

RELIGION, PRIVATE SCHOOLS AND THE DUTY OF REASONABLE ACCOMMODATION: LOOKING BEYOND THE TREES TO THE FOREST

by

Pierre Marois, President
Commission des droits de la personne et des droits de la jeunesse

Article published on Wednesday June 15, 2005 in *Le Devoir*.

This article is a summary of the opinion issued by the Commission under the title:
*Reflections on the scope and limits of the duty of reasonable accommodation
in the field of religion*¹ (February 2005)

In 1995, the Commission des droits de la personne published the document "*Religious pluralism in Québec: a social and ethical challenge*" which, among other things, stated that public schools could not block access to their services for students wearing an Islamic veil for religious reasons. This conclusion, based on the right to equality recognized by the charters of human rights, and also on the right of every child to receive public education, was accompanied by a warning that some restrictions were possible, and even necessary, if other rights were to be respected, such as sexual equality and considerations connected to public order and security.

The Commission's opinion had a major impact and, although it did not meet with unanimous acceptance, is still the rule for public schools in Québec.

The question of the degree of accommodation that schools must provide in the field of religion also arises in connection with private schools. Like public schools, private schools have a religiously diverse student population. Some private schools are religious schools, while others are not, and in fact emphasize their secular approach. It seems legitimate to ask whether the specific nature of a private school exempts it from the obligation of accommodation incumbent upon public schools, and if so, to what extent.

The Commission believes that it is appropriate, at this time, to specify the requirements of the Québec *Charter of Human Rights and Freedoms* in this particular area. In recent days, the Commission's position has been presented to stakeholders in the field of private education. To provide input for the public debate on the issues of religious pluralism, a brief summary of this position will be presented here. However, as we will see, reasonable accommodation in religious matters in private schools is part of a far broader range of issues that are fundamental to the future of our society, but on which debate has only just begun.

¹ This opinion is available on the Commission's website: www.cdpedj.qc.ca - See under "Religion", in the "Publications" section.

Private schools and the charters of rights

In any democratic society, one of the key freedoms is the right to associate with others. Every day, people come together for a wide range of contrasting reasons, whether cultural, ethnic, political, sporting, philosophical, or other. Freedom of association is protected by the charters of rights, as it should be. The charters also give a degree of latitude to associations formed for various reasons. As they pursue their activities, these associations must, from time to time, make choices and take decisions that provide a necessary and objective reflection of their particular nature. In Québec, the *Charter of Human Rights and Freedoms* authorizes institutions that are specifically devoted to the well-being of an ethnic group, and non-profit institutions, to exercise certain forms of discrimination (a distinction, exclusion or preference) provided it is justified by the “charitable, philanthropic, religious, political or educational nature” of the institution concerned. A political party, for example, may give priority to its own supporters when hiring support staff for a convention.

In the field of education, this latitude does not give free rein to private schools. To benefit from the provisions of the Charter, they must have a specific vocation to serve a group of people identified on the basis of religion, ethnic origin, language or another aspect, normally grounds on which discrimination is prohibited. Schools that do not serve an identifiable group, and that therefore do not benefit from the provisions of the Charter, must comply with the general obligations of the Charter, like any other school. The same applies to schools that do, in fact, serve a specific group, if there is no link between the school’s vocation and the type of discrimination exercised by the school. For example, a private Catholic school whose underlying vocation is to provide general academic instruction for its students cannot exclude a student with a slight physical disability because of the importance placed on physical education in its educational project.

In other words, non-profit institutions are not exempt from the principles of the Charter that constitute the basic rules for life in society. Unless a private school can show that its religious nature (for example) requires it, necessarily and objectively, to exclude or give preference to certain students, then it too must accommodate people with special needs, including religious needs.

The concept of reasonable accommodation

It is appropriate to emphasize that reasonable accommodation is a legal duty that arises from the right to equality. It is one of the tools used in Québec to manage, in a civilized way, the conflicts that inevitably occur given the growing diversity within society.

Reasonable accommodation is based on a simple observation: although all human beings are equal, they are not identical. This observation has repercussions in daily life. For example, the courts have ruled that pregnant female employees must be accommodated to allow them to continue working without being penalized; if they have to miss a few hours of work for a medical examination, the employer must accommodate them if this can be done without unduly affecting the operation of the enterprise. The same applies to people with disabilities, who may have to be accommodated by changes to their job tasks or to the workplace. As the jurisprudence now stands, the duty of reasonable accommodation is an integral part of the right to equality. By allowing everyone to participate fully in the life of society, reasonable accommodation fulfills an important social function.

Religious particularities are also taken into account to encourage everyone to play an active role in society, just as the needs linked to pregnancy or a disability are now recognized. A

refusal to take religious particularities into account could have the opposite effect, namely that of placing some people on the margins of society, and this must be avoided. In its 1995 opinion, the Commission took into account the risk that, if students were forbidden to wear an Islamic veil at school, they could be excluded from the right to public education. The acceptance of religious particularities is supported by a legal analysis of the situation, but it is also, and perhaps more importantly, an expression of the ethic of responsibility, since major social institutions play a key role in social integration. If institutions such as schools were to close their doors to people with certain religious particularities, then they would fail in their responsibilities.

The extent of accommodation

Obviously, we must still look at the question of how far accommodation should extend. The duty of accommodation does not mean that all particularities must be accepted unconditionally. As the Commission pointed out in 1995, "In the case of religion, rights and freedoms can soon be transformed into sacred absolutes placing constraints on society as a whole." The duty of reasonable accommodation has a limit, defined by the notion of undue hardship.

A wide range of factors can be taken into account when assessing whether the duty of reasonable accommodation will result in undue hardship. In its 1995 opinion, the Commission listed several factors in the field of education, including: the need to comply with compulsory curriculum content; compulsory school attendance; the status of French as the main language of instruction; sexual equality (and its corollary in the public school system, mixed classes); and the need to maintain order and security in schools, for example by prohibiting the wearing of clothes that masked a student's identity. The Commission wishes to state, today, that all these factors remain essential, non-negotiable elements of the school system.

Other factors can be used to assess whether a request for accommodation remains within the limit, such as: class rules; pedagogical objectives; the burden that accommodation measures would place on other people (students or staff members); and the drain on resources. The size of the school and the number, range and timing of requests can also be factors that affect the school's ability to accommodate a request.

In short, religious diversity must be dealt with like any other kind of difference, and is subject to the limits fixed by the requirements of life in society, in accordance with the Preamble to the Québec Charter, which states that "the rights and freedoms of the human person are inseparable from the rights and freedoms of others and from the common well-being".

Broader issues

However important the question of reasonable accommodation in the field of education may be, it is only one tree in the forest. To make sure that we do not lose sight of the forest as a whole, we must distinguish between individual rights, and group and collective rights. The concept of reasonable accommodation alone cannot answer all the questions connected with religious diversity. It is important to remember that reasonable accommodation in the field of religion is granted exclusively on the basis of an individual right: it does not confer a collective right on a religious group or denomination. Even a multiplication of individual rights does not create any kind of "collective right".

Whatever the degree of accommodation granted to individuals, the collective aspect of the religious question remains omnipresent. It is an increasing concern, given the troubled international context, in which pre-existing social and political conflicts are often intensified

and made more complex by their religious dimensions. The emphasis placed (rightly or wrongly) on the religious dimension of a conflict affects the social climate and, inevitably, the relationships between individuals within society. This is another reason why the type of relationship existing between religious groups and the State must be clarified.

In today's Québec, the collective dimensions of the religious question can be seen in a number of issues that will require a response in the short or medium term.

In the short term, Québec must decide whether the legislative provisions that protect the privileges of Catholics and Protestants in the area of religious instruction, notwithstanding the rights to equality and to religious freedom recognized by the Charters, should be extended. The current provisions expire on June 30, and the decision on whether or not to renew them will reflect Québec's willingness to respond to the major shift in perception in this area. For the last twenty years, the Commission has played a part in this debate, and has stated that the use of the notwithstanding clause is not an acceptable way of ensuring a place for religion in the curriculum. This is why the Commission welcomes the tabling of Bill 95, which proposes that the notwithstanding clause should no longer be invoked after a period of transition during which programs of ethics and religious culture will be introduced.

In the medium term, the use of the notwithstanding clause evokes another broader and even more difficult subject, namely secularization. During the second half of the twentieth century, Québec became an increasingly secular society. Although the social and political forces behind secularization constitute a strong historical trend, some grey zones remain. What type of secular society do we really want? Do we want a secular society that refuses, on principle, any religious content in public life? Or a secular society that remains aware of the religious dimension but supports the religious neutrality of the State? Or a secular society in which the State undertakes to respect the presence of religion in the public sphere, in return for an undertaking by the religious communities to "respect the spirit of the charters of rights", as proposed last year by the Conseil des relations interculturelles? Or, perhaps, an approach specific to Québec, consistent with the charters of rights, which needs to be defined by an in-depth public examination of the issues?

Conclusion

Until a structured public debate is launched to deal with all these issues, the Commission continues to believe that no action should be taken which, in a mechanical or dogmatic way, runs counter to a child's best interests and right to education. As the Commission pointed out in its 1995 opinion, neither exclusion nor prohibition can ever be a valid choice, whether in terms of respect for the right to equality, or in pedagogical and social terms.

However, the question of reasonable accommodation in private schools is only one component - and clearly not the most important - in the debate concerning the place of religion in society. What public spheres do we wish to make available for the expression of religious faith? To what extent should the State, in its policies and in the choices it makes on behalf of society, take into account the religious beliefs and affiliations of majority and minority groups? The responsibility for launching and supporting this debate lies first and foremost with the political authorities.

June 15, 2005