodate short of undue hardship be applied to all grounds in a similar way, or are there differences among the grounds that makes this inappropriate?

If the harm to be overcome in the workplace is religious favouritism, then either a policy of accommodation or a policy of non-accommodation (secularize everything) could be suitable. If all religions were accommodated similarly by employers, or no religion was accommodated, arguably the goal of eliminating preferential treatment would be achieved.

However, there is a history of Canadian employers engaging in preferential practices for the benefit of dominant Christian denominations. Most employers have work schedules that are based on the Christian calendar, and that permit the holy days of mainstream Christian religions to be honoured without conflict with work requirements. This means that these schedules should be understood as *prima facie* discriminatory against persons belonging to other religions. Most of the major religious discrimination cases (*O'Malley*, *Dairy Pool*, *Renaud*, *Chambly*) deal with work scheduling issues precisely because this is a significant point of conflict.[76] Instead of requiring employers to alter their work schedules to deal even-handedly with the needs of persons with diverse religious beliefs, or provide a schedule that could be considered genuinely secular, human rights law has been interpreted in a way that allows employers to maintain work schedules that favour mainstream Christian religions, as long as when requested to do so, and short of undue hardship, they accommodate persons with other religious beliefs.

Seen this way, accommodation may not be an adequate concept for dealing even with the ground religion to which it has been most applied, because it does not really eliminate religious favouritism; it merely softens its impact.

However, there is not just historical bias in favour of mainstream Christian religions to be taken into account when we are dealing with discrimination in this area. There is also the positive value that the society places on secular space. It is not really the goal of human rights laws to make the workplace more

[75] See, for example, *Howard* v. *University of British Columbia (No.1)* (1993), 18 C.H.R.R. D/353 (B.C.C.H.R.) (failure to accommodate the needs of a deaf student); *Menghani* v. *Canada (Employment and Immigration Comm.)* (1992), 17 C.H.R.R. D/236 (Can.Trib.), aff'd. remedy varied, (1993), 21 C.H.R.R. D/427 (F.C.T.D.) (failure to accommodate the needs of a Canadian of Indian origin who was attempting to obtain landed immigrant status for his brother); *Heincke* v. *Brownell* (1990), 14 C.H.R.R. D/68 (Ont. Bd. Inq.), aff'd, (1992), 16 C.H.R.R. D/300 (Ont. Ct. Gen. Div.), (failure to accommodate a pregnant worker's need for a change in work duties); *Brown* v. *M.N.R. Customs and Excise* (1993), 19 C.H.R.R. D/39 (Can. Trib.) (failure to accommodate a worker's need for schedule alterations because of pregnancy and childcare responsibilities.)

[76] *Bhinder*, *supra* footnote 4, is the exception, since it deals with a hard hat rule, not a work schedule issue.

religious. So while the law requires employers to accommodate minority religions, a defence of undue hardship has been created to limit an employer's duty to accommodate religious practice. Thus, though work scheduling was originally religion-based, the workplace is now considered a secular place with secular objectives. Religious practice mainly takes place elsewhere. The established responsibility of employers is to ensure sufficient flexibility in work rules to avoid placing employees who adhere to minority faiths in situations of harsh conflict.

McIntyre J. says in *obiter* in *O'Malley* that once reasonable efforts to accommodate have been made, if an employee is still not fully accommodated, she may have to choose between her religion and her employment.[77]

The fact that there are two values at work in this area — 1) accommodating minority religious faiths and 2) maintaining secular space — means, in our view, that the concepts of accommodation and undue hardship developed for dealing with the ground religion may well not be appropriate or adequate for dealing with other grounds like race, sex and disability where there is no balancing positive value, like secularism, that can be seen as an alternative way of achieving the goal of eliminating discrimination.

Law and policy regarding religious accommodation are still developing. Given Canada's changing population, we can expect more pressure to be brought to bear on employers where work schedules create conflicts. Schools and universities are also being pressed to allow students time off to respect the holidays of non-Christian religions. Rather than individual accommodation, broader solutions may be necessary.[78] It would be wrong to conclude that the jurisprudence on accommodation is settled, or that it is adequate, even with respect to religious discrimination. It is even more problematic to apply the jurisprudence on religious accommodation, without distinction or qualification, to other grounds.

b) *Does This Paradigm Fit Gender and Race?*

Despite the fact that the concept of accommodation is not yet fully developed even with respect to religious discrimination, which is the context in which it was conceived, it is being extended to other grounds. The tendency of the idea of accommodation to reinforce the status quo, combined with the built-in undue hardship modifier, is problematic where gender and race are concerned. Those elements of existing jurisprudence are fundamentally incompatible with the view that workplaces should be completely free of discrimination based on gender and race. Costs, disruption to collective

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[77] *Supra* footnote 3 at 555 (S.C.R.).

[78] Sopinka J. suggests in his decision in *Dairy Pool* that an employer with a large number of employees of different religions could discharge his obligations by adopting a general policy with respect to religious accommodation: *supra* footnote 5 at 529.

agreements, problems of morale of other employees have never been held to be acceptable justifications for continuing discrimination against women and members of racial minorities. Do we accept that after reasonable efforts an employee who is not fully accommodated must choose between her sex and her employment?

If accommodation functions to endorse the idea that workplaces should be centrally based on the needs of a unitary model of worker whose needs are considered to be "normal," provided that modest adjustments are made for the "abnormal" worker, this will perpetuate sex and race discrimination since that unitary model of worker is based on the dominant image of a worker, and he is male and white.

If accommodation is understood to be a special exception to the normal requirements of other workers, the result is likely to be that discriminatory attitudes and arrangements are left unchallenged and possibly reinforced. For example, if accommodation of pregnancy-related absence from work is understood to be an isolated, and individual arrangement required by pregnant women, a complex regime of arrangements and attitudes based on a model of a male worker with no children is likely to go unexamined. Further, employers may feel justified in resenting the legal requirement to accommodate pregnancy-related absence, especially if the requirement arises more than once.

There is nothing wrong with noting that some patterns of worker requirements are statistically more prevalent, and that other patterns are statistically less common. What is problematic from a human rights standpoint is privileging that which is prevalent and considered "normal" in a particular setting, and marginalizing or penalizing that which is less prevalent and considered "abnormal", where differentiations are related to social categories of inequality, such as being female or black. Just because the requirements of one group are more prevalent should not mean that the requirements of members of less well represented or less powerful groups are discounted. Indeed, if the requirements of the dominant group are continually reinforced, then the possibility of workplaces becoming more open to the participation of members of currently marginal groups is diminished.

It may be true that in some work settings where men predominate, pregnancy is not the norm, statistically speaking. This does not make "difference" an attribute of women as a group. The difference between men and women with respect to child-bearing capacities is relational. Pregnancy is not a difference. In fact, viewing pregnancy in this way is sexist because it posits that workplace standards can be based on a model of a male worker with no children, and anyone who does not fit them is "different." Instead pregnancy should be normalized, and dealing with pregnancy-related absences should be viewed as an ordinary cost of doing business, along with other regulatory requirements such as taxation and pollution controls.

The danger is that accommodation will focus on the individual pregnant worker and leave fundamentally sexist work rules in place. To take the example

of pregnancy leave again, the requirement for accommodation of pregnancy-related absence is only one aspect of what is required by women to effectively combine paid work and culturally-imposed child-rearing responsibilities. Fully addressing the employment barriers experienced by women because of child-bearing and child-raising requires a number of adjustments in workplace attitudes and arrangements for women as a group. Perhaps most obviously, many parents of young children, women especially, require some level of scheduling flexibility to deal with their children's care. If child-bearing and child-rearing are reconceived as ordinary and necessary activities of many workers, it follows that all workplace arrangements and attitudes related to these activities should be reviewed and altered in order to eliminate systemic barriers to women's employment opportunities.

If the standard for accommodation were sufficiently high, that is, if it meant full accommodation for groups as a whole, so that it was a tool for eliminating systemic barriers, there would be no problem. However, the standard of accommodation developed so far in the religion cases is individually focused and constrained by the undue hardship modifier. This is likely to produce a standard of accommodation that is unacceptably low, and which does not address systemic discrimination. For sex and race, there should be equality *un*modified.

c) *What About Disability?*

Disability, like sex and race, is clearly a socially constructed category. As female sex and black race have been socially constructed as stigmatizing and disadvantaging categories, so has disability. People labeled with disabilities are understood by definition to be "different," and "abnormal." We do not view the human population as comprised of people with many different kinds and levels of abilities, which are more and less suited at different times to different tasks and opportunities. Instead, we tend to make a demarcation, based on statistically and medically defined ranges for "normalcy," between the "able" and the "disabled"; we tend to favour certain physical and intellectual characteristics no matter what the circumstance, and stigmatize others.

Though it is similarly socially constructed as disadvantaging, compared to female sex or black race, disability is a category that includes not a few but a huge range of characteristics. It covers a wide spectrum of physical, emotional and intellectual capacities. There are many (dis)abilities and no one (dis)ability is monolithic. For example, there are many variations among people in their ability to see, and each person who is labeled blind is unique; one person who is blind may use tapes to receive or convey information, another braille, another a computer.

What this means is that there are some measures which are essential to eliminating the subordination of persons with (dis)abilities as a group, such as constructing accessible buildings and transportation systems and adapting

forms of communication so that they do not rely on sight or hearing alone. If these issues are dealt with as matters of individual accommodation and analyzed on the basis of whether it is an undue hardship to make alterations for a particular person, general accessibility and barrier removal will not result.

On the other hand, because of the wide range of abilities included in this category and the particularity of (dis)ability, individual accommodation, such as customizing a work site to suit the capacities of a person with a particular manifestation of a particular (dis)ability, is vital to the equality project.

There is an important difference then between thinking about accommodation related to sex and race, and thinking about accommodation related to (dis)ability. Dealing with accommodation as an individual matter when sex and race discrimination are at issue is a cop-out, a tactic that is likely to sidestep dealing directly with the social construction of the "normal" as male and white. However, with disability the subordinating effect of the category "disability" can only be eliminated by 1) using group-based measures, such as making buildings, transportation and communication systems accessible, and 2) making individualized adjustments to workplace or service systems. A focus on both group and individual is needed in order to make institutions and services more open to, and more functional for, people with a wider range of abilities.

For people with (dis)abilities, individualized accommodation can be incomplete in that it may leave the category "disabled" intact; but it can also be a necessity. If there were enough accommodation of enough people with various (dis)abilities, then the category "disabled" might break down, and be replaced by a sense that many people need to be supported in various ways to be full participants and contributors in different settings.

With the category "disability" more people may be persuaded that undue hardship is an appropriate limit on the duty to accommodate. This may be because smashing the stereotypes that underlie this category is particularly challenging in a Western, competition-based society. There is a close relationship between the characteristics of those who get included in the category "disabled" and what are understood to be fair, necessary and objective criteria of capability. In employment circumstances the definition of disability is apt to be tautological: you can't do the job; why can't you do the job? you have a disability; how do you know you have a disability? you can't do the job. A person who requires alterations to a workplace is understood by virtue of that fact alone to be disabled, and ill-suited to the job in question.

It is much harder than with sex and race to demonstrate that the characteristics associated with the category (dis)ability are unrelated to job performance. It is clear that race has nothing to do with job performance. In the case of gender, generalizations about women and job performance rarely hold up when they are applied to individuals. For women, pointing out the myriad individual exceptions has been the way of cracking the integrity of the generalizations about women as a group.

But with disability, who is considered to have a disability is closely tied to who is considered suitable for employment; this is a much tighter knot. Attacking the stereotypes that underlie the category "disability" requires questioning fundamental social beliefs in merit, competition, and normalcy.

In the current political and social climate of fiscal restraint and liberal market ideology, people with (dis)abilities are in danger of being pushed back to their former status as eligible for charity; they are less likely to achieve the real status of full and equal citizens that human rights laws promise them. The idea of undue hardship is a major stumbling block here if it measures out equality in teaspoons, in small doses that will not cause undue cost or disruption, but will also not fundamentally change systems or categorical thinking. If we do not believe that an employee should have to choose between her disability and her employment, we have to be wary of any limits on accommodation.

In summary, the paradigm of accommodation short of undue hardship which has emerged from religious discrimination cases may not be sufficient to address religious discrimination *and* appears not to be well suited to addressing discrimination on other grounds either. More care is needed in thinking through the concept of accommodation, and how to apply it, so that it will not undermine the goal of equality. It is not too late to give it more substantive content.

Conclusion

There are two layers of problems regarding the duty to accommodate. The first is that the jurisprudence has become tangled and unfruitful because, after *Dairy Pool*, different systems of analysis must be followed depending on whether direct or adverse effect discrimination is involved, and different results flow. If the discrimination is direct, then the defence of BFOQ is available, and, if proven, no accommodation is required; if the BFOQ is not proven, the rule will be struck down. On the other hand, if the discrimination is adverse effect discrimination, there is a duty to accommodate to the point of undue hardship, but the rule will not be struck down.

Since it is difficult in some circumstances to decide whether a rule or practice constitutes adverse effect or direct discrimination, and some rules and practices could be characterized as either, or both, the requirement to make a threshold identification of the form of the discrimination is problematic, particularly since important consequences are attached.

Further, there is nothing inherent in the form of direct discrimination that justifies no duty to accommodate being attached, and nothing inherent in the form of adverse effect discrimination that justifies a discriminatory rule being maintained. The reasons given for different results flowing, depending on the form of the discrimination, are simply not persuasive.

We are left asking: why should there not be accommodation, if it is possible, even if the discrimination is direct? Why should a rule not be struck, or radically

altered, if this is the best remedy for the discrimination, even if adverse effect discrimination is involved?

It is not human rights law should not notice that discrimination comes in different forms; it should engage in a continuous search to understand discrimination, in order to eliminate it. Noticing and naming different manifestations of discrimination, and the different effects of those manifestations, is important to increasing understanding, and to fashioning appropriate and inventive remedies. However, that noticing and naming is a different exercise from the rigid binary categorization of direct and adverse effect discrimination that the courts are currently engaged in, which closes down rather than opening up the exploration of many different forms of discrimination and the ways of remedying them. Noticing and naming different forms of discrimination must never divert attention from the effects of discrimination. The most appropriate remedy will not always be available, if appropriateness is strictly determined by the category of discrimination that is involved, rather than by a careful consideration of what, in the particular circumstances, will eliminate the discrimination.

We believe that this layer of problem can be resolved by eliminating the identification of the form of discrimination as a threshold requirement to analysis, and by incorporating the duty to accommodate into the BFOQ defence. It can be resolved by abandoning categorical analysis in favour of a more purposive approach to human rights reasoning.

However, this will not solve the second layer of problem, which is more difficult because it is embedded in the very idea of accommodation. The problems of this deeper layer are these. First, the idea of accommodation is rooted in the sameness/difference distinction, not in the recognition of inequality among groups. It tells us what to do when a person or group is considered "different" or in need of "different treatment." It does not disturb the existing distribution of power among groups; it does not acknowledge the fact that "different" is the label attached to those with less power. Rather it allows rules and practices that favour the powerful to be maintained as long as some minor adjustments are made to "accommodate" others.

Secondly, it allows an economic limit (in the form of the undue hardship defence) to be placed on the right to equality of those who are considered "different." As accommodation is applied to an increasing number of grounds (disability, sex, family status), and because disadvantaged groups are most broadly affected not by direct discrimination but by seemingly "neutral" rules (which are typically descriptions of the practices that suit an institution's traditional participants), the danger is that accommodation is emerging as a new line of analysis which provides a second class version of equality, that will allow economic and other limits to constrain the enjoyment of equality for those who are still disadvantaged.

Madam Justice Beverley McLachlin says: "[accommodation] operates by requiring that the powerful and the majority adapt their own rules and

practices, within the limits of reason and short of undue hardship...." At first, this sounds appealing, but it also reveals the problems inherent in the idea of accommodation. The power of the powerful and the majority is not challenged. Accommodation requires them to *adapt their* rules and practices to make some space for those who are "different." This minority rights version of accommodation does not require the powerful and the majority to work with others, on an equal footing, to devise new rules and practices that will better serve all the groups in a diverse population.

Can accommodation be an idea of equality? Or is it, by definition, accommodationist, not transformative, not egalitarian in vision? We believe that accommodation could be an idea of equality if it recognized that we are all "different," and that the structures that reinforce power imbalances among groups are the real impediment to equality. Accommodation could be an idea of equality if it came to mean: making space for the equal participation of diverse groups in work and social life through the negotiation of rules that redress power imbalances among groups.

However, making accommodation a big enough idea to address the inequality experienced by disadvantaged groups will not be easy. Interpreters of human rights law will need to analyze more carefully, be aware of the danger, and show commitment to the normative principle that human rights law should not be used to reinforce the inequality of disadvantaged groups, but to eliminate it.