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BACKGROUND PAPER

# AN EXAMINATION OF THE DUTY TO ACCOMMODATE IN THE CANADIAN HUMAN RIGHTS CONTEXT

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Revised by Robert Mason, Julia Nicol and Julian Walker

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## AUTHORSHIP


| | | |
|---|---|---|
| 1 December 2020 | | |
| | Robert Mason | Legal and Social Affairs Division |
| | Julia Nicol | Legal and Social Affairs Division |
| | Julian Walker | Legal and Social Affairs Division |
| 10 January 2012 | Laura Barnett | Legal and Legislative Affairs Division |
| | Julia Nicol | Legal and Legislative Affairs Division |
| | Julian Walker | Legal and Legislative Affairs Division |


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*An Examination of the Duty to Accommodate in the Canadian Human Rights Context*
(Background Paper)

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# EXECUTIVE SUMMARY

This Background Paper provides an overview of the duty to accommodate – a fundamental principle of equality included in all Canadian human rights laws – and describes how that principle has been interpreted and applied in Canadian jurisprudence. The duty to accommodate is a legal obligation imposed on employers, landlords, and public and private service providers (the duty holders) to accommodate the needs of individuals with respect to prohibited grounds of discrimination, such as disability, religion, sex and gender, gender identity and expression, and family status. These duty holders must help ensure that accommodations are made so that the individuals to whom they owe this duty have equal opportunities and are free from discrimination in employment, the provision of services and housing. This could mean, for example, permitting an employee not to work on a religious holiday; creating a practical and appropriate workspace for a person with a physical disability; or ensuring that employment criteria do not discriminate unfairly based on sex or gender. Other types of accommodation could include permitting an inmate to be imprisoned with persons who share their gender identity, rather than the sex they were assigned at birth, or allowing a parent the scheduling flexibility required to attend to their family's needs.

This obligation should not impose undue hardship on the duty holders. An accommodation is meant to achieve what is reasonable. For example, if accommodating an employee would be too costly or not practical, the employer may not be required to put in place all of the requested modifications to a job position. If an accommodation would have a negative impact on the rights of others, it may not be possible or required for the employer to proceed with it. Moreover, if an employer can show that a job position requires a certain level of fitness or ability, then the discrimination inherent in not hiring someone who does not meet the criteria may be justified (also known as a bona fide justification). The duty holder and the individual seeking an accommodation are expected to work together to find the accommodation that is most reasonable for all parties.

This Background Paper begins by reviewing the right to equality and the various human rights laws that establish the framework for the duty to accommodate. It then explores each of the prohibited grounds of discrimination in these laws (disability, religion, sex and gender, gender identity and gender expression, and family status), how they have been applied in the Canadian context, and how courts and human rights tribunals have defined the scope of the duty in different contexts.

# AN EXAMINATION OF THE DUTY TO ACCOMMODATE IN THE CANADIAN HUMAN RIGHTS CONTEXT

## 1 INTRODUCTION

Equality is a fundamental constitutional right guaranteed in the *Canadian Charter of Rights and Freedoms* (the Charter)[1] and in Canada's human rights laws. Equality can mean different things to different people, and individuals often disagree over what an equal society should look like. Canadians rely on governments, legislatures, courts and tribunals to provide guidance when it comes to implementing the principles of equality on a practical basis. One of the primary applications of the human right to equality is through the accommodation of difference.

This Background Paper explores the right to equality in Canadian law and how that right has generated a duty of accommodation that governs the practices of various actors, including employers, landlords, and public and private service providers across the country. Specific examples will be provided of how the duty to accommodate has been interpreted in relation to certain recognized prohibited grounds of discrimination; namely, disability, religion, sex and gender, gender identity and gender expression, and family status.

## 2 THE DUTY TO ACCOMMODATE

### 2.1 LEGISLATIVE FRAMEWORK

Across Canada, many laws prescribe various human rights protections. The Charter outlines those human rights that have received constitutional protection. It applies to all government actions across all jurisdictions in Canada. The most relevant right for the purposes of this Background Paper is the equality guarantee found in section 15 of the Charter.[2] This provision prohibits discrimination on various grounds while allowing room for affirmative action measures.[3] Nevertheless, the Charter is of limited application; it protects individuals from government actions, policies and legislation but not from the actions and policies of other individuals or organizations in society.

Of broader scope than the Charter – and the primary focus of this paper – are the federal, provincial and territorial human rights laws that serve to protect individuals from discrimination in areas such as employment, services, education and housing. While the Charter is part of Canada's Constitution[4] and therefore overrides any other Canadian laws that are found to violate Charter rights, federal and provincial/territorial human rights codes are considered quasi-constitutional.[5] Most human rights codes explicitly confirm that they prevail over other laws in the same jurisdiction unless a

law explicitly states otherwise. This ensures that other provincial laws, such as building codes, health and safety requirements or labour laws, cannot be used to justify discrimination.[6]

While these human rights laws vary in terms of precise content,[7] in general, they all serve to prohibit an individual or organization from discriminating against an employee, tenant or service user on specified grounds, such as those outlined in section 3(1) of the *Canadian Human Rights Act* (CHRA):

> For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.[8]

One important purpose of the equality guarantees contained in human rights laws and section 15 of the Charter is to promote substantive equality and not just formal equality. Formal equality dictates only that every citizen should be treated similarly, yet this can lead to inequalities given that people have different needs, resources and abilities. Substantive equality involves accounting for people's differences and historical disadvantages and taking active steps to address the discriminatory effects of any policies or initiatives. For example, a workplace may have a policy prohibiting taking disability into account during hiring decisions (i.e., treating all applicants the same), which would be an example of formal equality. However, if the workplace is not wheelchair-accessible, then it could effectively exclude a person who has a mobility impairment. To achieve full substantive equality, barriers or obstacles that prevent people's full participation in society would have to be removed.

As will be explored in further detail in this Background Paper, federal, provincial and territorial anti-discrimination laws place a duty on employers, landlords, and public and private service providers (the duty holders) to accommodate needs that relate to recognized prohibited grounds of discrimination. For example, if an employee holds a religious belief that they should not work on a certain day, the employer should seek ways to accommodate that restriction as much as is reasonably possible. However, duty holders are not required to take steps that impose undue hardship on them. In the Charter context, section 1 allows reasonable limits to all Charter rights, including section 15. Human rights laws also allow for duty holders to justify discrimination where it is a bona fide occupational requirement or there is a bona fide justification. An example might be requiring a driver to have good vision, even though this standard clearly discriminates against visually impaired employees.

Some jurisdictions make the duty to accommodate more explicit than others in their legislation. Manitoba, for instance, sets out the duty relatively clearly: section 9(1)(d) of Manitoba's *Human Rights Code* specifically defines discrimination as including the "failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon"[9] the prohibited grounds. By contrast, section 2 of the CHRA affirms in very broad and general terms that the purpose of the Act includes

> the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated … without being hindered in or prevented from doing so by discriminatory practices.

The CHRA also explains in section 15(2) that for any discriminatory practice to be justified, the duty holder must show that

> accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

## 2.2 WHEN THE DUTY TO ACCOMMODATE ARISES

While the process for determining the duty to accommodate at the federal and provincial/territorial levels varies, it generally begins with a request for accommodation or a complaint of discrimination that is first managed at the internal level (between the complainant and the management of an organization). If a settlement cannot be reached, in most jurisdictions the complainant may take the issue to the human rights commission,[10] which will attempt to mediate, and, if necessary, could refer the dispute to a human rights tribunal. The tribunal will then decide whether the respondent has discriminated against the complainant and thereby violated their human rights. In some circumstances, such tribunal decisions can be judicially reviewed by the courts (a limited form of appeal). In a unionized workplace, a complaint may be taken up by the union with the employer, and any dispute resolved by a labour arbitrator who may also apply the relevant human rights law.

There is rarely a precise formula for applying the duty to accommodate to any given situation. It calls upon the parties involved to be creative and sincere in negotiating and finding solutions. Reasonable accommodation requires a balance between the right of the person seeking accommodation to equal treatment and the right of the duty holder to run a productive operation. For example, in the employment context, the duty holder may not be required to create something completely new that did not previously exist, such as a new position with new duties. However, if a position is available, the duty holder may be required to choose a qualified person to whom they owe a duty to accommodate over other more qualified applicants.[11] In short, the obligation is to make a "genuine effort."[12]

Individuals requesting accommodation also have a general duty to assist with the process of determining what is suitable and appropriate under the circumstances and implementing any chosen solutions. While privacy concerns must be taken into consideration, a duty holder should generally be given enough information about the reasons behind the request for accommodation to propose an appropriate solution. For example, if the protected ground involved is a disability, a solution will likely work only if everyone involved has a clear understanding of the impairments or barriers that need to be considered.

## 2.3 JUDICIAL INTERPRETATION

Depending on the context, courts and tribunals may decide discrimination cases by applying the Charter, the relevant federal or provincial/territorial accommodation provisions, or both. Each of these approaches raises similar considerations. When bringing forward a case under section 15(1) of the Charter, a claimant must prove that a law or government action treats them differently than a comparable group of people based on one of the grounds enumerated in section 15(1) (race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability) or on an analogous ground.[13] If the court agrees that there has been discrimination, it will then determine whether that discrimination is justifiable "in a free and democratic society" in accordance with section 1 of the Charter. To make this determination, the court undertakes a proportionality analysis, balancing the importance of the government's objective and the reasonableness of the discriminatory means adopted to achieve that objective. In other words, it must examine whether the benefits of limiting a right or freedom outweigh the harmful effects of doing so.[14]

In many ways, this section 1 Charter analysis mirrors the test that has been developed by the courts for applying the duty to accommodate under anti-discrimination laws. The "bona fide justification test," as this is called, allows for a duty holder to justify discrimination in certain cases. For instance, in the workplace context, a standard or requirement that discriminates against an employee or a group of employees on a prohibited ground is generally not allowed, but courts will accept such discrimination if the employer is able to show that the standard or requirement is a bona fide occupational requirement (BFOR). The above-noted example of requiring a driver to have good vision would presumably be a valid BFOR.

The Supreme Court of Canada (Supreme Court) set out the test for establishing whether a discriminatory standard is a BFOR in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*[15] (commonly referred to as *Meiorin*). The Court held that the employer must prove three things, on a balance of probabilities:

- The standard is rationally connected to performance of the job, i.e., for safety- or efficiency-related reasons.

- The standard was adopted in an "honest and good faith belief" that it is necessary for the fulfilment of a legitimate work-related purpose.
- The standard was "reasonably necessary" for the accomplishment of that purpose, i.e., it would be impossible to accommodate the employee without undue hardship to the employer.

In *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*[16] (commonly referred to as *Grismer*), the Supreme Court extended this test beyond the employment context to ensure the application of the duty to accommodate in the housing and service industries unless it can be proven that the discrimination is based on a reasonable cause or a bona fide justification (BFJ). Again, this defence fails if it can be proven that the service provider can modify the offending conditions or practice without undue hardship.[17]

Courts have since interpreted the duty to accommodate in federal and provincial/territorial human rights codes as requiring the duty holder to take all reasonable measures to accommodate, short of undue hardship, in order to avoid discrimination.

Although there is no standard definition of "undue hardship," courts and human rights tribunals have set out a number of factors that must be taken into account when determining whether this standard is met.[18] These include the following:

- Cost: The cost to an organization or individual must be substantial for the standard of undue hardship to be met.
- Health and safety: Consideration must be given to the effects of accommodation on the health and safety of the complainant, all employees and the general public. In some cases, a decision-maker may allow a person seeking accommodation to accept some degree of risk. For example, traffic regulations require motorcyclists to wear helmets, but cases have been brought by Sikhs seeking an exemption so that they can wear their turban instead. Such cases have been decided both ways,[19] but in general, undue hardship will likely be found if there is a "demonstrable probability of substantial harm"[20] to any party.
- Conflicting rights: The duty to accommodate must not replace discrimination against the complainant with discrimination against others – any demand that involves significant interference with the rights of others will generally constitute undue hardship.

The Supreme Court has emphasized that when an accommodation is offered that is reasonable, the individual cannot generally reject that offer out of hand in search of a better solution. The duty to accommodate is not about finding the best accommodation available but about finding accommodation that is reasonable for all parties.[21]

## 3 GROUNDS OF DISCRIMINATION

The following sections provide examples of how the duty to accommodate has been applied by human rights tribunals and courts in relation to some of the grounds of discrimination prohibited by human rights laws in Canada.

### 3.1 DISABILITY

Disability is the most common ground involved in accommodation cases across Canada.[22] In 2020, 54% of all complaints accepted by the Canadian Human Rights Commission (CHRC) were related to disability.[23] The preponderance of such cases may be related to the fact that, in 2017, more than one in five Canadians aged 15 or over (6.2 million people) were estimated to have one or more disabilities, and this number will likely grow with Canada's aging population.[24]

Disability cases can be challenging to resolve because of the diverse range of physical and mental conditions and impairments that can be involved. In cases involving many of the recognized prohibited grounds of discrimination, accommodation can often be provided by a change to policies or programs. Accommodating a disability may involve finding creative solutions through alterations to physical spaces, the use of additional technology, or modifications to workloads or job responsibilities. Accommodating some illnesses, whether physical or mental, may also require an employee to take leaves of absence from work for indefinite periods of time, which may require temporary reorganization within a workplace.

Before any duty to accommodate can be found to exist by a tribunal or court, it must first be established that the complainant has a disability that fits within the definitions of the relevant human rights law. While "disability," or "handicap," is included as a prohibited ground of discrimination in all human rights legislation in Canada, as well as section 15 of the Charter, definitions of what constitutes a disability vary between jurisdictions.[25] Generally speaking, a disability will be found to exist where a person's physical or mental condition prevents them from performing an activity that most other people can do.[26] Conditions that are of a transitory nature and have a limited impact on a person's ability to carry out life's functions, such as a cold or flu, are less likely to be protected.[27]

Canadian jurisprudence has recognized a wide range of conditions in accommodation cases to be disabilities – both temporary and permanent – including epilepsy, heart conditions, cancer, seasonal allergies, asthma, Crohn's disease, hypertension, alcoholism or drug dependency, gambling, hysterectomy, spinal malformation, visual acuity problems, physical injuries, and mental illness and other mental health conditions, including depression and post-traumatic stress disorder.

Some conditions have been accepted as disabilities in some circumstances and rejected in others: one such example is obesity. Some obesity cases have turned on whether the medical evidence is more consistent with a bona fide physical disability caused by an injury, illness or condition, or, alternatively, with a lifestyle choice.[28] One Ontario tribunal clarified that obesity must be an ongoing condition that is effectively beyond the individual's control to be included in the protected ground of disability.[29]

The question of whether a physical or mental condition was the result of voluntary behaviour has also been examined in cases involving addictions such as addictions to drugs, alcohol or gambling. These cases have often hinged on whether the complainant had a drug dependency or addiction, and therefore had a disability, or simply used drugs.[30] Depending on the circumstances, a person with a drug dependency may have a duty to facilitate their own accommodation, for example, by disclosing their dependency to their employer[31] or by undergoing treatment.

If it is proven that a person has a disability within the meaning of the relevant human rights law in an accommodation case, the tribunal's or court's analysis generally turns to examining whether a respondent's BFOR or BFJ defence is valid. For instance, in *Grismer*, the complainant had a condition that prevented full peripheral vision. The British Columbia (B.C.) Superintendent of Motor Vehicles cancelled Mr. Grismer's driver's licence after determining that he no longer met the required minimum field of vision of 120 degrees. Although exceptions to this standard had been granted by the superintendent in other cases, the government's policy was to reject any applicant with Mr. Grismer's particular condition. The B.C. government stated that passing the field of vision test was a BFJ. In adapting the employment-related *Meiorin* decision to the provision of services, the Supreme Court ultimately concluded that the 120-degree vision standard was not reasonably necessary for the licence issuer to fulfill its intended purpose or goal. In other words, the complainant's disability could have been reasonably accommodated, and the standard used in the licensing test could have been modified in order to do so.

In terms of final outcomes, disability cases often require parties to produce innovative solutions to find suitable accommodations. For instance, in the case of *Youth Bowling Council of Ontario v. McLeod*,[32] the complainant wanted to participate in a bowling league, but her cerebral palsy prevented her from bowling without the use of an aid. The league did not want her to participate using the special wooden ramp she placed on her lap that had been designed by her father to accommodate her needs. The Ontario Court of Appeal examined the ramp and found that it did not provide the complainant with any particular advantage in bowling and therefore did not impose an undue hardship on the league.

Broader trends in disability issues suggest that duty holders may be expected to take more proactive steps to anticipate the types of accommodations they will need to make for persons with disabilities (rather than simply waiting for a complaint to be made). For example, in the context of special education funding, the Supreme Court noted in *Moore v. British Columbia (Education)* that while budgetary constraints are a relevant consideration in funding decisions, accommodation of students with disabilities "is not a dispensable luxury."[33] The Court determined that the key question was not whether special education programs were accessible, but whether they were adequate to the point that the core curriculum itself was accessible to all students. In other words, the duty holders had to consider the systemic impacts of their funding decisions.

Similarly, in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, the Supreme Court emphasized the point previously raised in *Grismer* that service providers have a duty to be inclusive with regard to persons with disabilities.[34] The CHRC has interpreted inclusivity requirements as extending to all stages of any project or initiative, "whether designing a building, establishing a policy, or developing new technology."[35] It also notes that this interpretation is in keeping with the principles of the United Nations *Convention on the Rights of Persons with Disabilities*, which Canada ratified in 2010 and which, among other things, creates an obligation in international law for state parties to ensure that reasonable accommodation is provided to all persons with disabilities.[36]

Canadian legislatures have also been passing laws to proactively create more inclusive spaces, to eliminate barriers and to develop standards of accessibility for persons with disabilities. For instance, Ontario's *Accessibility for Ontarians with Disabilities Act, 2005*[37] mandates a set of standards with which public and private organizations must comply. Other provinces have followed suit with similar laws.[38] At the federal level, the *Accessible Canada Act*[39] creates obligations for Parliament, the Government of Canada, Crown corporations and other federally regulated businesses to proactively identify, remove and prevent barriers to accessibility, and to put in place solutions to address the systemic factors that cause these barriers to persist. These laws allow governments to regulate standards pertaining to accessibility in employment, in buildings and other facilities, and in the design and delivery of programs and services. They can also create various mechanisms to encourage compliance. For example, the *Accessible Canada Act* requires those subject to the Act to publish reports on plans to promote accessibility; creates procedures for imposing monetary penalties in cases of non-compliance; and sets out the authority of the Accessibility Commissioner (who is full-time member of the CHRC) to investigate complaints and order remedies when a complaint is substantiated.[40] In promoting accessibility, equal opportunities and barrier-free spaces, these laws aim to reduce the need for persons with disabilities to make accommodation requests.

## 3.2 RELIGION

The constitutionally entrenched right to freedom of religion and the legislated human right to be free from discrimination based on religion protect individuals wishing to practise the religion of their choice – or to have no religion – and to hold personal beliefs without fear of persecution or prejudicial treatment from governments, employers, landlords, or public or private service providers.[41] These rights are not absolute, however, and may face limitations. Canadian courts and tribunals have often had to balance competing rights and interests, such as the situation in which a condominium board created rules limiting balcony use that effectively barred the inclusion of a Jewish succah;[42] where a Christian university required students and faculty to adhere to a religiously based code of conduct, which was felt by LGTBQ students to be discriminatory;[43] and where an employer created a workplace dress code that did not allow for the wearing of a hijab,[44] among others described in this Background Paper. These types of human rights cases can be challenging when different interests and values must be considered, such as secularism and freedom of religion or equality and public safety. They are thus different from cases involving disabilities, which tend to focus on the cost and logistics of accommodating an individual.

One of the first cases requiring religious accommodation in Canada involved a woman who objected to working from Friday evening to Saturday evening when she became a Seventh Day Adventist as her religion required her to respect this day as a day of rest. Her position, however, required her to work at some point during that period to remain a full-time employee. In its 1985 decision,[45] the Supreme Court concluded that the *Ontario Human Rights Code* implicitly required the employer to demonstrate that it had tried to accommodate her to the point of undue hardship, which it had not done. The Court essentially integrated the concept of reasonable accommodation, then found only in academic writing and American cases, into Canadian law because the *Ontario Human Rights Code* was silent on the matter.

Other cases have sought to strike a balance between religious accommodation and perceived threats to public safety. For example, the Sikh kirpan (a ceremonial dagger) has been the subject of several accommodation requests resulting in complaints under the Charter and the various human rights acts. The results have been mixed, depending on the context. For example, in terms of airline security, kirpans of a certain size have been prohibited. A 1999 case[46] before the Canadian Human Rights Tribunal dealt with the situation of an airline that refused to allow a Sikh man to board with a kirpan because its length did not respect the airline's policy of allowing only kirpans that were less dangerous than the utensils provided on board. Other airlines, however, were allowing a kirpan with a blade up to four inches long.

The Tribunal found the airline's policy respecting weapons to have a rational connection with the business of an airline company. In determining whether greater accommodation was required, the Tribunal assessed whether a four-inch blade such as the one belonging to the complainant would create a "sufficient risk" to justify refusing such accommodation. The Tribunal concluded that the four-inch standard used by other companies was arbitrary and that incidents, though rare, had occurred in the past where kirpans were used as weapons. The transitory nature of air travel was also important, as it did not allow airline staff time to get to know the individual or to access emergency personnel if an incident occurred. Thus, requiring the airline to allow kirpans with greater potential to harm than the utensils on board would pass the point of undue hardship, and the request for accommodation was refused.

The kirpan was also at issue in a Charter case, *Multani v. Commission scolaire Marguerite-Bourgeoys*,[47] that came before the Supreme Court in 2006, in which a school board refused to allow a Sikh student to wear a kirpan to school. The Court concluded that the student's freedom of religion, protected under section 2(a) of the Charter, had been violated. The next step was to balance the competing values in question under section 1 of the Charter (the "reasonable limits clause"), and the Court chose to use a duty to accommodate analysis as an analogy to assist in this balancing.

In the schoolyard context, the Court found that a complete ban on kirpans was not a reasonable option considering the low risk a kirpan posed to school security if certain conditions were put in place, such as ensuring that it be sewn into the boy's clothes at all times. In addition, the Court noted other items regularly available at schools that could be used as weapons, such as scissors, pencils or baseball bats. Thus, the school board's rule impaired the student's right beyond the minimal extent permitted under section 1 of the Charter, and the school board's decision was reversed. In contrast with the airplane scenario above, the Court felt that there was an ongoing relationship in the school environment that provided the opportunity to establish rules surrounding the use of the kirpan, and the context resulted in different conclusions with respect to safety risks.

Outside of the context of public safety, other cases have dealt with the perceived tension between religious accommodation and state secularism. An early case illustrating this tension involved a group of RCMP veterans who sought a court order forcing the RCMP to stop accommodating the wearing of turbans and other religious requirements for Sikh officers.[48] The veterans were concerned that, among other issues, allowing officers to wear turbans and other religious symbols would affect their appearance of neutrality. The Federal Court of Canada found that the wearing of the turban did not create a situation of bias or coercion to participate in the officer's religion, nor did it violate the rights of members of the public or of other officers.

More recently, the issue of religious expression by elected officials was addressed by the Supreme Court in *Mouvement laïque Québécois v. Saguenay (City)*,[49] in which an atheist challenged the City of Saguenay's practice of reciting a prayer during the municipal council's public meetings. The Court held that even a non-denominational prayer was a breach of the state's duty of religious neutrality and therefore discriminatory. It emphasized that the state must "neither encourage nor discourage any form of religious conviction whatsoever."[50] It also held that the city's attempt at accommodation by giving those who preferred not to attend the recitation of the prayer the time they needed to re-enter the council chamber had the effect of exacerbating religious discrimination.

In 2019, Quebec amended its *Charter of Human Rights and Freedoms* to emphasize that the principle of state secularism can justify legislation that limits the scope or exercise of freedoms and rights. This change was included in a bill that also prohibited certain persons from wearing religious symbols while exercising their functions, including teachers and police officers under Quebec jurisdiction.[51] The bill invoked the notwithstanding clause in section 33 of the Canadian Charter, which permits a legislature to declare that a law may continue to operate even where it violates the rights guaranteed in section 2 or any of sections 7 to 15.[52] This issue continues to generate media and public interest and has been the subject of multiple legal challenges, including several based on section 28 of the Canadian Charter, which specifically protects gender equality.[53]

## 3.3 SEX AND GENDER

All Canadian jurisdictions include some form of protection against discrimination based on the ground of "sex," and some have included a specific reference to "gender." The exact scope and definition of these terms have required elaboration in the jurisprudence over time. As explained further in section 3.4 of this Background Paper, all Canadian jurisdictions also now include a provision to recognize gender identity in their human rights legislation, and many also recognize gender expression.

In cases where discrimination has been alleged on the basis of sex, the simple fact of being a woman has been at issue, such as in the previously mentioned *Meiorin* case, which established the BFOR test. Ms. Meiorin, a forest firefighter, was unable to pass an aerobic standard and was dismissed, although no problems with her work had been identified. The evidence showed that most women have lower aerobic capacity than men and could not meet the firefighter standard through increased training. The Supreme Court found that this standard was not necessary to do the job safely and efficiently. Nor did the employer demonstrate that using another standard would cause it undue hardship. Thus, the general standard discriminated against women and could not be relied on as justification for her dismissal.[54]

Discrimination on the basis of pregnancy has been defined in the human rights acts of many jurisdictions across Canada as being included in sex or gender discrimination, while Quebec lists pregnancy as a separate ground of discrimination. Under this rubric, where an employee's job creates a risk for the foetus, and accommodation is not possible within that position, an employer may be required to explore the possibility of offering other positions to accommodate the employee. Fellow employees may be required to accept changes to their tasks and, depending on the situation, the creation of a new position may even be required.[55]

Discrimination based on breastfeeding has also been found to be a form of discrimination based on sex or gender. In one case, a doctor recommended that a mother breastfeed for as long as possible to help her child's weak immune system. The mother made requests for changes to her work schedule that were accepted only in part. The human rights tribunal rejected the employer's argument that objective proof of a need to breastfeed is required, finding that a working mother has a right to breastfeed her child. The tribunal required the employer to develop and promote a policy on accommodation for breastfeeding for its employees and to provide a financial award to the affected employee.[56]

Other situations have also been found to fit within the categories of gender or sex discrimination, although some situations, such as those involving sexual harassment, may not involve the duty to accommodate.[57]

## 3.4 GENDER IDENTITY AND GENDER EXPRESSION

Between 2012 and 2017, Canada's federal, provincial and territorial legislatures amended their human rights legislation to provide some form of protection against discrimination on the grounds of gender identity, with some also adding the ground of gender expression.[58] Gender identity refers to a person's internal sense of being a man, a woman, both or neither, while gender expression refers to the ways a person outwardly presents their gender identity.[59] The Northwest Territories was the exception, given that it included gender identity when it first enacted its *Human Rights Act* in 2002. Prior to these amendments, some human rights commissions had already developed policies to help ensure that gender identity rights were respected.[60]
Some Canadian courts and human rights tribunals had recognized that transgender persons and other gender nonconforming individuals should receive protection from discrimination. However, there was less certainty about which prohibited ground of discrimination should be used by complainants and the actions respondents were expected to take to avoid or address discriminatory practices. Sexual orientation, sex, gender and disability were proposed in various cases.[61]

Since the gender identity amendments to provincial/territorial human rights legislation were made, human rights tribunals and the Federal Court of Canada have been examining and defining the scope and application of the protections under this ground. For instance, in recognizing the necessity to discuss the meaning of "gender identity," the Manitoba Human Rights Adjudication Board reviewed key concepts and past jurisprudence in *T.A. v. Manitoba (Justice)* and articulated how "the concept of gender identity … needs to be interpreted broadly and expansively."[62] It added that "[p]eople whose gender identity is incongruent to their biological sex, such as transgender, pangender, and other non-binary people are a historically disadvantaged and discriminated against population."[63] Its decision required the province to ensure that non-binary sex designations be an option on birth certificates.[64]

The Federal Court of Canada also considered the recent evolution of the awareness of transgender rights in *Boulachanis v. Canada (Attorney General)*.[65] The Court considered an application to transfer a transgender inmate from a correctional institution for men to one for women.[66] After reviewing various theories about gender, the Court added that there has been a move away from a strictly medical approach on "transsexuality"[67] and gender dysphoria to a recognition of "individual autonomy in gender expression."[68] It concluded that the harm to the complainant from staying in a penitentiary for men outweighed any potential inconvenience to the Correctional Service of Canada and ordered it to accommodate the inmate's request for a transfer to a women's institution.

In the 2016 case of *Browne v. Sudbury Integrated Nickel Operations*,[69] the Human Rights Tribunal of Ontario considered a case whereby a cisgender man brought a discrimination complaint based on gender expression or sex whereby he sought to be accommodated so he could grow facial hair in a facility where a "clean-shaven policy" was in place due to the need for respirator masks. The adjudicator found that

> interpreting "gender expression" broadly to extend protection to the right of men to grow beards would do violence to the important and fundamental purposes sought to be achieved by human rights legislation. There is nothing to indicate that bearded men suffer any particular social, economic, political or historical disadvantage in Canadian or Ontario society, absent any connection between the wearing of a beard and matters of religious observance or perhaps some link to a protected ground in the [*Ontario Human Rights*] *Code* other than sex or gender expression.[70]

Another case that has drawn attention to issues pertaining to sex-segregated services and spaces and the rights of transgender individuals is *Yaniv v. Various Waxing Salons (No. 2)*.[71] The complainant alleged she was discriminated against by several waxing salons on the basis of her gender identity and expression in violation of the

B.C. *Human Rights Code* because they had refused to provide her with a body waxing service when she informed them that she was a transgender woman. For five of the seven salons she requested services from, she had requested the waxing of her genitals, which the B.C. Human Rights Tribunal interpreted as a request to have hair removed from her scrotum. These complaints were dismissed by the Tribunal because the salons had advertised a service called a "Brazilian wax," which removes all hair from a vulva. The Tribunal held that Ms. Yaniv had not presented any evidence that they offered a service whereby they would wax scrotums.[72]

In this decision, the Tribunal did not decide as to whether the salons had the right to refuse the waxing services more generally to Ms. Yaniv as a transgender woman nor what duty the salons had to accommodate her. It simply determined that the salons had advertised a service that applies to a specific body part that Ms. Yaniv does not possess.

A Human Rights Tribunal of Ontario decision from 2016 considered a situation involving the right to use a gendered washroom in *Lewis v. Sugar Daddys Nightclub*.[73] The complainant was a transgender individual who was assaulted and forcibly removed by a nightclub's security while using the men's washroom (the space in which the complainant felt most comfortable based on his gender identity). In finding for the complainant, the Tribunal noted the seriousness of the adverse conduct towards the complainant and ordered the respondent to pay $15,000 in damages.[74] It did not, however, make further or more explicit commentary about the right of transgender individuals to use the washroom of their choice.

Given the recency of the amendments to Canadian human rights laws to protect individuals based on their gender identity, there are not yet many tribunal or court decisions in this area. It can be expected that as individuals become more aware of their right to bring forward complaints of discrimination based on gender identity, courts and human rights tribunals will further expand on what reasonable accommodations they are entitled to expect from employers, landlords, and public and private service providers.

## 3.5 FAMILY STATUS

Of all the grounds of discrimination discussed in this Background Paper, "family status" is perhaps the hardest to define. When family status was first added to the CHRA, the example provided by the federal Minister of Justice at the time was of discrimination in employment based on the family to which a person belongs.[75] In contrast, the primary issues of accommodation recently addressed by the courts under family status relate to work schedules and child care or elder care needs.

Judges and adjudicators have almost always agreed that child care obligations must be accommodated to avoid discrimination based on family status.[76] However, different

courts and tribunals have used different tests for establishing whether discrimination has occurred.

The narrower approach, adopted in a 2004 B.C. Court of Appeal case, essentially treats discrimination based on family status differently than other grounds of discrimination by requiring that a complainant demonstrate "serious interference" with a "substantial … duty"[77] rather than a simple finding of discrimination. This approach seems, at least in part, to be inspired by concerns about a potential flood of claims, given the large number of employees who are also parents. Using this approach, the Federal Court of Appeal stated in a 2014 decision that human rights protections only apply to child care obligations that are the result of a legal duty. Accommodation would therefore not be required for personal family choices, such as taking a child to a dance class or a hockey tournament.[78]

The broader approach to assessing whether there has been discrimination treats accommodation based on family status (such as for child care and elder care needs) similarly to accommodations based on other grounds of discrimination. In other words, an applicant must establish that they are a member of a protected group and that discrimination on that basis was a factor in adverse treatment that they experienced.[79] This approach may require greater accommodation for activities that do not arise from strict legal obligations (as under the narrower approach) but that are still significant, such as caring for elderly parents. In a 2020 case, the Supreme Court noted that the scope of family status protection under human rights laws remains unsettled and indicated that the issue of elder care responsibilities merits close examination from the Court in future cases.[80]

Under either approach, family status accommodation can have significant implications for employers. In a 2010 case,[81] a single mother was asked to relocate temporarily by her employer, Canadian National Railway (CN). However, previous experiences leaving her son had been negative. CN gave the employee four months' delay before requiring her to move but did not accommodate her further, seeing her refusal to move as a personal choice to prioritize a family obligation over her employee obligations. However, the Canadian Human Rights Tribunal concluded that this was an incorrect understanding of the legal requirements of accommodation. It noted that family status includes both being a parent and the obligations associated with that role. It also clarified that accommodation has two aspects: procedural and substantive. An employer must consider all reasonable possibilities for accommodation to respect its procedural duties, in addition to actually providing accommodation where justified (the substantive aspect). In this case, the company was required to review its policies and offer training for managers and staff, and to provide financial compensation to the affected employee.

## 4 CONCLUSION

The duty to accommodate challenges employers, landlords, service providers and other duty holders to go beyond treating all people the same and to recognize that people may in fact need to be treated differently in order to achieve true equality in a meaningful way. Sometimes, it is difficult to balance the requirements of equality with other important considerations, such as safety or financial constraints. The principle of undue hardship acknowledges that there are limits to what is possible. When an accommodation is reasonably obtainable, however, Canadian human rights laws make it clear that it must be granted.

NOTES

1. *Canadian Charter of Rights and Freedoms* [the Charter], Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
2. For more on section 15 of the Charter, see Martha Butler, *Section 15 of the* Canadian Charter of Rights and Freedoms*: The Development of the Supreme Court of Canada's Approach to Equality Rights Under the Charter*, Publication no. 2013-83-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 11 September 2013.
3. Affirmative action measures are permitted under section 15(2) of the Charter.
4. Canada's Constitution includes the original United Kingdom statute that established the Dominion of Canada at the time of Confederation, the *British North America Act, 1867* (now the *Constitution Act, 1867*). See *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.). It also includes the *Constitution Act, 1982*, which became part of the Constitution when it was repatriated to Canada in 1982, as well as unwritten sources, including British parliamentary tradition and certain common law principles, such as the rule of law.
5. The Supreme Court of Canada has described human rights laws as quasi-constitutional, or "as having a special nature, not quite constitutional but certainly more than the ordinary." *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536, para. 12. See also *Insurance Corporation of British Columbia v. Heerspink et al.*, [1982] 2 S.C.R. 145; and *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321.
6. Manitoba Human Rights Commission, *You can remove barriers to equality of opportunity and participation: What process to use – Guidelines on Reasonable Accommodation under* The Human Rights Code *(Manitoba) for employers, unions, landlords, service providers, and persons or groups with special needs* [*Guidelines on Reasonable Accommodation*]; and Susan Joanis, "Human Rights Law in B.C.: Religious Discrimination," *Canadian Human Rights Reporter*, March 2001.
7. For example, Quebec's *Charter of Human Rights and Freedoms* is much more extensive than most provinces' human rights laws, which focus specifically on discrimination. See *Charter of Human Rights and Freedoms*, C.Q.L.R., c. C-12.
8. *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 3(1). Most accommodation cases tend to be brought under provincial/territorial human rights legislation as the Act applies very specifically to employers and service providers that fall under federal jurisdiction, such as federal government departments and agencies; Crown corporations; chartered banks; radio, television, and telephone companies; and other federally regulated industries.
9. *The Human Rights Code*, C.C.S.M., c. H175, s. 9(1)(d).
10. In British Columbia and Ontario, complaints are first filed directly with a human rights tribunal. See also Canadian Human Rights Commission [CHRC], *Provincial & Territorial Human Rights Agencies*.
11. *Hamilton-Wentworth District School Board v. Fair*, 2016 ONCA 421 (CanLII), paras. 73–75.
12. *Holmes v. Canada (Attorney General)*, 1997 CanLII 5101 (FC), which was upheld on appeal. See *Holmes v. Canada (Attorney General)*, 1999 CanLII 7869 (FCA).

13. *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. Canadian courts have recognized citizenship, sexual orientation, marital status and Aboriginal residence as analogous grounds.

14. *R. v. Oakes*, [1986] 1 S.C.R. 103.

15. *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3. This case is discussed further in section 3.3 of this Background Paper.

16. *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868. For more details, see section 3.1 of this Background Paper.

17. Manitoba Human Rights Commission, *Guidelines on Reasonable Accommodation*; and Alberta Human Rights Commission, "Duty to Accommodate," Interpretive bulletin, February 2010.

18. See Ontario Human Rights Commission [OHRC], "How Far Does the Duty to Accommodate Go?," Fact sheet; Alberta Human Rights Commission, *Duty to Accommodate*; Manitoba Human Rights Commission, *Guidelines on Reasonable Accommodation*; Monique Rochon and Pierre Bosset, *Religious Pluralism in Québec: A Social and Ethical Challenge*, Commission des droits de la personne et des droits de la jeunesse, February 1995; and José Woehrling, "L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse," *McGill Law Journal*, Vol. 43, No. 3, 1998, pp. 325–401. [AVAILABLE IN FRENCH ONLY]

19. See, for example, *Dhillon v. B.C. Ministry of Transportation and Highways – Motor Vehicle Branch*, 1999 BCHRT 25 (CanLII), in which the British Columbia Human Rights Tribunal waived the helmet obligation, stating that the discrimination involved in mandating the helmet was not justified by the marginal increase in risk to the person or increase in medical costs associated with non-helmeted motorcycling. However, in 2008 in *R. v. Badesha*, 2008 ONCJ 94 (CanLII), the Ontario Court of Justice took the opposite approach, holding that the province's need to uphold reasonable safety standards outweighed the motorcyclist's right to wear a turban. At the time of writing, some provinces, including Ontario, Alberta, British Columbia and Manitoba have chosen to exempt turban-wearing Sikhs from the helmet obligation.

20. OHRC, *How Far Does the Duty to Accommodate Go?*

21. *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970.

22. As per statistics provided by human rights commissions across Canada.

23. CHRC, *By the Numbers*.

24. Statistics Canada, "Table 13-10-0374-01: Persons with and without disabilities aged 15 years and over, by age group and sex, Canada, provinces and territories" accessed 1 December 2020.

25. See, for example, Russel W. Zinn and Patricia P. Brethour, "Physical or Mental Disability," Chapter 5 in *The Law of Human Rights in Canada: Practice and Procedure*, looseleaf ed., Canada Law Book, Aurora, Ontario. For more on definitions of disability, see Julian Walker, "4.2 Definitions of 'Disability'," *The United Nations* Convention on the Rights of Persons with Disabilities*: An Overview*, Publication no. 2013-09-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 27 February 2013.

26. Zinn and Brethour, Chapter 5:30.

27. *Ouimette v. Lily Cups Ltd.*, 1990 CanLII 12497 (ON HRT).

28. See, for example, *Hamlyn v. Cominco Ltd.*, 1989 CanLII 9050 (BC HRT); and *Saskatchewan (Human Rights Commission) v. St. Paul Lutheran Home of Melville et al.*, 1993 CanLII 6669 (SK CA).

29. *Ontario (Human Rights Comm.) v. Vogue Shoes*, 1991 CanLII 13168 (ON HRT).

30. *Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115*, 2006 BCCA 58 (CanLII).

31. *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30.

32. *Youth Bowling Council of Ontario v. McLeod*, 1994 CanLII 8714 (ON CA).

33. *Moore v. British Columbia (Education)*, 2012 SCC 61, paras. 5 and 50.

34. *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15.

35. Canadian Human Rights Commission, *2010 Annual Report*, March 2011, p. 4.

36. The convention and its optional protocol were adopted on 13 December 2006 and came into force on 3 May 2008. Canada signed the convention on 30 March 2007, the day it opened for signature, and later ratified it on 11 March 2010. United Nations, Department of Economic and Social Affairs – Disability, *Convention on the Rights of Persons with Disabilities (CPRD)*.

37. *Accessibility for Ontarians With Disabilities Act, 2005*, S.O. 2005, c. 11 (CanLII).

38. See, for example, *The Accessibility for Manitobans Act*, C.C.S.M., c. A1.7 (CanLII); and *Accessibility Act*, S.N.S. 2017, c. 2 (CanLII).

39. *Accessible Canada Act*, S.C. 2019, c. 10.

40. See Brendan Naef and Mayra Perez-Leclerc, *Legislative Summary of Bill C-81: An Act to ensure a barrier-free Canada*, Publication no. 42-1-C81-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 27 June 2019.

41. For more on freedom of religion, see Laura Barnett, *Freedom of Religion and Religious Symbols in the Public Sphere*, Publication no. 2011-60-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 15 January 2013.

42. *Syndicat Northcrest v. Amselem*, 2004 SCC 47.

43. *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32; and *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33.

44. *Audmax Inc. v. Ontario Human Rights Tribunal*, 2011 ONSC 315 (CanLII).

45. *Ont. Human Rights Comm. v. Simpsons-Sears*.

46. *Nijjar v. Canada 3000 Airlines Ltd.*, 1999 CanLII 19861 (CHRT).

47. *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6.

48. *Grant v. Canada (Attorney General)*, 1995 CanLII 11062 (FCA). The appeal was dismissed.

49. *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16. See also Julian Walker, *Mouvement laïque québécois v. Saguenay (City): Freedom of Religion and the State's Duty of Neutrality*, HillNotes, Library of Parliament, 12 May 2015.

50. *Mouvement laïque québécois v. Saguenay (City)*, para. 78.

51. See section 30 of Bill 21, An Act respecting the laicity of the State, 1st Session, 42nd Legislature of Quebec (S.Q. 2019, c. 12).

52. For instance, section 2(a) of the Charter protects freedom of religion and section 15 protects equality rights.

53. Jonathan Montpetit, "How lawyers are trying to overturn Quebec's religious symbols ban," *CBCNews*, 12 December 2019. In July 2019, the Quebec Superior Court dismissed an application for a provisional stay of two of the law's provisions. In April 2020, the Supreme Court of Canada declined the applicants' leave to appeal from the judgment of the Court of Appeal of Quebec. See "Docket 39016: *Ichrak Nourel Hak, et al. v. Attorney General of Québec)*," *Supreme Court of Canada*. In April 2021, the Quebec Superior Court upheld most of the challenged provisions, with exceptions for English schools based on protections for minority language educational rights under section 23 of the Charter. Section 23 of the Charter is not subject to the notwithstanding clause. See *Hak c. Procureur général du Québec*, 2021 QCCS 1466 (CanLII) [Available in French only]. Quebec intends to appeal the decision.

54. *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, para. 83.

55. *Dominion Colour Corp. v. Teamsters, Local 1880 (Metcalfe Grievance)*, [1999] O.L.A.A. No. 688.

56. *Cole v. Bell Canada*, 2007 CHRT 7 (CanLII).

57. Workplace sexual harassment is recognized as a form of discrimination based on sex. In *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, the Supreme Court of Canada noted that sexual harassment in the workplace creates a barrier that affects certain groups (in this case women) in a disproportionately negative way. The case involved two waitresses who experienced persistent sexual harassment by a male employee, including unwanted touching, kissing and inappropriate comments. Their employer made no attempt to end the harassment and was therefore held liable for the actions of the male employee.

58. British Columbia: *Human Rights Code*, R.S.B.C. 1996, c. 210; Alberta: *Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5; Saskatchewan: *The Saskatchewan Human Rights Code, 2018*, S.S. 2018, c. S-24.2; Manitoba: *The Human Rights Code*, C.C.S.M., c. H175; Ontario: *Human Rights Code*, R.S.O. 1990, c. H.19; Quebec: *Charter of Human Rights and Freedoms*, C.Q.L.R., c. C-12; New Brunswick: *Human Rights Act*, R.S.N.B. 2011, c. 171 (CanLII); Nova Scotia: *Human Rights Act*, R.S.N.S. 1989, c. 214; Prince Edward Island: *Human Rights Act*, R.S.P.E.I. 1988, c. H-12 (CanLII); Newfoundland and Labrador: *Human Rights Act, 2010*, S.N.L. 2010, c. H-13.1; Yukon: *Human Rights Act*, R.S.Y. 2002, c. 116 (CanLII); Northwest Territories: *Human Rights Act*, S.N.W.T. 2002, c. 18; and Nunavut: *Consolidation of Human Rights Act*, S.Nu. 2003, c. 12.

59. Clare Annett, *Gender Equality Week: Understanding Gender and Sexual Diversity Terminology*, HillNotes, Library of Parliament, 24 September 2018.

60. See, for example, OHRC, *Toward a Commission Policy on Gender Identity*, Discussion paper, October 1999; and OHRC, *Consultation survey: Revised Policy on discrimination and harassment because of gender identity and gender expression*.

61. See, for example, *Vanderputten v. Seydaco Packaging Corp.*, 2012 HRTO 1977 (CanLII); *McMahon v. Wilkinson*, 2015 HRTO 1019 (CanLII); *Sheridan v. Sanctuary Investments*, 1999 BCHRT 4 (CanLII); and *Vancouver Rape Relief v. British Columbia (Human Rights Commission)*, 2000 BCSC 889 (CanLII).

62. *T.A. v. Manitoba (Justice)*, 2019 MBHR 12 (CanLII), para. 32.

63. Ibid., para. 24.

64. For other cases involving discrimination and identification documents, see *T.A. v. Ontario (Transportation)*, 2016 HRTO 17 (CanLII); and *Chédor v. Canada (Citizenship and Immigration)*, 2016 FC 1205 (CanLII).

65. *Boulachanis v. Canada (Attorney General)*, 2019 FC 456 (CanLII).

66. For an example of a decision concerning an application for a correctional facility transfer and policies for transgender inmates at the provincial level, see *Wiens v. BC Ministry of Public Safety and Solicitor General*, 2019 BCHRT 88 (CanLII).

67. “Transsexuality” is the term used in this Background Paper, as this was used by the Ontario Human Rights Tribunal in its decision in *Boulachanis v. Canada (Attorney General)*. The Gender and Sexual Diversity Glossary put out by the Government of Canada’s Translation Bureau states: “Some people consider the terms "transsexuality," "trans-sexuality" and "transexuality" pejorative because they are strongly medically connoted. However, some have reappropriated these terms and use them as a form of positive self-identification.”

68. *Boulachanis v. Canada (Attorney General)*, para. 8. While Justice Grammond makes this point generally in relation to the federal jurisdiction in certain respects, the reference to individual autonomy in gender expression applies specifically to Quebec.

69. *Browne v. Sudbury Integrated Nickel Operations*, 2016 HRTO 62 (CanLII).

70. Ibid., para. 39. He also added that growing a beard was an appearance and grooming issue that had previously been decided in other forums to not be worthy of human rights protection.

71. *Yaniv v. Various Waxing Salons (No. 2)*, 2019 BCHRT 222 (CanLII).

72. Ibid., para. 2. Note that the Tribunal also recognized that some of the complaints were brought for improper motives (paras. 103–135).

73. *Lewis v. Sugar Daddys Nightclub*, 2016 HRTO 347 (CanLII).

74. A few commentators have criticized this amount as being insufficient. One law firm stated,

> [L]ow damage awards for serious breaches of the [*Ontario Human Rights*] *Code* … can do more harm than good. Serious physical assault accompanied by prejudicial slurs must be compensated with more than $15,000 if human rights in Ontario are to have any meaning.

Nicole Simes, *Physical Assault and Trans Slurs Compensated With Only $15,000*, MacLeod Law Firm Blog, 3 May 2016. See also Jennifer Ramsey, “Speaker’s Corner: Human Rights Tribunal needs to revisit discrimination remedies,” *Law Times*, 11 April 2016.

75. *Johnstone v. Canada Border Services*, 2010 CHRT 20 (CanLII), para. 222.

76. *Canada (Attorney General) v. Johnstone*, 2014 FCA 110 (CanLII), para. 59.

77. *Health Sciences Assoc. of B.C. v. Campbell River and North Island Transition Society*, 2004 BCCA 260 (CanLII), para. 39. The case law on both approaches is summarized in *Whyte v. Canadian National Railway*, 2010 CHRT 22 (CanLII), paras. 149–152.

78. *Canada (Attorney General) v. Johnstone*, paras. 69 and 93.

79. *Misetich v. Value Village Stores Inc.*, 2016 HRTO 1229 (CanLII), para. 43.

80. *Fraser v. Canada (Attorney General)*, 2020 SCC 28, paras. 118 and 122.

81. *Whyte v. Canadian National Railway*. Two other cases with similar facts were brought against CN Rail in 2010 as well: *Seeley v. Canadian National Railway*, 2010 CHRT 23 (CanLII); and *Richards v. Canadian National Railway*, 2010 CHRT 24 (CanLII).