Reasonable Accommodation

Amélie Barras

Abstract This chapter starts by discussing the legal concept of reasonable accommodation, focusing on how it has been used in religious freedom decisions at the Supreme Court of Canada (SCC). It then moves to describing how the concept has, over the past decade, broken away from law and entered public discourse. This shift is illustrated by briefly discussing how the Bouchard-Taylor Commission (2008) in the province of Quebec has referred to and used the notion of reasonable accommodation in its proceedings. In so doing, the chapter highlights some of the power-dynamics lodged within that notion and the conundrums they present for thinking about the complexity of religious lives in contemporary Canada. In the last section, the chapter explores potential alternative frameworks to reasonable accommodation better equipped to capture the richness and intricacies of everyday lived religion.

Keywords Reasonable accommodation · Sincerity of belief · Religious minorities · Bouchard-Taylor Commission · Navigation · Negotiation · Supreme Court of Canada · Lived religion

1 General Introduction

When and why is the concept of Reasonable Accommodation (RA) used in Canadian law? How is it related to religious freedom? Does its legal understanding differ from the ways it is being used in public discourse? What are the power asymmetries lodged within that framework? These are a few important questions this chapter tackles. This chapter starts by discussing key concepts related to RA through the study of two well-known religious freedom cases at the Supreme Court of Canada. Second, it explores how the concept of RA has made its way in the past decade from law to public discourse, and surveys some of the conundrums of this new usage. This chapter refers to the Quebec Bouchard-Taylor commission (2008) to illustrate

A. Barras (✉)
Department of Social Science, York University, Toronto, ON, Canada
e-mail: abarras@yorku.ca

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these conundrums, including the power asymmetries lodge within the framework of RA. Finally, this piece draws on recent qualitative research with self-identified Muslims in Canada to suggest possible alternative frameworks to RA that may be better equipped to capture the complexity of religious lives in Canada.

2 Reasonable Accommodations: Real Life Stories

2.1 Ontario Human Rights Commission and Teresa O'Malley vs Simpson Sears [1985] 2 S.C.R. 536

In 1971 Ms. O'Malley starts working for Simpson Sears in Quebec as a salesperson. She continues to work for the same company when she moves in 1975 to Kingston, Ontario. At the time she is hired, O'Malley is informed that all full-time employees are required to work on a rotating basis on Friday evenings, and two Saturdays out of three every month, as these are the busiest times for the store. O'Malley works this schedule until 1978, when she converts to the Seventh-Day Adventist Church. Because one of the tenets of her new faith requires that she not work from Friday sundown to Saturday sundown, O'Malley informs her manager that she will not be available anymore during that period. This schedule is problematic as it contravenes the policy that requires all full-time sales clerks to work on these busy days. The manager offers her part-time employment, which is intended to meet her need of a more flexible schedule. He also mentions that the store will keep her informed of any full-time job openings that do not have this schedule requirement. She accepts this solution, but sees her monthly income shrink substantively. As a result, O'Malley decides to file a complaint in court alleging discrimination on the basis of religion. O'Malley's case reaches the Supreme Court of Canada (SCC) in 1985, that rules in a unanimous decision that Simpson Sears has discriminated against her.

2.2 Multani vs Commission Scolaire Marguerite-Bourgeoys [2006] 1 S.C.R. 256, 2006 SCC 6

Gurbaj Singh Multani, a public school student in Montreal, is an orthodox Sikh who believes that his faith requires him to wear a kirpan (a Sikh ceremonial dagger) made of metal under his clothes. In 2001, Gurbaj, who is 12 years old at the time, unintentionally drops his kirpan in the playground of his school. As a result, the school board sends a letter to his parents suggesting a "reasonable accommodation," whereby Gurbaj would be allowed to continue wearing his kirpan provided that it is well sealed inside his clothing. The family accepts this solution. Nonetheless, the district school board refuses to endorse the arrangement. For them, it infringes on the code of conduct of the school that prohibits weapons in schools. As an alternative,

the district school board explains that it could allow Gurbaj to wear a symbolic kirpan that would take the form of a pendant, or that would be made of another risk-free material like plastic. Gurbaj is unable to accept these solutions. They go against his belief that he needs to wear a kirpan made of metal at all times. As a result, Gurbaj changes schools and attends a private institution. Moreover, he and his father decide to contest the decision of the governing board in court, on the ground that it violates Gurbaj's freedom of religion and belief. They ask that the original arrangement proposed by the school board, which allowed him to wear his kirpan as long as it was sealed under his clothes, prevail. In 2006, after a series of appeals, their case reaches the SCC, which decides in a majority decision that the district school board did violate Gurbaj's religious freedom and should have made greater efforts to accommodate his need.

While more than 20 years apart, both the O'Malley and Multani cases are important as they help us flesh-out the contours of RA in the Canadian legal context. In the following section, I draw on these two cases to explore the parameters developed by Canadian courts to evaluate whether particular claims fall within the framework of RA. In so doing, I also highlight some of the tensions lodged within this concept. This chapter then moves on to trace the evolution of the notion of RA over the past decade, emphasizing the fact that it has travelled outside the court system and into public discourse, and exploring some effects and conundrums of this displacement. In the last section, I discuss an alternative model to RA—a negotiation/navigation model—that is perhaps better equipped to capture the lived and contextual dimensions of religion, and whose structure is less conducive to (re) producing asymmetrical power relations.

3 Delimiting the Contours of Reasonable Accommodations: Key Concepts

Neutrality of the Norm—moving beyond formal equality?

While the notion of RA is referenced in both the Multani and O'Malley cases to address the grounds of religious discrimination, at the outset it is noteworthy to underline that Canadian courts draw on this notion in cases involving a range of other discriminations prohibited under the Canadian Charter of Human Rights and Freedoms, including discriminations based on age, sex, pregnancy, age, and disability (see also Bosset 2005: 3).

To get a better sense of what RA entails, it is relevant to understand in what context and why this notion is used. One of the underlining ideas structuring the notion of RA is that while a rule, norm, or law might appear neutral, as its aim is to affect everyone equally and not discriminate against a particular group, when it gets applied it may nevertheless discriminate against particular individuals. In other words, even if the intention and objective of the rule is precisely not to discriminate, by applying the same treatment to everyone, it may still discriminate against

individuals who do not, because of their age, religion, health, etc., correspond to the average individual for whom the rule was designed.

To better understand these distinctions, it is important to differentiate between two sets of related concepts: formal and substantial equality, and direct discrimination and adverse effect discrimination. Both O'Malley and Multani found themselves in environments where institutions had developed rules that were intended to apply to all employees or students. In O'Malley's case the SCC explains that the policy requiring full-time sales clerks to work on Friday evenings and Saturdays was: "adopted for sound business reasons and not as the result of any intent to discriminate against the complainant, or members of her faith" (Ontario Human Rights Commission (O'Malley) v. Simpsons-Sears 1985, para 3). Likewise for Multani, the rule in the school code of conduct prohibiting weapons in schools was not meant to discriminate against particular students, but was meant to: "ensure a reasonable level of safety at the school" (Multani v. Commission scolaire 2006, para 48). In other words, in neither case is the institution's intention to directly discriminate. This clarification is well articulated by Judge McIntyre, who wrote the O'Malley decision, and underlines that the rule adopted by Simpsons-Sears does not: "on its face discriminate on prohibited grounds. For example: No Catholics or no women or no blacks employed here" (Ontario Human Rights Commission (O'Malley) v. Simpsons-Sears 1985, para 17). And yet the SCC's decisions highlight how these rules had adverse effects for both O'Malley and Multani by infringing on their religious freedom. In so doing, the SCC embraces a substantive reading of equality, one which requires adapting "apparently neutral rules and policies" (Ryder 2008, p. 88) that actually infringe on the religious practice and/or belief of individuals to limit adverse effects.

To put it simply, this understanding of equality foresees the possibility that an apparently neutral ruling can result in putting particular individuals, like O'Malley and Multani, in front of an impossible dilemma (e.g. choosing between accessing full-time employment or attending public school, and practicing their religion the way they wish to) and requires that reasonable measures be taken to mitigate this situation. This is grounded in the idea, as Ryder sensibly explains, that: "True equality requires that religious differences be accommodated and that coercive pressures of neutral rules on religious observance be avoided" (Ryder 2008, p. 88). To be clear, in cases of RAs, like O'Malley's and Multani's, the apparently neutral rule will not be stricken down. This is because the rule does not directly discriminate against particular individuals, nor is that its intent. On the contrary, it is conceived as applying to everyone, and it is actually this general application that leads to adverse effects. It is a rule based on a formal reading of equality. The duty of RA requires, on the other hand, that institutions take reasonable steps to adapt the rule for individuals whose rights it infringes.

3.1 Religious Sincerity

Another important question that courts have to evaluate when deciding whether institutions have a duty to reasonably accommodate an individual's religious request is the extent to which this request falls in the category of freedom of religion or belief. In other words, the courts must evaluate the sincerity of belief of the claimant, and draw the difficult line between: "subjective preferences and meaning-giving beliefs" (Maclure 2011, p. 271). It is important to note here that according to the SCC this 'sincere belief' does not need to necessarily be related to the teachings of established religions, nor to those followed by the majority of believers (Bosset 2005). Neither does the claimant, in principle, have to follow past practices. This explains why in the Multani decision, the SCC makes it clear that the fact that other Sikhs agree to wear a replica of the kirpan not made of metal, is irrelevant (Multani v. Commission scolaire 2006, para 39). What *is* relevant is that Gurbaj sincerely believes that he has to follow this requirement. In so doing, the SCC seeks to embrace a subjective understanding of freedom of religion precisely to account for the variability of beliefs and practices between believers as well as during the life course of an individual (see Amselem v. Syndicat Northcrest 2004, p. 554). In other words, claimants have to prove the sincerity of their beliefs, but are not required to show that this belief is related to: "some sort of objective religious obligation, requirement or precept" (Amselem v. Syndicat Northcrest 2004, p. 554). Courts are required to assess this sincerity, which means determining the honesty of belief that should not be "fictitious nor capricious" (Amselem v. Syndicat Northcrest 2004, p. 554), but they are not in a position to evaluate the "content of subjective understanding of a religious requirement" (Amselem v. Syndicat Northcrest 2004, p. 554). To do so, they can analyze "the credibility of a claimant's testimony, as well as […] whether the alleged belief is consistent with his or her other current religious practices" (Amselem v. Syndicat Northcrest 2004, p. 554). A contextual and case-by-case analysis is therefore required here since only this type of analysis will allow courts to get a sense of the subjective practice of a particular individual, and to account for variability of practices (see Lepinard 2016, p. 71). This sincerity test is important as it is the sincerity of belief that triggers the duty of RA.

Several scholars have highlighted the difficulty of this test, especially when it comes to refraining from evaluating the content of particular faiths and, therefore, from relying on an objective reading of religion. In her analysis of the Multani decision, Lori Beaman (2008), for instance, notes that despite the SCC emphasis on the fact that a religious practice need not be required by the tenets of a religion to be protected, the Court's language still indicates a reliance on the "essence" of that particular faith. She explains:

> The Court begins with "in the case at bar, Gurbaj Singh must show that he sincerely believes that his faith requires him at all times to wear a kirpan made of metal." The words "require", "must comply", "strict disciplinary code requiring," and so on reinforce the notion that there is a direct link between Singh's religious practice/belief and an ideological orthodoxy connected to a specific faith tradition. Were the link non-existent or tenuous, or more

> possibly subjective, it is difficult to imagine that the Court would have been so decisively supportive (p. 203).

Likewise, Woehrling provides us with insights on this tension. He notes that it is much easier for Canadian courts to rely on the idea of subjectivity to assess sincerity of beliefs when they are faced with a precept that is clearly part of the teachings of a known religion (1998, p. 389). This insight can shed light on why assessing the sincerity of the beliefs of both O'Malley and Multani was not a central question with which courts struggled. In O'Malley's case the SCC clearly notes that observing Shabat (i.e. not working from sundown Friday to sundown Saturday) is a tenet that: "must be strictly kept" by members of the Adventist Church (Ontario Human Rights Commission (O'Malley) v. Simpsons-Sears 1985, para 3). As discussed, similar language weaves through Multani. Woehrling notes that in fact tensions around sincerity of beliefs are visible when the claimant is the only one believing in this particular belief or practice and/or if he does not belong to a "known" religion. He stresses that in this context it is harder for the believer to prove that her beliefs/practices are more than "simple opinions" (p. 391, my translation). One could add that this "suspicion" ends up affecting members of not "well-known" religions, who often tend to also be members of religious minorities (Beaman 2008).

In sum, courts in Canada have opted to ground part of their evaluation of whether a religious request should be warranted accommodation on the sincerity of belief of the claimant. In this process, judges should avoid evaluating whether a particular request fits within the known content of a religion, but rather base their judgment on the subjective understanding of religion of the claimant. This is partly to account for the variability and flexibility of religious beliefs and practices. Yet, as seen, this approach comes with its own share of conundrums. In fact, it has been difficult for judges in their decisions not to refer to, nor try to extract the essence of particular religions, making the sincerity test easier for believers like Multani or O'Malley whose practices are in tune with well-known tenets of their faith.

3.2 Undue Hardship

Besides establishing the sincerity of belief of the claimant, courts are also responsible for evaluating arguments of undue hardship provided by institutions that consider they cannot accommodate a request. In other words, the duty of accommodation does not mean that all sincere religious requests should be accepted. It is limited by the notion of undue hardship, which entails that an institution is not required to accommodate a particular request if it leads to excessive interference (Bosset 2005). According to the SCC, undue hardship can be triggered by three factors. The first two were fleshed out in labor law decisions (e.g. Ontario Human Rights Commission (O'Malley) v. Simpsons-Sears 1985): (1) undue expenses to a business (i.e. granting the accommodation request costs too much to a business) and (2) undue hindrance to the ways a business functions (i.e. granting the accommodation would

significantly interfere in how a business/institution works). The last and third (3) one was developed later and is related to infringement on the rights of others, including other employees.

The SCC explains that institutions claiming that an accommodation request would cause undue hardship need to provide clear facts that this would be the case based on the specificities of their institutions. In other words, context is again highly important, as proof of undue hardship will vary in relation to a number of things, including the type of organization (e.g. schools, private businesses, courtrooms, for profit or non-profit organizations), its size, budget, mission, the broader economic and/or political climate, and so on. Likewise, the employer is advised not to ground his/her arguments on speculations:

> When the employer refuses to grant the leave request of an employee for religious reasons because he/she says that they worry that this will trigger an avalanche of similar demands, he/she has to prove that this "snowball" effect effectively happened and cannot limit himself to affirming that this could eventually happen (Woehrling 1998, p. 346, my translation).

It is useful to return to the O'Malley and Multani decisions to think through the specificities of this notion of undue hardship and how it is applied in practice. O'Malley is interesting as it is a good example of how this notion was used to mitigate employer –employee relations. The SCC in O'Malley clearly establishes that it is up to the institution — in this case Simpson-Sears — to prove that the accommodation would lead to undue hardship for its business. Judge McIntyre explains: "it seems evident to me that in this kind of case the onus should […] rest on the employer, for it is the employer who will be in possession of the necessary information to show undue hardship" (Ontario Human Rights Commission (O'Malley) v. Simpsons-Sears 1985, para 28). O'Malley's employer tried to accommodate her needs by offering her part-time employment. However, the decision notes that it never produced evidence that rearranging O'Malley's work schedule so that she could continue working full-time would lead to undue expenses or interferences in the functioning of the company:

> There was no evidence adduced regarding the problems which could have arisen as a result of further steps by the respondent, or of what expense would have been incurred in rearranging working periods for her benefit, or of what other problems could have arisen if further steps were taken towards her accommodation (Ontario Human Rights Commission (O'Malley) v. Simpsons-Sears 1985, para 29).

As described in the vignette, while O'Malley accepted the part-time offer, she did not consider this accommodation 'reasonable', as it affected her ability to earn a decent living quite substantively. It is precisely the absence of evidence of undue hardship that leads the Court to rule that Simpsons-Sears did discriminate against O'Malley (Ontario Human Rights Commission (O'Malley) v. Simpsons-Sears 1985, para 29). Context is therefore key in informing this decision. Indeed, if the company had provided solid proof of undue interference, one could imagine that the outcome of the case could have been quite different.

The Multani case provides us with even more information on the importance of context to evaluate the level of hardship. One of the arguments put forth against allowing Gurbaj to keep his kirpan is that doing so would lead the school to: "reduce its safety standards", which would result in undue hardship for that institution (Multani v. Commission scolaire 2006, para 12):

> According to the CSMB [*Commission Scolaire Marguerite Bourgeoys* (district school board)], to allow the kirpan to be worn in school entails the risks that it could be used for violent purposes by the person wearing it or by another student who takes it away from him [from Gurbaj], that it could lead to a proliferation of weapons at the school, and that its presence could have a negative impact on the school environment (Multani v. Commission scolaire 2006, para 55).

In other words, not only would the wearing of the kirpan produce undue hindrance in the functioning of the school, but it would also disproportionally affect the rights of other students by putting their safety at risk. To buttress these points, the school district governing board posits that the kirpan is a weapon that symbolises violence (Multani v. Commission scolaire 2006, para 55). In its close examination of these arguments, the SCC contextualises them. This is an exercise that requires evaluating their accuracy when juxtaposed with Gurbaj's reality. In its assessment of whether the kirpan infringes on the safety of Gurbaj's school, the Court first notes that there is no evidence that Gurbaj has "behavioural problems", or that he has had a violent behaviour in school (Multani v. Commission scolaire 2006, para 57). In fact, there has never been one reported violent event related to the wearing the kirpan in Canadian schools (Multani v. Commission scolaire 2006, para 59). The decision also highlights that the risk that other students would use his kirpan violently is minimal. This is especially true given the initial arrangement with the school board after the incident in the school playground, which required Gurbaj to wear his kirpan sealed and inside his clothes. This solution substantially limited the ability of other students to take the kirpan or chances that the kirpan would fall. Judge Charron, who authored the majority, decision notes that there are numerous objects more accessible on school grounds that could be used for violent purposes, such as scissors, compasses, or pencils (Multani v. Commission scolaire 2006, para 46 and 58). As Lépinard underlines, in her analysis of this decision, these comparisons are part and parcel of a contextual analysis that allows the SCC to conduct a concrete evaluation of the arguments put forth to prohibit the kirpan on the ground of undue hardship in a school setting (2016).

Delving into the particularities of school settings also allows Judge Charron to respond to the district school board arguments that schools are similar environments to airplanes and courts, in which courts' decisions confirmed the prohibition of the kirpan (Multani v. Commission scolaire 2006). While Judge Charron notes that safety is important in these different spaces, she also stresses the importance of not forgetting to account for the specificities of these different environments. Schools are unique spaces in the sense that they are "living communities" that are conducive to developing meaningful relationships between staff and students: "These relationships make it possible to better control the different types of situations that arise in schools" (Multani v. Commission scolaire 2006, para 65). This is not the case for

airports and planes, where in the first space "groups of strangers are brought together" (2006, para 63), and where the second is an adversarial setting. Moreover, students are required to attend school on a daily basis, whereas the presence in courts and airplane is "temporary" (Multani v. Commission scolaire, para 65). In other words, the prejudicial effects of forbidding the kirpan are quite different, as its prohibition in schools would potentially affect years in the life of a student. To put it simply, it is through this careful consideration of context, including through these comparisons with other settings and objects, that the SCC is able to assess the respondent's claim that allowing the wearing of the kirpan would result in undue hardship. Here again, the lack of concrete evidence related to this particular case leads the Court to reject this claim: "Justice Charron found that an absolute prohibition was not justified. The minimal risk to school safety posed by the wearing of kirpans could be managed in the school environment by the imposition of conditions on the wearing of kirpans" (Ryder 2008, p. 103).

4 Reasonable Accommodations: A Few Statistics

It is interesting to note that the Quebec Human Rights Commission (*Commission des droits de la personne et des droits de la jeunesse* (CDPDJ)) underscores that between 2009 and 2013, out of the 3583 complaints regarding accommodation requests it received only 0.7% that were related to religion, and that complaints on the ground of disability were 13 times more frequent (CDPDJ 2013). In another study that focuses more specifically on cases of religious RAs filed with the CDPDJ, Paul Eid concludes that one request for RA out of two is filed by Christian plaintiffs (2007). These statistics are relevant if only because it puts in perspective the fact that while public discourse has, over the last decade, focused on religious RAs, and more particularly on those filed by Muslim plaintiffs, the range and types of complaints that are filed in Canadian courts and/or with provincial Human Rights Commissions offer a much more complex picture.

This recent discursive importance given to religious RA is discussed in detail in the Bouchard-Taylor report. In its study of RA in the province of Quebec, the Bouchard-Taylor report underscores that from 1985 to 2006, 25 cases were covered by the media, the majority of which were related to court decisions on these cases. In contrast, from March 2006 to June 2007, approximately 40 cases were reported in the media (2008). The commissioners note that this considerable rise in media coverage of religious RAs does not necessarily reflect a rise in the number of accommodations, but rather is representative of a shift in public discourse where the language of accommodation limited until that point to the legal realm starts to become part and parcel of public parlance, and thus central to the journalistic gaze (this shift, including some if its consequences, is discussed at greater length in Sect. 5). This also means that cases making the headlines cease to be limited to those that reach courts, but extend to those understood as being related to the "integration of

immigrant population and minorities" (2008, p. 53). In that process, RA becomes a broader and more ambiguous notion not restricted to its legal definition.

5 Reasonable Accommodations: Current Challenges and Future Opportunities

5.1 Reasonable Accommodations: Recent Evolutions

The Multani decision is particularly important in understanding the recent evolutions of RA. Not only is it identified as the first decision that uses the concept outside employment law, but it also marks the beginning of animated debates outside the legal arena around the "limits" that should be put on religious RAs. Reactions to the decision were particularly strong in the province of Quebec, where "much of it [the reaction] [was] negative, and much of it focused on the idea that there was simply 'too much' accommodation happening" (Beaman 2012a, p. 3). To put it simply, with the Multani decision, the notion of RA acquired a life of its own outside of the legal arena (Beaman 2012a; Barras 2016). It is noteworthy that while

Fig. 1 Courtesy of Frederic Serre/Concordia University Magazine

discussions around this topic seem to have been the most virulent in Quebec, the RA framework as a means to deal with religious requests has been an important topic of debates elsewhere in Canada: "the debate over accommodation is nationwide and its resolution has profound implications for the entire country" (Beaman and Beyer 2008, p. 4) (Fig. 1).

Accordingly, following the Multani decision, a number of concerns around the RA framework have started to circulate in the Canadian public imagination, including the following: (1) that RAs are used almost exclusively by religious individuals to get their religious needs accommodated, and that these requests are increasing; (2) that religious RAs are unfair and unreasonable because religious practices, unlike race, age, or other forms of discrimination, can easily be changed to meet the rules of particular institutions (on this see Maclure 2011, p. 266); (3) that a great number of requests for religious RAs are incompatible with Canadian "values", especially gender equality (see Moon 2008, p. 12); and (4) that non-Christian religious minorities, especially Muslims, are the ones that use the notion of RA most frequently because they tend to be more orthodox and rigid in their approach to religion, which explains why they are less inclined to adapt their faith (Eid 2007).

While most of these concerns have been challenged by academic research, they have nonetheless delimited the parameters of discussions on RA. This is clearly visible in Quebec, including in the successive responses of Quebecois policymakers and politicians to these debates. For example, in 2007, in the aftermath of the release of the Multani decision, the provincial government headed by the Liberal Party established the Bouchard-Taylor Commission to conduct provincial consultations on accommodation practices: "in response to public discontent concerning reasonable accommodation" (Bouchard and Taylor 2008, p. 17). In so doing, the Commission instigated "a public discussion" and produced "a public response" to address a perceived crisis (Beaman 2012a, b, p. 3), whereby the values of the province were believed to be under threat by an increase in "unreasonable" accommodation requests, and whereby this situation required an urgent need to develop a clear framework governing these requests (Bouchard and Taylor 2008, p. 18). Although the mandate of the Commission was to analyze "Accommodation Practices Related to Cultural Differences", public debates delimited the specifics of this focus. As a consequence, stories that came up during public consultations and examples used in the Commission's report were almost exclusively related to religious requests by minorities, in particular Muslims (on this see Barras 2016; Bender and Klassen 2010: 4; and Mahrouse 2010). In other words, while the Bouchard-Taylor Commission tried to debunk several of the above-mentioned concerns by giving them space in public debate, it participated, at the same time, in delimiting the terms of discussion, and set a precedent for other policy-making initiatives. As such, Bill 94, tabled in 2011 by the Liberal Party at the Quebec National Assembly, aimed to provide a framework to regulate accommodation requests. Likewise, this idea of developing a clear framework was picked up by Bill 60, tabled in 2013 by the Party Quebecois, whose advocates saw it as a way to limit "unreasonable" religious requests, and again by Bill 62, tabled by the Liberal Party in 2015.

Numerous scholars have criticized debates around the notion of RA, in particular because they have facilitated the (re) production of an unequal "us" (majority) versus "them" (minority) framework. Beyer, for instance, considers that (re) producing this dichotomy is particularly problematic since in practice the boundaries between minorities and majorities are increasingly blurred and fluid (Beyer 2012). While this dichotomy is already visible in the legal use of RA (see Berger 2010, p. 100 on this), it seems to become magnified in public debate. In fact, scholars argue that this framework is inherent to how the notion of RA is structured. Beaman notes that like the notion of tolerance, the notion of accommodation conveys the idea that: "there is a part of Canadian society that is entitled to accommodate and tolerate and a portion that is asking to be tolerated and accommodated" (2012b, p. 212). It thus produces and sustains unequal relationships and categories between a majority "entitled to accommodate", and a minority vulnerable to "majoritarian desires and fears" (Beaman 2012b, p. 212).

The narratives around which the Bouchard-Taylor report is structured are a good illustration of these mechanisms. As argued elsewhere (Barras 2016), religious minorities in the report are identified as requesters that are asking Canadian institutions to accommodate their religious needs. They are, in this process, differentiated from institutional managers who are described as the ones responsible for evaluating the validity, reasonableness, and compatibility of these requests with the good functioning of their organization, and if necessary, suggest compromises to requesters. Managers, on the one hand, come out as thoughtful actors capable of flexibility and innovation. Requesters, on the other hand, appear as quite passive and inflexible in this framework. While the Bouchard-Taylor report offers a description of the process that managers go through in evaluating requests (2008, p. 171), there is no such discussion when it comes to requesters. In other words, this leaves very little space to consider: "the process that brought them [the requesters] to make a request and to their willingness or unwillingness to compromise (or to propose a compromise)" (Barras 2016, p. 63), as well as to capture the variability and subjectivity of religious practices. These same dynamics are visible in the consultation processes on RA conducted by the Bouchard-Taylor Commission in different cities across the province of Quebec (see Mahrouse 2010; Côté 2008). For instance, Mahrouse argues the majority of participants to these forums were French Canadians who identified themselves as such, and who dictated the terms of the conversation:

> By and large, testimonies in the citizens' forums followed a pattern: French-Canadian Quebecers lamented the loss of the mythical days when Quebec identity was untainted by the threat of "cultural differences"; in response, members of immigrant and minority communities were expected to soothe such fears (2010, p. 89).

Even if one of the aims of these consultations was to question 'racial hierarchies' (Mahrouse 2010, p. 88), it ended-up (re) producing them. In other words, while the SCC has had limited success in giving some place to the voices and thought process of claimants, including by trying to rely on a subjective understanding of religion (remember the place given to Gurbaj's understanding of his religion), examples of this thought process and subjective approach to religion remain limited in the

Bouchard-Taylor report, and are quasi-absent in public debates. To put it simply, because the focus of public debates has been on how institutions should deal with, evaluate, and limit requests for accommodations, requesters are almost obliged to adopt a defensive position where they have to justify their religious needs and how these are compatible with Canadian values (on this see Barras 2016 and Mahrouse 2010). In this process, their religious identity tends to be framed as an all-encompassing one that defines them, and that they have to be willing to refer to in order to have a voice in those debates. This raises a number of concerns, including the fact that it gives prevalence to the voices and perspectives of individuals who feel comfortable working with this framework (Barras et al. 2016, p. 107–108). It also leaves little space to consider the fact that it is often difficult to detangle religious needs from other life circumstances, and that the ways individuals will carve a space for these needs will depend greatly on the individual herself and her context (Selby et al. 2018). Finally, the fact that the language of RA is frequently associated in public discourse with problems, tensions, conflicts, and refusals, limits our ability to consider and hear 'positive' stories related to religious diversity in Canada (on this see Beaman 2014). While the Bouchard-Taylor report tries to provide some glimpses of these stories, this is nonetheless difficult given that it is it written as a response to public debates largely framed along these negative terms. This negative undertone is well conveyed by Samaa Elibyari of the Canadian Council for Muslim Women interviewed by Sharify-Funk, and who was asked in the aftermath of the Bouchard-Taylor Commission to react to the notion of RA: "I don't like the word accommodation because it seems like we're [Muslims] a pain in the neck—they have to accommodate us, they have to live with us. I'm rather pessimistic" (2010, p. 546).

5.2 Thinking of Alternatives to Reasonable Accommodation: Future Possibilities

The legal notion of RA was developed to provide a mechanism to adjust a rule that seemed on its face to be neutral, but that actually had discriminatory adverse effects for particular individuals. It is, in other words, inspired by a substantive understanding of equality. Yet, as discussed, it comes with its own share of conundrums. The most significant one, perhaps, is that it is structured around a minority versus majority dichotomy, which (re) produces power asymmetries. With regards to requests for RA around religion, this structure also requires an evaluation of the religious requests, and in so doing, of the sincerity of the believer. As seen in our discussion of SCC decisions this is not an easy task. It often, even if only inadvertently, requires judges to delimit the "essence" of religion. In so doing, it fails to do justice to the variability of religious practices. These power asymmetries and essentializing dynamics are magnified when the notion of RA is used in public discourse and policy debates. Rather than being approached as "a legal instrument to redress a

discriminatory situation between citizens", RA becomes associated in public imaginary with a "privilege granted" to religious minorities —as we saw in the previous section with Sharify-Funk citing a representative of a Muslim association based in Montreal (2010, p. 546).

Given this situation, it is worth asking ourselves if we can do better than RA, and if there are alternatives to the RA framework where minorities are not left in a "'less than' position" (Beaman 2012b, p. 212). As a starting point for thinking about what these alternatives could look like, some scholars have suggested that we shift languages and approaches. For instance, Beaman (2014) and Selby et al. (2018) have taken as their point of departure for their reflection one of the observations made in the Bouchard-Taylor report. The report highlights that citizens generally work out their differences without great fuss, or without resorting to filing formal requests for RA (Bouchard and Taylor 2008, p. 19). Consequently, rather than focusing on cases of RA that make the headlines or/and that are settled in courts, Selby, Barras, and Beaman suggest that there is value to exploring how citizens in their everyday life actually negotiate religious differences. While analyzing court decisions is important to think about notions of equality and discrimination, this exploration remains nonetheless partial, limited by the adversarial processes that structure the act of filing a claim in court. Focusing on these everyday interactions can provide new insights on the intricacies of religious diversity in Canada.

In order to map these on-the-ground dynamics, Beaman explains that a: "shift of focus (not a dismissal or ignoring of them) from negative experiences to those positive ways in which people work through difference" (2012b, p. 221) is needed. Selby, Barras, and Beaman (2018) also suggest using a negotiation/navigation framework, which they see as better suited to capture these dynamics than the notion of RA. This framework conveys the idea that working out differences is a dialogical process. This, of course, does not mean that this process is not marked by power-asymmetries — it most certainly is. But it does convey a sense of flexibility and dialogue with oneself and/or others that is often eluded by the RA framework. This negotiation/navigation framework also leaves space to consider that working out difference does not always or necessarily happen with others, but that it can be something that an individual does with oneself. The term "navigation" is used in this framework purposely to capture the internal arithmetic religious practitioners are often required to do in their everyday lives to juggle their religious priorities with other important parameters (e.g. job security, health, parenting, friendship, education). Navigation often acts as a first step in an external negotiation with others. The concept of negotiation is thus used to think about the process of working out differences with others.

In short, for these scholars, shifting our focus to the everyday and moving away from using the RA framework can help capture different and overlooked facets of how religion gets woven into Canadian fabric. It can also help us theorize more inclusive understandings of equality and respect — on this see Beaman's work on deep equality (2014) and Selby et al. discussion of respect (2018). This does not mean that the concept of RA becomes irrelevant, but it does highlight the importance of not approaching it as an end goal. In other words, it does signal that we can

hope for more and do better than RA; that a shift in focus has the potential to initiate a move away from the language of problems, conflicts, and assessment of (un) reasonability currently dominating public conversations, to one where recognition, respect, and equality are given a more prominent place.

To get a better sense of the dynamics that shape mundane accounts, let us finish this section by turning to the experience of Sonia, who participated in the research conducted by Selby, Barras, and Beaman on how self-identified Muslims in Canada negotiate their religion in daily life. Sonia, a 40 year-old researcher living in Montreal who self-identifies as Muslim, describes how she crafted a place for her religious needs at parties organized by her Quebecois friends and colleagues:

> S: And then I, I remember they invited me, I don't remember the first time but I remember the first couple of times they invited me to their place for a late night party. And I said sure I would. So I went there with my samosas [laughs]. They love it so I brought that and they made some *poutine* [Quebecois traditional dish] and there was a *pâté chinois* [sheppard's pie]. All the Quebecois things. And then they asked me, because they knew about Muslims but they didn't know anybody personally […] So they asked me like 'what do you eat'. And I said 'What do you have, tell me the ingredients'.
>
> I: They asked you before or at the party?
>
> S: At the party […]. They asked me because they're aware. It's not like 'go eat'. They were aware that I'm from India, that I'm Muslim. And then drinks they knew. I brought my own diet coke but it was a great party. Great party. I mean I don't mind smoking a couple of puffs of a cigarette but so I was a part of the party but at the same time I kept my religion.

Sonia goes on to explain that one of her friends had baked a cake for the party, and had asked what ingredients she should avoid when baking it:

> S: So I'm like gelatin is something that I don't eat. So: 'what else should not be on the package'? I'm like nothing, just gelatin or if there's animal product. That's easier because they're all scientists [her friends]. Even if there is something that's not obvious that it comes from an animal but they know that. This time when she cooked it and I was there and I started you know just to pick it up and she was like 'no no let me check the package'. She checked the package and she's like 'you can't eat it, it has gelatin in it'. I'm like 'thank you'. That's so sweet. Like get yourself something else, you know, fruits or something. So that's respect you know. I'm really touched by it.

Analyzing Sonia's experience through a navigation/negotiation framework directs our gaze to important subtleties. First, it allows us to pay particular attention to her mental arithmetic. It becomes clear that she has already thought through what she would be comfortable with and what she would not at this event. She does not want to miss the party and chooses to bring her own non-alcoholic beverage to mitigate the presence of alcohol. She chooses to address the presence of alcohol by crafting her own arrangement with herself. It seems that for her, not drinking alcohol, eating *halal* food, but also partaking in parties and socializing with colleagues and friends are important, and perhaps, one could say, almost non-negotiable elements at this moment in her life. She finds a way to assemble these different elements. She gives herself more leeway with other aspects, such as smoking cigarettes. Her account offers us a snapshot of the navigation that she does before negotiating other aspects with her hosts. In fact, it is equally interesting to note that she does not initiate the

negotiation. Actually, one could imagine that she might just have navigated her way through the party without sharing details about her religion or negotiating with others a space for her dietary requirements, simply, for example, by avoiding food items that she cannot eat, or eating the dishes that she had brought. Yet, she ends up sharing her dietary restrictions with her hosts when they ask her what she can and cannot eat. By asking this question, her friends acknowledge power-asymmetries while at the same time not judging her or/and trying to change her (on this see Beaman 2014, p. 98). This, according to James Tully, is an essential step in the process of recognition (see Tully 2000, p. 476, 1995, p. 128).

If we zoom in on the exchange between Sonia and her friends we also see how it is marked by a generosity on both sides, which requires not being afraid to put oneself in an awkward or/and vulnerable position. Indeed, they ask her questions that enable this exchange: “what do you eat?”, “what ingredients should I avoid?” These queries are essential for these friends to share a moment together, but they also carry the risk of making incorrect assumptions or/and putting Sonia in an uncomfortable position, where she has to share details of her religious practice when she does not want to. Yet, for Sonia, like for several other participants that Selby, Barras, and Beaman interviewed, these moments are typically lived as a sign of respect, a gesture of care that validates their identity. Sonia, by choosing to partake in an event where there is alcohol and mitigating this by bringing her own beverage, is also putting herself in a vulnerable position. Bringing her ‘diet coke’ (and her samosas) might be her way to avoid putting her hosts in an uncomfortable position, protecting herself as well as her friends from harm, but it could equally be interpreted by her hosts as overstepping hospitality codes. And yet, it seems that her gestures, not unlike her friends’ questions, are understood as being conducive to allowing them to fully experience the party together. Unlike the RA framework, a navigation/negotiation lens helps us consider the possibility that crafting a place for religious difference is not necessarily an end in and of itself, but that it is part and parcel of a process where the goal is sharing a moment together, living *well* together. In other words, this lens is process oriented rather than outcome based, and allows us to capture the dialogical and flexible dimension of exchanges rather than focusing on how a majority can accommodate a minority. To put it simply, while these everyday moments and exchanges have generally been the focus of little attention in scholarly and public discussions around religious governance in Canada, they are nonetheless extremely rich. They can help us think beyond and outside the boundaries of the notion of RA, to develop new and more comprehensive understandings of equality, respect, and generosity.

6 Concluding Thoughts

This chapter started with a discussion of the legal notion of RA. This notion has been developed to account for the fact that rules that may appear neutral can actually have adverse discriminatory effects for particular individuals in particular

contexts. In other words, one of the sensible impetuses behind the RA framework is to move beyond formal equality and enable a substantive reading of equality. As discussed, a contextual analysis has therefore been essential for courts to evaluate whether a request warrants an accommodation. While the RA framework can be used to ask for redress for any types of discrimination prohibited under the Charter, when it comes to evaluating religious requests, courts are required to evaluate the sincerity of belief of requesters. They are required to do so, while at the same time refraining from assessing whether a specific practice is actually essential to a particular religion. This is an arduous task, and for some observers almost an impossible one. Indeed, in reviewing decisions where courts evaluate the sincerity of belief of claimants, scholars note that the sincerity of believers of "known" faiths, especially those who follow "known" tenets of these faiths, like Multani and O'Malley, tend to be subject to less scrutiny than the sincerity of believers whose practices are not well-known. This reliance on the essence of religion is problematic since it does limit the ability of the RA framework to account for the variability and flexibility of religious practices woven through everyday life.

As discussed, the Multani decision (2006) seems to mark a turning point in the history of RA. Not only is it the first time that this legal notion has been used outside of employment law, but it is also identified as the moment when the notion of RA broke away from law and entered public discourse. It is noteworthy that while the SCC, after the Multani decision, has moved away from formally using this legal standard in other religious freedom rulings outside of employment law, such as R v. N.S. (2012) or Mouvement laïque québécois v. Saguenay (2015), the notion of RA continues to be used in the background of those decisions, such as in the summaries of the arguments made by applicants and respondents (Selby, Barras, Beaman, 2018). Likewise, RA has become prevalent in Canadian media coverage, policy discussions and reports, and more generally, in popular discourse on how to manage religious diversity. As noted through our brief discussion of this phenomenon in the province of Quebec, tensions that are already present when RA is used as a legal standard seem to become magnified when it is used outside the legal realm. The fact that the RA framework is structured around two parties in which one party finds itself in a position of authority responsible for evaluating and assessing the reasonableness of a request, and in which the other party is left in a vulnerable position waiting on the outcome of this assessment is particularly problematic. It reproduces structural power-asymmetries easily conflated with a majority/minority dichotomy. At the same time, it facilitates a situation where the party responsible for assessing the request becomes a theological arbitrator: encouraged to determine whether the request falls within the "common" practices of a particular religion, and therefore for fleshing out the contour of what is "common" and what is not. Again, this process eludes, even inadvertently, the subjective, flexible, and textured dimension of lived religion.

In response to some of those conundrums, and, in particular, to try to do justice to how religion is lived and negotiated in quotidian life, the last part of this chapter proposes to shift our gaze away from the RA framework. As an example of that shift, it suggests adopting a navigation/negotiation framework that seems better

equipped to capture the organic and textured ways individuals manage their religious differences in their everyday lives. Thinking beyond the RA framework is important, especially since it carries the possibility of providing a more accurate picture of religious diversity in Canada, or at least an alternative and complementary picture that has, until now, been obscured by the dynamics structuring the RA framework. It is equally relevant on a theoretical level, as thinking through mundane experiences like Sonia's, in which individuals describe how they work out their differences with friends, neighbors, colleagues, and even strangers, can help to flesh out more comprehensive understandings of equality and respect (on this see Beaman 2014, and Selby et al. 2018). While this does not mean that we should disregard the notion of RA altogether, this shift of focus seems to be an important and necessary first step towards changing and widening the dominant terms of the conversation around religious diversity in Canada.

7 Reasonable Accommodations: Questions for Critical Thought

1. To which extent has the notion of RA been used to delimit the boundaries of 'Canadianness' and 'Canadian values'? What does this tells us about 'Canadian values', and the power-relations lodged in how these values are delimited? Can you think of other discursive frameworks that are also used to delimit these values?
2. Can you think of cases, besides the ones mentioned in this chapter, where the notion of RA has been used? In your university, neighborhood, city? Have they succeeded in enabling a substantive understanding of equality? If so, in which ways? If not, why? Was the notion of RA used formally or informally in those cases? Does this, in your opinion, make a difference in the ability to account for lived religion in the resolution of those cases? If so, how?

8 Online Teaching and Learning Resources

Religion and Diversity Project: Linking classrooms videos: http://religionanddiversity.ca/projects-and-tools/projects/linking-classrooms/linking-classrooms-videos/(in particular, Meredith McGuire's video on lived religion).

This resource will allow students to learn about recent trends in the study of religion in and beyond Canada by listening directly to scholars of religion, religious leaders, and religious practioners.

Canadian Court Cases Involving Religion Database: http://religionanddiversity.ca/media/uploads/canadian_court_cases_involving_religion_november_2016_web.pdf

This list of Canadian court cases on religion is useful especially for students interested in further exploring legal decisions on religion.

Forces of Law Bibliography: http://religionanddiversity.ca/media/uploads/projects_and_results/biblio_and_case_law/force_of_laws_bibliography.pdf

This is a relevant resource as it is a non-exhaustive list of scholarly literature on religion and law. This will be helpful for students who want to further research the connection between religion and law.

Ontario Human Rights Commission Research: Negotiating Differences http://religionanddiversity.ca/media/uploads/memo--methodology_themes_and_trends.pdf

This study is interesting, as it provides information on why parties decide to bring cases to the Ontario Human Rights Tribunal to resolve religious differences.

Commission Des Droits de la Personne et Des Droits de la Jeunesse (CDPDJ) (Quebec): Reasonable Accommodation: http://www.cdpdj.qc.ca/en/droits-de-la-personne/responsabilites-employeurs/Pages/accommodement.aspx

This resource developed by the CDPDJ will help students get a better sense of the material available to employers to assess the reasonability of a request for accommodation.

Reasonable Accommodation Requests (statistics): http://www.cdpdj.qc.ca/en/droits-de-la-personne/droits-pour-tous/Pages/accommodement_demandes.aspx

This resource provides statistics related to RA requests processed by the CDPDJ from 2009 to 2013.

Ontario Human Rights Commission (OHRC) (Ontario): OHRC and the Human Resources Professionals Association (HRPA) webinar on preventing discrimination based on creed:

http://www.ohrc.on.ca/en/ohrc-and-hrpa-webinar-preventing-discrimination-based-creed

This resource developed by the OHRC will provide students with information on the ways employers can prevent, recognize and address discrimination based on creeds.

Policy on Preventing Discrimination Based on Creed: http://www.ohrc.on.ca/en/policy-preventing-discrimination-based-creed

This is a policy developed by the OHRC to prevent discrimination based on creed. One interesting element about this resource is that it provides a definition of creed.

On religious accommodation and discrimination in the experience of Jewish communities in Ontario: http://www.ohrc.on.ca/ko/node/8750

Students will find this study relevant as it looks at the current experience of Jewish communities in Ontario with RA, including new tensions around accommodation practices that were granted in the past.

Documentaries: Nitoslawski, S. 2010. *Liberté, égalité, accommmodements.* Cinéfête. http://www.cinefete.ca/fr/site/products/74686#.WAo6qNBRfww

This documentary provides students with a background on the events that led to the Bouchard Taylor Commission and on the proceedings of the Commission.

9 Further Reading

Brown, W. (2008). *Regulating aversion: Tolerance in the age of identity and empire*. Princeton: Princeton University Press.

In this book, Brown takes a critical look at the notion of tolerance. Given that several of her criticisms are also valid for RA, this resource should help students better understand the scope of those criticisms.

Dabby, D. (2017, February 1). Opinion: Quebec should stop trying to legislate on religion. *Montreal Gazette*. Retrieved from http://montrealgazette.com/opinion/columnists/opinion-quebec-should-stop-trying-to-legislate-on-religion

This opinion piece discusses the most recent attempt in Quebec to legislate on religious accommodation. Given that Bill 62, was voted into law in November 2017, students will find this piece of particular relevance.

Policy Options. (2007). *Reasonable accommodation, 28*(8). Retrieved from http://policyoptions.irpp.org/magazines/reasonable-accommodation/

This resource will provide students with a range of different views on RA by academics and practitioners in and outside Quebec.

Jézéquel, M. (Ed.) (2007). *Les accommodements raisonnables: quoi, comment, jusqu'où? Des outils pour tous*. Cowansville: Editions Yvon Blais.

This edited collection provides a valuable analysis of RA in the employment, education and health sectors.

10 Researcher Background

Amélie Barras' interest in how states regulate and delimit religion and the right to religious freedom started during her doctoral research which she completed at the London School of Economics in the Department of Government. In *Refashioning Secularisms in France and Turkey* (Barras 2014), she looks at how the French and Turkish states are using the concept of secularism to regulate the bodies of Muslim women wearing headscarves, and the impact this had on the right to religious freedom. She became drawn to a similar set of questions when she came to Canada in 2012 to do a post-doctoral fellowship with the Religion and Diversity Project headed by Professor Lori Beaman. One of her areas of research since then has been to explore the power of the concept of reasonable accommodation both in law and in public discourse to demarcate the boundaries of what is religiously acceptable and what is not in the Canadian public imaginary. She has equally been interested in thinking about the extent to which this concept is used by and is useful for religiously practicing individuals in their everyday life. Barras is currently Assistant Professor in the Department of Social Science at York University.

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