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EMPLOYMENT LAW

Accommodating religion

Quebec's proposed 'Charter of Values' raises questions around what's allowed

By Kenneth Krupat

Since the announcement of the proposed Quebec "Charter of Values," there has been a great deal of discussion over the issue of reasonable accommodation of minority religious practices.

The topic has generated a great deal of controversy in Quebec. It has also attracted widespread publicity and discussion across the rest of Canada, and even around the world.

But outside of Quebec, the issue, from a legal standpoint, has not been particularly controversial. Canadian courts have generally tackled the topic in a common-sense fashion and in a way that has enhanced the multicultural fabric of an ever-changing Canadian society.

While there are certainly some issues that can and do create greater controversy than others, the courts have been able to draw reasonable lines without resorting to the type of sweeping, xenophobic absolutes that characterize the Quebec proposal.

If the Quebec charter is passed, it is likely to wind up before the courts. So it is worth having a look at issues of religious accommodation that have previously been addressed in the courts — and will continue to be addressed in the coming years.

Defining religion

In the Supreme Court of Canada's 2004 landmark case in *Syndicat Northcrest v. Amselem*, a majority of the court defined freedom of religion as "the freedom to undertake practices and harbour beliefs, having a nexus with religion… which an individual sincerely believes or is sincerely undertaking in order to connect with the divine."

This was a significant recognition that minority religious rights are entitled to protection. Practices such as religious clothing, activities and other behaviours are entitled to reasonable accommodation. This broad and tolerant view of religious minority rights stands in marked contrast to the Quebec proposal.

In the 2012 case *R. v. N.S.*, the majority of the Supreme Court adopted the *Amselem* approach in considering whether an individual's right to wear a niqab was worthy of protection. However, the court then looked at other factors and rights — in particular, the right of an accused to a fair trial weighed against accommodation of religious practice.

While the court left the door open to the possibility of broader restrictions on the right to wear a full-face niqab, it rejected the notion that the proper approach to different religious requirements is to ban religious dress entirely.

Writing for the majority, chief justice Beverley McLachlin wrote "(the) need to accommodate and balance sincerely held religious beliefs against other interests is deeply entrenched in Canadian law. For over half a century, this tradition has served us well."

It is this broad recognition of divergent religious practices that has resulted in Canada being viewed as a tolerant, multicultural society in which religious and cultural minorities are welcomed as full participants in society.

Key concerns

Many of the decisions McLachlin cited were in the context of employment. It is worth recapping some of these legal developments:

Sabbath observance: Some of the earliest charter decisions addressed the issue of minority religious rights in the context of Sabbath observance.

Starting with the 1985 *Ontario Human Rights Commission v. Simpson-Sears Ltd.*, Canadian courts have made it clear that followers of minority religious practices, such as the strict observance of a Saturday Sabbath, are entitled to reasonable accommodation to the point of undue hardship.

While there have been situations in which employers have been able to demonstrate undue hardship, the protection is reasonably broad.

Religious holy days: Likewise, Canadian courts have also recognized the right that religious employees have to observe their holy days. In a limited context, the Supreme Court even ruled employers should not penalize employees monetarily for observing these days (in the 1994 *Commission scolaire régionale de Chambly v. Bergevin*).

However, employers are not required by law to pay for all of an employee's religious observances. They are, however, required to accommodate the required time off to the point of undue hardship.

Religious dress: Unlike the wording of the proposed Quebec charter, Canadian courts have recognized that turbans, hijabs, kippas, kirpans and other forms of religious dress are integral to the religious practises of those who wear them. These are permissible and should be accommodated in any workplace to the point of undue hardship.

However, there may be exceptions where there are legitimate safety considerations. There may also be other considerations that limit the entitlement to protection for niqabs or burqas or other forms of face coverings. However, the broad point is recognition that in a multicultural society, people will dress differently in the workplace and there is nothing wrong with that.

Prayer times: More recently, some courts and arbitrators have been asked to adjudicate the issue of the accommodation of religiously mandated prayer times that may occur during the workday. Once again, predictably, courts and tribunals have indicated that a reasonable approach to accommodation should be taken.

This does not mean an employee can leave her post unattended without making reasonable arrangements. Nor does it mean employers must always provide fully dedicated prayer rooms. But there is a duty on employers to make reasonable efforts to accommodate these practices.

Future issues

It is foreseeable that some minority religious practices or beliefs could clash with other charter rights or the human rights of other individuals. The *R. v. N.S.* case was one example.

Another example might be a request by an employee, for religious purposes, not to have to work with or for someone of the opposite gender.

In still other cases, religious views may be used to defend expression or actions that are homophobic, anti-Semitic or misogynist. Canadian courts and tribunals can and will draw reasonable lines as to the limits of required accommodation of religious practices and beliefs.

As McLachlin pointed out in *R. v. N.S.*, courts have done a good job managing these issues and the courts' approach has served Canadians well, while fostering a vibrant, tolerant, multicultural society. It is little wonder those who appreciate this type of society have been so opposed to the contrasting and xenophobic approach proposed by the government in Quebec.

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