

Human Rights and Family Responsibilities: Family Status Discrimination under Human Rights Law in British Columbia and Canada

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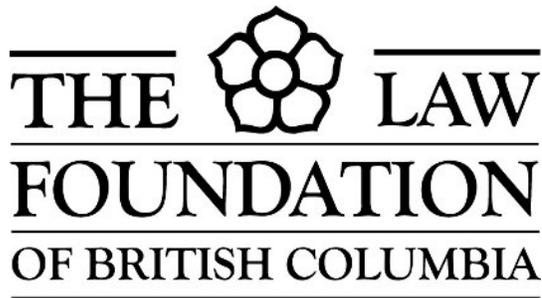
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Family Status Project Advisory Committee

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Executive Summary

Introduction

The British Columbia *Human Rights Code*, like all human rights statutes, prohibits discrimination in a variety of contexts, including employment, service or facility customarily available to the public, and tenancy,¹ where differential treatment is linked to a prohibited ground. The original list of grounds included race, creed, colour, nationality, ancestry and place of origin. The list has gradually been expanded over the years to include religion, marital status, family status, physical or mental disability, sex, sexual orientation and age.² Human rights statutes have existed in Canada for about fifty years, and early anti-discrimination laws can be traced back to the 1940s; however, the appearance of family status as a prohibited ground is relatively new. This ground first appeared in a Canadian human rights statute in 1981, and was added to the B.C. *Code* in 1992.

To date there has been little consideration of the ground of family status. This Study Paper aims to:

- Conduct a thorough review of legislation and jurisprudence in relation to the family status ground in Canada;
- Describe the issues and problems with treatment of the family status ground in B.C.;
- Develop scholarly research and analysis of issues relating to the family status ground;
- Foster discussion regarding the purpose and function of the family status ground in contemporary law and society; and
- Identify further questions for consideration to give effect to the notion of inclusive communities and respect for diversity of family configurations in B.C.

Section I is a general introduction. Section II situates the addition of family status within the development of human rights law in B.C. and Canada. The main part of the paper, section III, is a series of chapters that analyze the family status cases, covering decisions of courts, human rights tribunals and labour arbitrators. Section IV is comparative. It reviews international covenants and conventions relating to equality rights protection and family responsibilities, and describes approaches taken in human rights and employment law in other jurisdictions to address equality in the workplace vis-à-vis family relationships and responsibilities. This comparative review is intended both to explore what family status could mean, and identify alternative legal approaches for addressing discrimination based on family status. Section V summarizes the findings from our research, and concludes with questions that policy-makers will likely need to address. The Appendices contain tables that summarize all the family status cases reviewed as part of this study, many of which are discussed in more detail in Section III.

¹ The BC *Human Rights Code* provides protection against discrimination in accommodation, service or facility customarily available to the public, tenancy, employment, employment advertising, purchase of property, and membership in a trade union, employer's association or occupational association.

² Not every ground applies in every context. For example, family status is not a prohibited ground of discrimination in the context of purchase of property. Lawful source of income is listed as a ground exclusively in the section of the *Code* dealing with discrimination in tenancy premises, and criminal or summary conviction offence unrelated to the employment is listed as a ground exclusively in the sections dealing with employment discrimination and discrimination by unions and associations.

The Meaning of Family Status and Family Status Discrimination

The meaning of family status is not obvious, and that the ground does not mean the same thing across Canada. In part, differences in approaches to family status reflect different statutory definitions of the term. In Canada, three approaches to defining family status exist. They can be placed on a spectrum according to breadth. At one end of the spectrum is the strict “parent-child relationship” definition. In the middle lies the definition of family status as the state of being “related by blood, marriage, or adoption”. The B.C. approach of including family status in the human rights law without a definition is at the opposing end.

These definitions of family status characterize what kinds of family relationships are included in the concept of “family status.” In B.C., decision-makers have treated the absence of a statutory definition as a rationale for interpreting family status broadly to capture many different family relationships. However, the differences found in the application of the family status ground across the country do not arise only from differences in the statutory definitions. The thorny question appears to be, what circumstances or behaviours are captured by the concept of family status discrimination?

The scope of family status discrimination has been carved out over the past two decades by human rights decision-makers. The review of reported decisions undertaken as part of this research project indicates that family status discrimination may involve disadvantage stemming from:

- i. *Inequality of benefits*: These decisions consider whether it is discriminatory to offer different or inferior benefits to biological versus adoptive parents, or birth fathers versus mothers, often in relation to parental or bereavement leave.
- ii. *Absence from the workplace due to maternity, parental or other leave*: These decisions consider whether discrimination occurs when a worker experiences a reduction in or curtailment of benefits, such as pay increases and retirement benefits, as a result of taking a leave to meet family obligations, usually in relation to caring for children.
- iii. *Facially neutral employment standards that may discriminate against parents with particular family responsibilities*: These cases consider whether discrimination results when particular family responsibilities (usually child care issues) make it difficult or impossible for an employee to meet standard terms and conditions of employment, where the employer is unwilling or unable to accommodate the employee. The cases deal with, for example, requests to convert to part-time employment, requirements to work evening or overnight shifts, changes to hours of work initiated by the employer, and requests for temporary changes to shift times and responsibilities during pregnancy.
- iv. *Discriminatory termination linked to family status*: These decisions often concern disputes as to whether termination was due to family obligations, or alternatively, performance or another legitimate business rationale.
- v. *Tenancy discrimination linked to young children*: Many of these cases concern a denial of rental accommodation due to family status, often because a prospective tenant has children or is a single parent.

- vi. *Discriminatory policy in relation to administration of public benefits:* These cases raise issues about whether publicly funded programs discriminate against people in certain family arrangements. Many cases address entitlement to income assistance by people in diverse family circumstances, such as under-age parents, adult children living with their parents, or parents with shared custody. A few cases consider entitlement of grandparents to foster parent support payments.
- vii. *Nepotism and anti-nepotism cases:* These cases consider facts involving preferential treatment of family members, or a denial of an opportunity due to policies prohibiting family members from working together.

While these categories reflect a diverse range of experiences, we found that the majority of family status cases deal with families struggling to maintain caregiving responsibilities. Over half of the cases arise out of employment as compared with, for example, tenancy or access to public services. Reported decisions provide examples of working parents who face difficulty in securing appropriate and affordable childcare compatible with long hours, overnight shifts and unpredictable schedules. Labour arbitrations illustrate barriers to accommodating the wish of new mothers to work part-time after maternity leave, and reveal the negative impact multiple parental leaves can have on long-term entitlement to employment benefits. Non-employment cases reveal the financial strain imposed on different kinds of caregivers: parents who provide long-term assistance to adult family members with disabilities; grandparents who assume primary care of their grandchildren when the biological parents are unable to take on that role; and low income families struggling to support three generations in one home when a youth becomes a parent herself. Collectively the cases illustrate challenges that various family responsibilities impose on contemporary families.

One of the unknowns at the outset of this project was the extent to which the family status discrimination cases reflect diversity in family circumstances. This Study Paper concludes that the cases lack diversity. Childcare related concerns dominate and most of the cases pertain to parent-child relationships. Few cases address challenges relating to care of aging parents or other adult family members. Few cases highlight families impacted by poverty or other grounds of discrimination, other than sex or disability.

The Jurisprudence: Campbell River and Beyond

In recent years, the meaning and scope of family status discrimination has become a source of uncertainty and controversy, particularly with respect to discrimination in terms and conditions of employment. Increasingly, labour arbitrators and human rights tribunals are faced with cases involving allegations of family status discrimination arising out of circumstances where ostensibly neutral employment rules impose a disadvantage on employees with particular family responsibilities, usually in relation to child care.

Two divergent approaches to family status discrimination in the employment context have developed, with the more restrictive approach to family status discrimination originating in B.C. In *Health Sciences Association of B.C. v. Campbell River and North Island Transition Society*, the B.C. Court of Appeal fashioned the test of “serious interference with a substantial parental or family obligation” for assessing allegations of employment discrimination on the basis of family status. In contrast, the

Federal Court Trial Division rejected the serious interference test as inconsistent with the most authoritative jurisprudence on the general test for establishing discrimination. The Federal Court criticized *Campbell River* for inappropriately creating a separate and more restrictive test for one ground of discrimination. This divergence in the application of the family status ground is one of the reasons this study was undertaken.

The decisions that rely on *Campbell River* tend to require that a worker's family responsibilities must be extraordinary or unusual to ground a claim of family status discrimination. In many instances claims of family status discrimination have been rejected because the employee's child was not disabled, even though the ground of discrimination alleged was family status, not disability. Patterns of interpretation require a complainant to establish that the disadvantage he or she experiences is unique and not a function of personal life choices, usually by providing medical evidence of a disability or special needs in relation to the family member requiring care. The idea that an experience of disadvantage cannot amount to discrimination only because the experience is too common or typical is problematic. Nowhere does human rights law admit that practices are more acceptable only because they are widespread.

The language of extraordinariness appears to be grounded in a concern to limit the scope of family status and protect against a flood of cases. If family status is characterized broadly to include all instances where work and family responsibilities conflict, then the number of potential cases would be limitless. Addressing the challenge of supporting workers with family responsibilities to maintain employment through human rights litigation places a heavy burden on the private sector to address discrimination that has its roots outside the workplace. Disadvantage that results from conflicts between work and family obligations is often not special or unique to one worker.

The line of cases following *Campbell River* appear to be raising the question, however indirectly, of whether family responsibilities' challenges merit human rights protection. There is a sense in them that family responsibilities are too ordinary to have human rights significance.

Challenges of using the Human Rights Framework to Address Family Responsibilities Discrimination

The commonness of barriers to workers with family responsibilities remaining in the workplace does not render the barriers any less daunting. The potential prevalence of employment discrimination on the ground of family status does suggest, however, that human rights legislation may not be the ideal tool for addressing the challenge of creating more inclusive workplaces. The patterns of disadvantage revealed by the jurisprudence on family status discrimination present social issues the system for dealing with human rights complaints does not have the capacity to address on its own. Although this may be true of all grounds, given the often system nature of discrimination, the family status cases underscores this reality in relation to family responsibilities discrimination.

First, the sheer volume of potential complaints, given the ubiquity of family caregiving obligations, speaks of a need for a more accessible and less costly forum for addressing disadvantage in the workplace resulting from family responsibilities. Due to aging demographics and the consequentially shrinking workforce, tensions between workplace and family responsibilities are likely only to increase in subsequent years.

Second, the human rights approach is individualistic, carving out individual remedies for particular complaints and grievances. This individualized approach places the burden on employers, unions and employees to address the question of social and community responsibility for the care of dependents and other family members requiring support, care or assistance. Such an approach can put strain on employers, including small employers who lack comparable resources to innovate and follow through on issues of inclusive workplace design. This rights-based approach also requires an individual to assert a violation in order to get a remedy: problems of access to justice thus present barriers to achieving inclusive workplaces. Reliance on human rights also results in a dynamic whereby social standards are effectively being created in a piecemeal fashion, without parliamentary input.

In the absence of alternatives for addressing issues in relation to family responsibilities, it is likely that people will continue to file human rights complaints and labour grievances in order to pursue accommodation of family responsibilities. The state of the law on family status discrimination, including the obligations placed on employers, would likely be surprising to many employers and workers, as well as others not versed in human rights law. However, there is authoritative jurisprudence to support the proposition that some instances where workplace and family responsibilities clash will give rise to a human rights violation.

There is a strong economic rationale for finding ways to support people to remain in the workforce and employers to accommodate workers who have family responsibilities. The desirable goals of employee health, satisfaction and retention point to a need for a less adversarial means than litigation for addressing the accommodation of family responsibilities in the workplace.

This paper does not advocate for a retraction or expansion of human rights institutions in B.C. Rather, it illustrates the reality that human rights institutions are being asked to address problems of inclusion in workplaces and communities and respond to the strain currently imposed on families to manage care. Human rights institutions do not have the capacity to address these challenges on their own, and in some instances, where problems are much larger than a single workplace and a single worker, human rights litigation may not be the ideal tool. Human rights litigation remains an important forum for raising issues of equality and inclusion. However, if there is a will to explore a more comprehensive response to the issues raised in the jurisprudence, law reform and policy development outside of the realm of human rights law is required.

This paper concludes with questions inviting a broader public discussion of changes outside the realm of human rights law to address family status discrimination and the promotion of inclusive workplaces in B.C. The questions outlined in the conclusion explore: (1) the development a family status discrimination policy for B.C.; (2) the reform of the B.C. *Human Rights Code* to clarify whether family responsibilities are protected; (3) the creation of workplace flexibility legislation for B.C.; (4) the social policy issues to address in relation to supporting the family responsibilities of British Columbians; and (5) the legal test for establishing family status discrimination.

I. Introduction: The Scope and Purpose of the B.C. Family Status Legal Research Project

A. What is Family Status Discrimination?

This project is concerned with the meaning and scope of the concept of family status discrimination in British Columbia and the rest of Canada. Today, family status discrimination appears to be the source of some confusion and inconsistent treatment by courts and tribunals. Recent jurisprudence on family status discrimination in the employment context has resulted in two divergent approaches to the concept, with the most restrictive approach coming out of B.C. This Study Paper is a creature of this controversy over the meaning of family status discrimination that has plagued jurisprudence since the decision of the B.C. Court of Appeal in *Health Sciences Association of B.C. v. Campbell River and North Island Transition Society*.³ This paper steps outside the focus on resolution of a particular case that constrains consideration of family status in the decision-making context in order to interrogate and explore the scope and meaning of family status in contemporary B.C. The paper reviews the family status jurisprudence since *Campbell River*, identifying themes emerging from reported decisions.

The concept of family is neither static nor homogenous. Few families are nuclear. Families are reshaped and reborn through separation, divorce and remarriage, redefined by illness and disability, and expanded through immigration and procreation. In some circumstances family is chosen, through bonds of friendship and community. Families can be a source of support and assistance, but they can also be a site of abuse and oppression. Although families do not always include young children, both the limited parliamentary discussion surrounding the addition of family status to the B.C. Code, as well as the family status jurisprudence, suggest that children and parenting lie at the heart of this prohibited ground of discrimination.

Children enter people's lives via diverse routes—following pregnancy, adoption, foster parenting, dating and remarriage. Some people remain single or childless; others raise children, and may do so as single parents, in a couple relationship, or through an extended family that is intensely involved in parenting, including circumstances where grandparents live with their grandchildren and are intimately involved in their day to day care. In some instances grandparents even take the place of the biological parent as primary caregiver.

Consider, for example, the following two stories gleaned from the case review on family status discrimination. In *D.W.R. v. D.J.R.*, which involved a gay couple and a lesbian couple who entered an informal reciprocal arrangement whereby both couples would have a child, becoming parents was a result of significant planning.⁴ The two children that were born out of this arrangement had the same biological parents, but were raised respectively by the different same sex couples, who remained friends and involved in each other's lives for a period of time. When the male couple separated, the biological mother asserted custodial rights, and one of the fathers argued that the *Alberta Family Law Act* discriminated against him as a man in a homosexual relationship who had

³ *Health Sciences Association of BC v. Campbell River and North Island Transition Society*, 2004 BCCA 260 [*Campbell River*].

⁴ *D.W.R. v. D.J.R.*, 2011 ABQB 608.

used assisted conception. In contrast, as the circumstances of the complainant in *Hendershott*⁵ demonstrate, children can enter our lives quite unexpectedly, when we are rather unprepared to deal with all the responsibilities associated with parenting. Meghan Hendershott was 15 years old and living at home with her parents when she gave birth to her twins—a circumstance involving a girl raising children when she is still only a child herself.

These two stories provide examples of different journeys toward parenting, and different types of families. One of the questions motivating this study was a curiosity about the extent to which diverse families and different family challenges are represented in the reported decisions on family status discrimination. Is the concept of family status being interpreted in a manner sufficiently broad enough to include many kinds of families, or do patterns of interpretation privilege certain types of families? For example, is the concept of family being interpreted in a manner that recognizes and respects cultural differences? Are individuals in family relationships characterized by vulnerability or disadvantage bringing forward complaints of discrimination? Do the cases reveal complainants whose identity implicates other sites of oppression or disadvantage, such as disability, race, immigration status or sexual orientation, and what kinds of patterns are emerging in terms of the relationship between family status and other enumerated grounds? Are the cases limited to barriers associated with childcare, or do the cases address other family obligations, such as assistance for aging parents, support for adult children with developmental disabilities, and care for family members who are ill or dying?

In this research project we are culling the cases for signs of diversity, telling a story of how representative the jurisprudence is of diversity in family configurations, all the while recognizing that many features of families will not be revealed by reported case decisions. These portraits, being pulled from a tribunal or court decision, are partial, relaying only the facts the decision-maker deemed relevant to the written decision on the legal question at issue. In *Hendershott* vulnerability and oppression is evident in the girl's financial circumstances, her youth, her single parent status; *D.W.R v. D.J.R* concerns the circumstances of two same sex couples. Both cases are silent on other aspects of identity.

Another concern motivating this project is a sense that the *Campbell River* framework may not be in step with the reality of contemporary families or recognize either the significant participation of women in the workplace or the complex challenges that must be negotiated by women who are caring for children while maintaining employment. Many social changes have occurred over the years in relation to the family and the workplace, and the experience of the working mother implodes any notion of a separation between work and home—family responsibilities are not suspended when women punch the clock. This Study Paper strives to consider whether patterns of interpretation reflect contemporary notions of family and are responsive to systemic disadvantages linked to family status. The challenge is to recognize the gendered division of labour without making decisions that reinforce gendered stereotypes.

In the face of recent confusing jurisprudence and the changing landscape of the family in B.C., the B.C. Law Institute embarked on the B.C. Family Status Legal Research Project. Generously funded by the Law Foundation of B.C., the goal of this project is to research and analyze the family status ground, and prepare a Study Paper. This Study Paper aims to:

⁵ *Hendershott v. Ontario (Ministry of Community and Social Services)*, [2011] OHRTD No 478.

- Conduct a thorough review of legislation and jurisprudence in relation to the family status ground in Canada;
- Describe the issues and problems with the family status ground in B.C.;
- Develop scholarly research and analysis of issues relating to the family status ground;
- Foster discussion regarding the purpose and function of the family status ground in contemporary law and society; and
- Identify further legal research, law reform or legal education to be undertaken in this area in order to give effect to the notion of inclusive communities and respect for diversity of family configurations.

From the outset this project was understood to be a first step in exploring the meaning of family status in B.C., anticipating that at the conclusion of this one-year project further discussion or consultation would be required to identify the ideal approach for moving forward. In Section V of this Study Paper we map out where to go from here, identifying questions for further consideration.

B. The Statutory Framework

Although human rights statutes have existed in Canada for decades, the concept of a family status ground is relatively new. The ground was first included in a Canadian human rights law in 1981, when family status was added to the Ontario *Human Rights Code*.⁶ Family status did not appear in the B.C. human rights statute until much later, in 1992.⁷ At the time of writing, family status has been a part of B.C. human rights law for twenty years, and family status is now a protected ground of discrimination in most Canadian jurisdictions.⁸

In some Canadian jurisdictions the term family status is defined in the human rights statute. There exist two streams of statutory definitions: “the status of being related to another person by blood, marriage or adoption”⁹ and “the status of being in a parent-child relationship.”¹⁰ However, family status is not defined in the B.C. *Human Rights Code*.¹¹ Adding to this uncertainty, minimal parliamentary discussion of the meaning of family status surrounded the addition of the ground in any Canadian jurisdiction—the only trend being a concern expressed in the B.C. legislature regarding the importance of protecting families with children and single parents from discrimination.¹² Such

⁶ *An Act to revise and extend Protection of Human Rights in Ontario*, SO 1981, c 53.

⁷ *Human Rights Amendment Act, 1992*, SBC 1992, c 43, ss. 2-7. In BC the absence of family status persisted for over a decade after Ontario introduced family status, in spite of a series of amendments occurring in the intermediary years, including an overhaul of the statute that added the ground of disability: *Human Rights Act*, SBC 1984, c 22.

⁸ The exception is New Brunswick. Québec does not have a family status ground but has adopted the slightly more narrow civil status ground. See Figures 2 and 3 of this Study Paper for a comparative overview of approaches to family status discrimination in Canada.

⁹ *Human Rights Act*, RSA 2000, c A-25.5, s 44(1)(f); *Human Rights Act*, SNU 2003, c 12, s 1.

¹⁰ *Human Rights Code*, RSS 1979, c S-24.1, s 2(1); *Human Rights Code*, RSO 1990, c H.19, s 10(1); *Human Rights Act*, RSNS 1989, c 214, s 3(h); *Human Rights Act*, c H-12, RSPEI 1988, c H-12, s 1(1)(h 11); *Human Rights Code*, RSNL 1990, c H-14, s 2(e 1).

¹¹ *Human Rights Code*, RSBC 1996, c 210 [1996 *Human Rights Code*, RSBC].

¹² Joy MacPhail, MLA for Vancouver-Hastings, stated: “While I support the overall bill, some sections are particularly important to me, the first one being family status. No longer will women and men have to worry about the fact that they have children. They're not going to have to hide their children; they're not going to have to lie about that. While it will affect all of us in society, this is particularly important for women. Eighty-five percent of our single-parent households are headed by women, so we will benefit from this amendment completely.” British Columbia, Legislative Assembly, Official Report of Debates of the Legislative Assembly (Hansard), 35th Parl, 1st Sess, Vol 5, No 10 (9 June

statements provide only a hint of purpose. They suggest a goal of protecting individuals in family arrangements associated with vulnerability and poverty. While statutes are living instruments, and interpretation is not constrained by parliamentary intent, the relative silence of parliament across Canada is interesting. In a number of jurisdictions the addition of family status to the human rights statute occurred virtually without comment, and in quite a few jurisdictions the addition of family status was utterly eclipsed by controversy surrounding the concurrent introduction of the ground of sexual orientation.¹³

As compared with other enumerated grounds, such as sex or race, the meaning of the term family status is less self-evident. The Ontario Human Rights Commission articulates this lack of clarity in its 2006 publication, *The Cost of Caring: Report on the Consultation on the Basis of Family Status*. The paper concludes that:

Family Status is one of the least understood grounds of the Ontario *Human Rights Code* (“the Code”). It is clear from the Commission's consultations that employers, landlords and service providers, as well as potential complainants and advocates, are largely unaware of the protections of the Code with respect to family status, or of issues and barriers related to this ground of discrimination.¹⁴

Indeed, in B.C., family status complaints appear to be less common than human rights complaints based on other grounds: the 2010-2011 annual report of the B.C. Human Rights Tribunal indicates that family status is cited in approximately 6% of complaints, as compared with physical disability, cited in 23%, and sex, cited in 14%.¹⁵

C. The Jurisprudence

The family status ground has been the subject of limited judicial interpretation and academic engagement as compared with other enumerated grounds. In 2012 the meaning and scope of the concept of family status discrimination is not certain, and appears to be a work-in-progress. To date, two Supreme Court of Canada decisions have clarified the meaning and scope of family status discrimination.¹⁶

One unique and undisputed feature of the concept of family status is that the term captures both the fact of being adversely treated for being in a particular type of family relationship (for example, being in a single-parent family, being married or single) as well as an adverse distinction drawn on the basis of the particular identity of a family member (for example, anti-nepotism policies). The

1992) at 2419 (Joy MacPhail). Mike Farnsworth, MLA for Port Coquitlam-Burke Mountain, is recorded as saying that “adding family status recognizes the distinct problems families of today face.” British Columbia, Official Report of Debates of the Legislative Assembly (Hansard), 35th Parl, 1st Sess, Vol 5, No 10 (9 June 1992) at 2427 (Mike Farnsworth).

¹³ This is true of BC, Alberta, Saskatchewan, Manitoba and Prince Edward Island.

¹⁴ “The Cost of Caring: Report on the Consultation on the Basis of Family Status” (2006), online: Ontario Human Rights Commission <<http://www.ohrc.on.ca/en/cost-caring-report-consultation-discrimination-basis-family-status>> at 4 [The Cost of Caring]. This paper resulted of a comprehensive province-wide consultation regarding family status discrimination.

¹⁵ *Annual Report 2010-2011*, online: BC Human Rights Tribunal <http://www.bchrt.bc.ca/annual_reports/index.htm> at 5 [BCHRT Annual Report].

¹⁶ *B v. Ontario (Human Rights Commission)*, [2002] SCC No 66 at 53 [*B. v. Ontario*]; *Canada (Attorney General) v. Mossop*, [1993] SCJ No 20 [*Mossop*].

Court has characterized these categories of family status discrimination, respectively, as absolute status and relative status discrimination.¹⁷ Although the nomenclature of absolute and relative status does not figure prominently in tribunal and grievance arbitration decisions, both types of cases continue to be brought forward.

The Supreme Court of Canada has had limited opportunities to consider the meaning of family status. One of its few statements on the subject characterized discrimination in employment on the ground of family status rather broadly. In *B v. Ontario*—a complaint involving a man who was dismissed by his employer when his wife and daughter accused the complainant's brother (and boss) of having sexually molested the complainant's daughter—the Supreme Court of Canada referred favourably to Justice Abella's description of employment discrimination on the basis of marital and family status in her decision on behalf of the Ontario Court of Appeal. The Justice described family status employment discrimination broadly as “practices or attitudes that have the effect of limiting the conditions of employment of, or the employment opportunities available to, employees on the basis of a characteristic relating to their marriage (or non-marriage) or family.”¹⁸ The Supreme Court of Canada decision was largely focused on whether the concept of family status captured relative status discrimination or required membership in a disadvantaged group. The brief words of McLachlin C.J. and Gonthier J. preceding the decision of the majority noted that while they do not disagree with the result, they “would reserve for another day the more general question of the precise meaning of discrimination on the basis of ‘family status.’”¹⁹ In a sense, this is where *B v. Ontario* leaves us. We are still, ten years later, waiting for that day.

In 1993 the Court had considered the meaning of family status in *Mossop*.²⁰ This case concerned a complainant who argued discrimination based on family status when his employer denied him bereavement leave in respect of the death of his male partner's father. In *Mossop* the majority found that the experience of the complainant was captured by the ground of sexual orientation (then not included in the *Canadian Human Rights Code*) rather than family status, and the resulting written decision in *Mossop* thus does not clarify the concept of family status any further.²¹

One of the leading B.C. authorities on the scope and meaning of family status discrimination is the Court of Appeal decision in *Campbell River*.²² This case concerned a female employee who had four children, one of whom had been diagnosed with a psychiatric disorder. The woman had historically worked a shift that ended at 3:00 pm, allowing her to provide after school care to her son. When the employer unilaterally changed her shift schedule such that she finished at 6:00 pm, the woman filed a grievance alleging discrimination on the basis of family status, arguing that the change in terms and conditions of employment created a conflict that undermined her ability to care for her son.

¹⁷ *B v. Ontario*, *supra* note 16; The Court also considered the meaning of the ground of civil status in the Quebec *Charter of Rights and Freedoms* in *Brossard (Ville) c. Quebec (Commission des droits de la personne)*, [1988] 2 SCR 279 [Brossard]. That decision, which characterizes civil status as broad enough to include family relationships and embraces the absolute/relative status distinction, does not contribute to our understanding of the concept of family status.

¹⁸ *B v. Ontario (Human Rights Commission)*, [2000] OJ No. 4275 (O.C.A.) at 54.

¹⁹ *B v. Ontario*, *supra* note 16 at 1.

²⁰ *Mossop*, *supra* note 16.

²¹ The decision of the Supreme Court of Canada in *Mossop* is discussed in greater detail in Section V of this Study Paper.

²² *Campbell River*, *supra* note 3.

In *Campbell River* the Court fashioned the “serious interference with a substantial parental or family obligation” test for assessing allegations of employment discrimination on the basis of family status, an approach subsequently rejected by the Federal Court as inconsistent with upper level jurisprudence on the test for *prima facie* discrimination. The Federal Court criticized *Campbell River* as establishing a higher bar than is required in relation to either discrimination on other grounds, or discrimination in other contexts, such as services or tenancy.²³ This disagreement between the B.C. Court of Appeal and the Federal Court has resulted in a line of labour arbitration, human rights tribunal and court decisions debating the appropriate standard for proving *prima facie* discrimination on the ground of family status. This Study Paper examines these decisions.

The *Campbell River* decision considers the role of human rights law in protecting families from barriers to participating in the workforce that arise out of the interplay between family responsibilities and workplace rules, standards and norms, a matter the Supreme Court of Canada has yet to examine. *Campbell River* raises the issue of inclusive workplace design, and the extent to which individuals can expect their employers to treat different employees differently, in recognition of the challenges associated with their unique family circumstances. *Campbell River* narrowly conceptualized family status discrimination in a manner that captured the experience of the grievor, but does not bode well for inclusivity. The purposes of the B.C. *Human Rights Code* include “foster[ing] a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia,” and “identify[ing] and eliminat[ing] persistent patterns of inequality associated with discrimination prohibited by this Code.”²⁴ This Study Paper considers whether the current jurisprudence takes an approach to family status discrimination that is consistent with the statutory purposes of human rights law in B.C.

D. The Structure of this Study Paper

This Study Paper is divided into five sections. The first section is this introduction. Section II sets out a legislative and historical framework for understanding the cases, providing a brief overview of the history of human rights law in B.C. and Canada, and situating the family status ground within a larger chronology. Section II includes a number of figures which plot the addition of family status within a larger history of grounds creation in Canada, and compare the legislative approaches to family status that have been taken in the different provinces and territories.

The chapters in section III discuss patterns emerging from the jurisprudence. Summaries of all of the cases reviewed as part of this study can be found in the tables located at Appendix A and B. Section III discusses a selection of these cases.

Section IV offers a comparative lens and situates the Canadian approach within an international human rights context, identifying international covenants and conventions that shed light on what family status could mean, and offering alternative approaches for addressing the social policy pressures illustrated by the cases. One of the questions underlying the complex social dynamics at play in the jurisprudence is the appropriateness of the human rights forum for addressing problems of access and inclusivity being raised in the cases. As such, this Study Paper begins an exploration of alternatives, considering approaches taken in jurisdictions outside Canada.

²³ *Johnstone v. Canada (Attorney General)*, 2007 FC 36 [Johnstone].

²⁴ 1996 *Human Rights Code*, RSBC, *supra* note 11 at s 3.

Finally, Section V provides a summary of findings and offers questions for further consideration, setting the stage for next steps in developing law and policy that is more responsive to the social problems highlighted by the family status jurisprudence.

This Study Paper is intended to serve multiple audiences, providing both a thorough review of the family status ground in B.C. jurisprudence and Canadian legislation, and well as a scholarly interrogation of the concept of family status discrimination and its treatment in the cases. As much as possible, information is distilled into practical summary tables and visual tools. Although footnoting is continuous, each of the sections is self-contained and the chapters can be read separately and in a non-linear fashion.

We hope this Study Paper will be a resource for academics, advocates, decision-makers and policy analysts working in the area of human rights. We trust that clarification of the family status ground will serve individuals and organizations that provide advice or information in relation to human rights, including advocates, lawyers, trade unions, human resources personnel, and government agencies. We wish this paper to be a resource for decision-makers considering family status discrimination in diverse contexts. This Study Paper does not point to a simple solution. However, we expect this paper will offer food for thought to shape further discussions around policy and law intended to: address challenges faced by diverse families; undermine patterns of inequality and disadvantage associated with the characteristics of some families; and, to quote the purposes of the *Human Rights Code* once again, to cultivate a society that promotes “the full and free participation in the economic, social, political and cultural life of British Columbia.”²⁵

²⁵ 1996 *Human Rights Code*, RSBC, *supra* note 11.

II. Overview of the Family Status Ground in Canadian Human Rights Legislation

A. A Brief History of Human Rights Legislation in Canada

1. Dominant Ideology in the Years Prior to the Development of Human Rights Law

In Canada equality rights legislation was largely a post-war phenomenon. Prior to the Second World War (“WWII”), the issue of human rights received little attention and little political support in Canada²⁶ and virtually no legislation against discrimination existed (subject to some early exceptions discussed below).²⁷ As Deborah K. Lovett, QC and Angela R. Westmacott wrote in their review of human rights law in B.C., “the issue of human rights seldom arose in public policy debates or political writings. Discriminatory attitudes and beliefs were pervasive. Discriminatory practices were not confined to the private sphere of social and economic relations, but were also reflected in legislation and public policy.”²⁸ The pre-war years were a time of exclusionary immigration policies, denial of voting rights to women and minorities, and segregated schools.²⁹ In a sense, discrimination was the norm, not the exception.

Brian R. Howe attributes the lack of public support for, and resistance to, the development of human rights legislation in Canada prior to the First World War, to this anti-equality climate.³⁰ He also highlights a widespread belief in a social *laissez-faire* approach.³¹ For while discrimination was viewed as “morally wrong or socially undesirable,” there remained a general concern that anti-discrimination legislation would lead to “unwanted state-interference with individual freedom, property rights, and the right to contract,” and that a legalistic approach would erode liberty and undermine harmony in social and ethnic relations.³² Rather, the favoured approach was one of education and voluntarism, in which “discrimination was best dealt with not through public policy but rather through the private means of moral suasion and education...without interference with individual freedom and property rights.”³³ The vision was that Canadians would be taught to respect equality rights without individual liberty being compromised.

During the 1940s and the years following, partly as a reaction to the atrocities of WWII, there was a fundamental shift in Canadian attitudes and beliefs from social *laissez-faire* to support for the principle of human rights legislation, which led to the beginning of the development of human rights legislation in Canada.³⁴ Most Canadian anti-discrimination laws were enacted following WWII, and indeed a number of the early more comprehensive Canadian human rights statutes

²⁶ Howe, R. Brian, *Restraining Equality: Human Rights Commissions in Canada*, (Toronto: University of Toronto Press, 2000) at 22 [Howe].

²⁷ *Ibid.*

²⁸ Deborah K. Lovett, QC and Angela R. Westmacott, “A Human Rights Review: A Background Paper for the Administrative Justice Project,” (December 2001), Ministry of the Attorney General at 6 [Lovett & Westmacott].

²⁹ Howe, *supra* note 26 at 23.

³⁰ *Ibid* at 23.

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid* at 24.

³⁴ Howe, *supra* note 26 at 25; William W. Black, *Report Concerning Internal Procedures of the B.C. Council of Human Rights and Related Agencies*, November 15, 1993 at 2 [Black Report].

reference the Universal Declaration of Human Rights,³⁵ adopted by the United Nations following the resolution of WWII.³⁶ While this document contains a much broader statement of equality than figured in early Canadian human rights legislation, the *Universal Declaration's* list of grounds omits family status. The *Universal Declaration* states:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as *race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.³⁷

The United Nations Charter, a more condensed reference to equality based on grounds, refers to race, sex, language, or religion, but again, does not include family status.³⁸

2. Early Laws Focus on Race, Religion, Ethnicity, Place of Origin

Although the *Universal Declaration* and the *UN Charter* had a significant impact on the development of human rights law in Canada, arguably the first phase in the growth of equality law in Canada occurred prior to the creation of either anti-discrimination specific legislation or the development of comprehensive human rights regimes in Canada. These early precursors to comprehensive human rights legislation in Canada were focused on discrimination based on race, religion or political belief.

B.C. was one of the first provinces to enact provisions prohibiting discrimination. The 1931 *Unemployment Relief Act*³⁹ prohibited discrimination based on political affiliation, and was expanded in 1932 to state that “in no case shall discrimination be made or permitted in the employment of any persons by reason of their political affiliation, race or religious views.”⁴⁰ Another early example of anti-discrimination language appeared in the *Insurance Act* of Ontario. This statute was amended in 1932 to include a provision prohibiting discrimination in the insurance assessment on the basis of the race or religion of the insured.⁴¹

In 1944, Ontario passed the *Racial Discrimination Act*, which “prohibited the publication or displaying of signs, symbols, or other representation expressing racial or religious discrimination.”⁴² Later, in

³⁵ *Universal Declaration of Human Rights*, GA Res 217A(III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948) 71, [Universal Declaration]. Early comprehensive human rights laws that referenced the *Universal Declaration* include: *An Act to establish the Ontario Code of Human Rights and to provide for its Administration*, SO 1961-62, c. 93; *An Act to Amend and Consolidate the Statute Law Relating to Human Rights*, SNS 1963, c 5, *An Act Respecting Human Rights*, SPEI 1968, c 24; and *An Act to Establish the Newfoundland Human Rights Code and to Provide for its Implementation*, SNfld 1969, No 75.

³⁶ “The Universal Declaration of Human Rights - History of the Document,” online: United Nations <<http://www.un.org/en/documents/udhr/history.shtml>>.

³⁷ *Universal Declaration*, *supra* note 35 (emphasis ours).

³⁸ *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 [UN Charter].

³⁹ *An Act Respecting Unemployment Relief*, SBC 1931, c 65, schedule A, s 8.

⁴⁰ *Unemployment Relief Act*, SBC 1932, c 58 [Unemployment Relief Act].

⁴¹ *Ontario Insurance Act*, SO 1932, c 24, s 4 [Ontario Insurance Act].

⁴² *Racial Discrimination Act*, 1944 SO 1944, c 51, s 1.

1945, the B.C. *Social Assistance Act*⁴³ provided that “in the administration of social assistance there shall be no discrimination based on race, colour, creed or political affiliations.”⁴⁴

In 1947 Saskatchewan passed the first human rights statute that was somewhat comprehensive in terms of applying broadly to various sites of discrimination, including employment, engagement in occupations, ownership and occupation of property, access to public places, membership in professional and trade associations, education, and publications.⁴⁵ The law captured discrimination based on the grounds of race, creed, religion, colour or ethnic or national origin.⁴⁶

Throughout the next two decades, other early anti-discrimination statutes emerged which generally addressed discrimination in the context of either employment or accommodation, referred to as “fair practices” legislation. Fair employment legislation was passed in Ontario, Manitoba, Nova Scotia, New Brunswick and British Columbia between 1951 and 1956.⁴⁷ None of these statutes referenced the family status ground.⁴⁸ Fair accommodation legislation was passed in Ontario, Saskatchewan, New Brunswick, Nova Scotia, Manitoba and B.C.⁴⁹ Again, family status did not figure in these early statutes.⁵⁰ Although the terminology varied, the focus of all the fair practices legislation was protecting individuals from discrimination based on the often related grounds of race, ethnicity, religion and place of origin.

Other grounds were added in subsequent years. In the 60’s and 70’s various jurisdictions passed comprehensive human rights statutes that applied to both employment and accommodation, but again, family status was not enumerated as a ground in any of these comprehensive codes.⁵¹ Sex was not added as a ground in any jurisdiction in Canada until it was added by B.C. in 1969.⁵²

⁴³ *Social Assistance Act*, SBC 1945, c 62.

⁴⁴ *Ibid* at s 8.

⁴⁵ *The Saskatchewan Bill of Rights Act, 1947*, SS 1947, c 35, ss 8-14.

⁴⁶ *Ibid*.

⁴⁷ *An Act to promote Fair Employment Practices in Ontario*, SO 1951, c 24, ss. 3-5; *Fair Employment Practices Act*, SM 1953 (2nd session), c 18, s 4; *Fair Employment Practices Act*, SNS 1955, c 5, s 3; *Fair Employment Practices Act*, SNB 1956, c 9, s 3; *Fair Employment Practices Act*, SBC 1956, c 16, ss 3-5. Sources cited in Walter S. Tarnopolsky, *Discrimination and the Law of Canada* (Toronto, Ontario, Canada: Richard De Boo, 1982).

⁴⁸ Ontario’s act prohibited discrimination on the basis of race, creed, religion, colour or ethnic or national origin; the Manitoba, Nova Scotia and New Brunswick acts prohibited discrimination on the basis of race, national origin, colour, or religion; B.C.’s act prohibited discrimination on the basis of race, creed, colour, nationality, ancestry, or place of origin.

⁴⁹ *Fair Accommodation Practices Act*, SO 1954, c 28, s 2; *Fair Accommodation Practices Act, 1956*, SS 1956, c 68, ss 3-4; *Fair Accommodation Practices Act*, SNB 1959, c 6, s 3; *Fair Accommodation Practices Act*, SNS 1959, c 4, ss 3-5; *Fair Accommodation Practices Act*, SM 1960, c 14, ss 3-4; *Public Accommodation Practices Act*, SBC, c 50, ss 3-4. Sources cited in Tarnopolsky, *supra* note 47.

⁵⁰ Ontario and New Brunswick’s acts prohibited discrimination on the basis of race, creed, colour, nationality, ancestry or place of origin; Saskatchewan and Nova Scotia’s acts prohibited discrimination on the basis of race, religion, religious creed, colour or ethnic or national origin; Manitoba’s act prohibited discrimination on the basis of race, religion, religious creed, colour, ancestry, ethnic or national origin; B.C.’s act prohibited discrimination on the basis of race, creed, colour, nationality, ancestry, or place of origin.

⁵¹ *An Act to establish the Ontario Code of Human Rights and to provide for its Administration*, SO 1961-62, c 93 (prohibited grounds: race, creed, colour, nationality, ancestry, or place of origin of such person or class of persons); *An Act to Amend and Consolidate the Statute Law Relating to Human Rights*, SNS 1963, c 5 (prohibited grounds: race, religion, religious creed, colour or ethnic or national origin of such person or class of persons); *An Act respecting Human Rights*, SA 1966, c 39 (prohibited grounds: race, religious beliefs, colour, ancestry, or place of origin of that person or class of persons or of any other person or class of persons); *Human Rights Act*, SNB 1967, c 13 (prohibited grounds vary depending on

As Figure 1 illustrates, there was a significant time gap between the introduction of the early or founding prohibited grounds, such as race, ethnicity, religion and place of origin, and the addition of subsequent grounds. Sex and physical disability were added in the 70's. Family status is one of the most recent grounds to be added.⁵³ The first statute to include family status was the *Ontario Human Rights Code*, which added the ground in 1981,⁵⁴ and, as Figure 2 illustrates, it was many years before the majority of Canadian human rights statutes incorporated family status as a ground.

whether in employment, accommodation, trade unions: race, national origin, colour, or religion, creed, nationality, ancestry, place of origin); *An Act Respecting Human Rights*, SPEI 1968, c 24 (prohibited grounds: race, religion, religious creed, colour or ethnic or national origin of such person or class of persons); *An Act for the Promotion and Protection of the Fundamental Rights of the People of British Columbia*, SBC 1969, c 10 (prohibited grounds: race, religion, sex, colour, nationality, ancestry, or place of origin, or age, for those between 45 and 65) [*BC Human Rights Act, 1969*]; *The Human Rights Act*, SM 1970, c 104 (prohibited grounds: race, creed, religion, sex, colour or ethnic or national origin of any person or class of persons); *An Act to Establish the Newfoundland Human Rights Code and to Provide for its Implementation*, SNfld 1969, No. 75 (prohibited grounds: race, religion, religious creed, political opinion, colour or ethnic, national or social origin of such person or class of persons); *Charter of human rights and freedoms*, SQ 1975, c 6 (prohibited grounds: race, colour, sex, civil status, religion, political convictions, language, ethnic or national origin or social condition).

⁵² *BC Human Rights Act, 1969, ibid*, c 10. Lovett & Westmacott note however that in BC “the legislative history of human rights legislation can be traced back to 1953 when the first prohibition against wage discrimination was passed in the form of an *Act to Ensure Fair Remuneration to Female Employees*, S.B.C. (2d) C-6.” See Lovett & Westmacott, *supra* note 28 at 10.

⁵³ In 2002 the Northwest Territories included “family affiliation” and “family status” as grounds in their original human rights statute. See *Human Rights Act*, SNWT 2002, c. 18, s 5. The Northwest Territories is the only Canadian jurisdiction that includes family affiliation in the statute. The term is not defined in the Act.

⁵⁴ *An Act to revise and extend Protection of Human Rights in Ontario*, SO 1981, c 53.

Figure 1: Chronology of Introduction of Prohibited Grounds in Canada

	1950	1960	1970	1980
RACE	SK ¹ 1947			
COLOUR	SK 1947			
COUNTRY, NATIONAL or ETHNIC ORIGIN	SK 1947			
RELIGION or CREED	SK 1947			
ANCESTRY		ON ² 1961		
AGE			BC ³ 1969	
SEX			BC 1969	
POLITICAL AFFILIATION			N&L ⁴ 1971	
MARITAL STATUS			AB ⁵ 1971	
SOCIAL CONDITION			N&L 1971	
CRIMINAL RECORD			BC ⁶ 1973	
SOURCE OF INCOME			MB ⁷ 1974	
PHYSICAL DISABILITY			BC ⁸ 1976	
SEXUAL ORIENTATION			QC ⁹ 1977	
MENTAL DISABILITY			QC ¹⁰ 1978	
FAMILY STATUS*				ON ¹¹ 1981

¹ *The Saskatchewan Bill of Rights Act, 1947*, SS 1947, c 35. It was the first statute, analogous to modern human rights acts, aimed to protect against discrimination in employment (as "Fair Practices Acts" did before it), service provision, and accommodation.

² *The Ontario Human Rights Code, 1961-62*, SO 1961-62, c 93

³ *Human Rights Act, SBC 1969*, c 10 (British Columbia)

⁴ *The Newfoundland Human Rights Code, SNfld 1969*, No 75 (Newfoundland and Labrador)

⁵ *The Human Rights Act, SA 1971*, c 48 (Alberta)

⁶ *Human Rights Act, SBC 1973* (2nd Sess.), c 119 (British Columbia)

⁷ *Human Rights Act, SM 1974*, c 65 (Manitoba)

⁸ "physical disability" was read-in to the BC *Human Rights Code* after *Jefferson v. B.C. Ferries Services* (unreported, 1976)

⁹ *Charter of Rights and Freedoms, SQ 1977*, c 6 (Quebec)

¹⁰ The Quebec *Charter of Rights and Freedoms* only includes "disability", but defines it as including mental disability

¹¹ *An Act to Revise and Extend Protection of Human Rights in Ontario, SO 1981*, c 53

* In 2002, the Northwest Territories were the first to adopt the undefined ground of "family affiliation" alongside "family status". To date, there have been no decisions by the NWT Human Rights Commission on this ground which would serve to define it.

Figure 2: Chronology of Introduction of Family Status Ground Across Canada

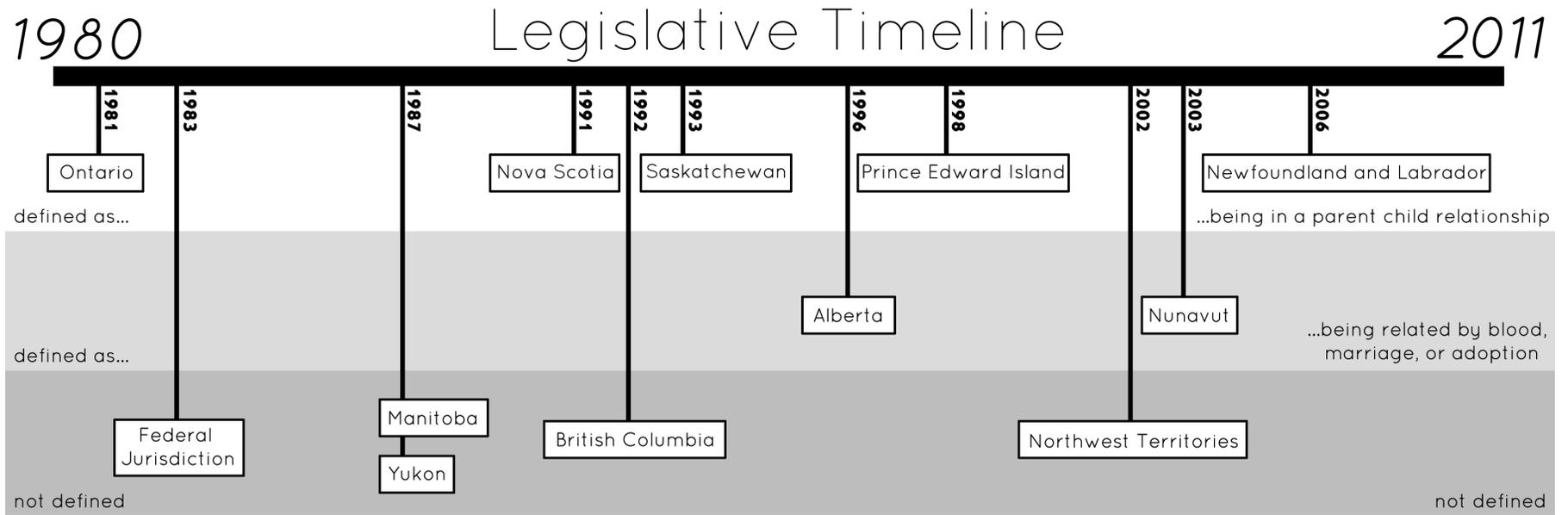


Figure 3: Approaches to Defining Family Status Across Canada

Family Status is not an enumerated ground	Family Status is an enumerated ground		
	not defined	“related by blood, marriage, or adoption”	“being in a parent-child relationship”
<p>Canadian Charter of Rights and Freedoms <i>Canadian Charter of Rights and Freedoms</i>, s. 15, Part I of the <i>Constitution Act, 1982, being Schedule B to the Canada Act 1982</i> (U.K.), 1982, c 11</p>	<p>Federal jurisdiction <i>Canadian Human Rights Act</i>, RSC 1985, c H-6</p> <p>Family Status added in 1983 in: <i>An Act to Amend the Canadian Human Rights Act and to amend certain acts in consequence thereof</i>, SC 1980-81-82-83, c 143</p>	<p>Alberta <i>Alberta Human Rights Act</i>, RSA 2000, c. A-25.5</p> <p>Family Status added in 1996 in: <i>Individual’s Rights Protection Amendment Act, 1996</i>, SA 1996, c 25</p>	<p>Prince Edward Island <i>Human Rights Act</i>, RSPEI 1988, c H-12</p> <p>Family Status added in 1998 in: <i>An Act to Amend the Human Rights Act (No. 2)</i>, SPEI c 92</p>
<p>New Brunswick <i>Human Rights Act</i>, RSNB 2011, c 171</p>	<p>British Columbia <i>Human Rights Code</i>, R.S.B.C. 1996, c. 210</p> <p>Family Status added in 1992 in: <i>Human Rights Amendment Act, 1992</i>, SB.C. 1992 c 43</p>	<p>Nunavut <i>Human Rights Act</i>, Snu 2003, c 12</p> <p>Family Status was included in the original version of the Act in 2003</p>	<p>Newfoundland and Labrador³ <i>Human Rights Act</i>, 2010 SNL 2010, c H-13.1</p> <p>Family Status was added in 2006 in: <i>An Act to Amend the Human Rights Code</i>, SNL 2006, c 22</p>
<p>Quebec¹ <i>Charte des Droits et Libertés de la Personne</i>, R.S.Q. 2000 c. c-12</p> <p>“État civil”/”Civil status” included in the <i>Charter</i> since 1983</p>	<p>Northwest Territories² <i>Human Rights Act</i>, SNWT 2002, c 18</p> <p>Family Status was included in the original version of the <i>Act</i> in 2002</p>		<p>Nova Scotia <i>Human Rights Act</i>, RSNS 1989, c 214</p> <p>Family Status was added in 1991 in: <i>An Act to Amend Chapter 214 of the Revised Statutes, 1989, the Human Rights Act</i>, SNS 1991, c 12</p>
	<p>YU.Kon <i>Human Rights Act</i>, RSY 2002, c 116</p> <p>Family Status was included in the original version of the <i>Act</i> in 1987</p>		<p>Ontario <i>Human Rights Code</i>, R.S.O. 1990, c H.19</p> <p>Family Status was included in the original version of the <i>Code</i> in 1981</p>
	<p>Manitoba <i>The Human Rights Code</i>, CCSM 1987, c H175</p> <p>Family Status was included in the original version of the <i>Code</i> in 1987</p>		<p>Saskatchewan⁴ <i>Saskatchewan Human Rights Code</i>, S.S. 1979, c S-24.1</p> <p>Family Status added in 1993 in: <i>An Act to Amend The Saskatchewan Human Rights Code</i>, SS 1993, c 61</p>

¹ Family status is not included in the English-version of the Quebec Charter of Human Rights. Instead the undefined “civil status” (“état civil”) is used.

² NWT also includes the ground of “family affiliation”.

³ Where “child” includes a stepchild and an adopted child, and “parent” includes a step-parent and an adoptive parent.

⁴ “Child” means son, daughter, stepson, stepdaughter, adopted child, and person to whom another person stands in place of a parent. “Parent” means father, mother, stepfather, stepmother, adoptive parent, and person who stands in place of a parent to another person.

3. The Development of Comprehensive Human Rights Codes and Human Rights Commissions

One major shift in the evolution of human rights legislation in Canada was the consolidation of the assorted human rights acts into comprehensive human rights statutes.⁵⁵ These statutes prohibited discrimination in employment, accommodations and services, and sale and rental of housing and land on the basis of certain limited grounds.⁵⁶ During the same time period human rights commissions were established to administer the acts.⁵⁷

While these early human rights statutes were initially limited in scope, substantial revisions occurred between the 1960s and the 1990s. By the 1990s, most Canadian jurisdictions had human rights legislation that had expanded to include most of the following prohibited grounds of discrimination: age, disability, political belief, sexual orientation, record of criminal conviction, dependence on alcohol or drugs, and source of income.⁵⁸ Similarly, the scope of the application of human rights legislation had expanded to include the following areas: “contracts, employment agencies, sexual harassment, hate literature, employment of domestic workers, and reasonable accommodation by employers to religious minorities and persons with disabilities.”⁵⁹

The expansion of human rights legislation across Canada also involved administrative reforms that provided for a stronger and more proactive human rights system, and involved areas such as “affirmative action, the investigation of systemic discrimination, and ordering of remedies.”⁶⁰ Commissions in most jurisdictions were given the authority “to recommend, approve, or initiate special programs as a remedy for systemic or indirect discrimination” and tribunals were also given the authority to order a remedy of affirmative action.⁶¹ Commissions acquired the power to initiate complaints themselves, and in some jurisdictions, such as Ontario, Quebec, Manitoba, Saskatchewan, Nova Scotia, B.C. and the federal jurisdiction, to investigate patterns of systemic discrimination.⁶² As noted by Howe, “[s]uch authority in the area of systemic discrimination was a major development, and led to pressures in other jurisdictions for similar change.”⁶³

4. Judicial Interpretation Shapes the Development of Equality Law

The expansion of human rights legislation in Canada was also significantly influenced by judicial interpretation and the common law. As described by Howe:

In deciding human rights cases where the law was unclear or imprecise, even when there were restrictive interpretations and reversals, boards and courts often interpreted the law

⁵⁵ Black Report, *supra* note 34; Howe, *supra* note 26 at 28; Lovett & Westmacott, *supra* note 28 at 8.

⁵⁶ Black Report, *ibid*; Howe, *ibid*.

⁵⁷ Black Report, *ibid*; Howe, *ibid*.

⁵⁸ Howe, *ibid*.

⁵⁹ *Ibid* at 31-32.

⁶⁰ *Ibid* at 34.

⁶¹ *Ibid*.

⁶² *Ibid*.

⁶³ *Ibid* at 41.

liberally in favour of extending equality rights. These liberal interpretations frequently contributed to pressures for explicit legislation.⁶⁴

Judicial interpretation played a key role in both increasing the effect, and elevating the legal status, of human rights legislation, particularly after the enactment of the *Canadian Charter of Rights and Freedoms*.⁶⁵ In the 1970s, following the lead of the U.S., Canadian boards of inquiry and courts began to apply a systemic concept of discrimination whereby a complainant was no longer required to prove intent to discriminate; rather, discrimination “could also arise on the basis of result or adverse effects, such as through apparently neutral policies or practices.”⁶⁶ In determining the constitutional validity of legislation in *R. v. Big M Drug Mart Ltd.*,⁶⁷ the Supreme Court of Canada favoured an interpretation of the *Charter* that looked at the content, purpose and effects of the legislation.⁶⁸

[T]he legislation’s purpose is the initial test of constitutional validity and its effects are to be considered when the law under review has passed or, at least, has purportedly passed the purpose test... Thus, if the law with a valid purpose interferes by its impact, with rights or freedoms, a litigant could still argue the effects of the legislation as a means to defeat its applicability and possibly its validity.⁶⁹

The Supreme Court of Canada subsequently affirmed the systemic “effects” interpretation in the discrimination context in *O’Malley*⁷⁰ and *Bhinder and The Canadian Human Rights Commission v. The Canadian National Railway*.⁷¹ In *O’Malley* the Court defined the concept of adverse effect discrimination:

There is, of course, no disagreement in the case at bar that direct discrimination of that nature would contravene the *Act*. On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force... An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply.⁷²

Further, the Supreme Court of Canada in *O’Malley* indicated that human rights legislation was quasi-constitutional in status:

⁶⁴ *Ibid* at 41-42; See *Ontario Human Rights Commission and O’Malley (Vincent) v. Simpson-Sears*, [1985] 2 SCR 536 [*O’Malley*] in which the Supreme Court of Canada established the duty of employers to accommodate religious minority employees to the point of undue hardship (*ibid*, at 42).

⁶⁵ W.S. Tarnopolsky, “Discrimination and the Law in Canada” (1992) 41 UNB LJ 215-234 at 229 [Tarnopolsky 1992]; Howe, *supra* note 26 at 43; Lovett & Westmacott, *supra* note 28 at 8-9.

⁶⁶ Howe, *supra* note 26 at 42; Tarnopolsky 1992, *supra* note 65 at 229.

⁶⁷ *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295 [*Big M*].

⁶⁸ Tarnopolsky 1992, *supra* note 65 at 229-30.

⁶⁹ *Big M*, *supra* note 67 at 88, in Tarnopolsky 1992, *supra* note 65 at 230.

⁷⁰ *O’Malley*, *supra* note 64.

⁷¹ *Bhinder and The Canadian Human Rights Commission v. The Canadian National Railway*, [1985] 2 SCR 561 [*Bhinder*].

⁷² *O’Malley*, *supra* note 64 at 18, in Tarnopolsky 1992, *supra* note 65 at 231.

The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment [...], and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary—and it is for the courts to seek out its purpose and give it effect.⁷³

5. The Principle Forces Driving the Development of Equality Law

In *Restraining Equality: Human Rights Commissions in Canada*, Howe discusses the “principle forces” behind the evolution of human rights legislation and policy in Canada. Howe concludes that there are both “society-centred” and “state-centred” explanations for the development of Canada's modern human rights regime.⁷⁴ Examples of society-centred explanations for the development of human rights legislation and policy referred to by Howe include the following:⁷⁵

- The spread of human rights consciousness in Canada during and after WWII;
- Changes in Canadian demography, including an increase in ethnocultural minorities in Canada;
- An increased presence of women and ethnocultural minorities in the workforce and their support for equality rights in the workplace;
- An increase in human rights interest groups pressuring for anti-discrimination legislation;
- Growing interest in postmaterialist, not strictly materialist, values, such as a cleaner environment, wider democracy and the pursuit of equality rights, that emerged out of a time frame during which the basic needs of individuals were arguably better met than during wartime; and
- A rights-oriented political culture that emerged around Diefenbaker's *Bill of Rights* and the subsequent efforts to amend the Constitution to include the *Charter*.

Howe notes that, “as equality rights consciousness expanded between the 1960s and the 1990s, so too did human rights legislation.”⁷⁶

In addition, as noted by Howe, legislative reform sometimes went beyond the changes demanded by public opinion and interest groups.⁷⁷ For example, Howe highlights the following state-centred explanations for the evolution of human rights legislation in Canada:⁷⁸

- Ideological commitment of politicians and policymakers, particularly following WWII (eg. enactment of Saskatchewan's 1947 *Bill of Rights Act*);
- Political party pressure for expansive human rights legislation (following WWII all parties supported the principle of human rights legislation);
- Judicial interpretation by other state officials such as boards of inquiry, human rights tribunals, and judges, which expanded and strengthened human rights legislation. While

⁷³ O'Malley, *ibid* at 12, in Howe, *supra* note 26 at 43.

⁷⁴ *Ibid* at 44. Howe explains that society-centred “assumes that what happens in public policy and legislation is ultimately a reflection of what happens in society” and that state-centred “assumes that public policy is shaped more by forces within the state than by ones in society (at 45).

⁷⁵ *Ibid* at 45-48.

⁷⁶ *Ibid* at 45.

⁷⁷ *Ibid* at 48.

⁷⁸ *Ibid* at 48-52.

originally sympathetic to social *laissez-faire*, judicial rulings following WWII began to provide broad and liberal interpretations that reflected an equality rights consciousness;

- Change in the structure of the state with the enactment of the *Charter*—a shift from parliamentary supremacy to judicially enforced constitutional rights;⁷⁹
- Amendment of provincial human rights legislation to conform with equality rights protected by the *Charter*; and
- Expansion of human rights legislation by human rights commission officials.

Ultimately, both society and the state played important roles in the evolution of human rights legislation in Canada.

B. The Development of Human Rights Law in British Columbia

1. The Expansion of Prohibited Grounds and Other Early Reforms

B.C.'s first consolidated human rights statute was enacted in 1969.⁸⁰ The originating grounds included in the 1969 B.C. *Human Rights Act* were: race, religion, sex, colour, nationality, ancestry, or place of origin, or age (for individuals between the ages of 45 and 65).⁸¹ Following a comprehensive revision of B.C.'s human rights legislation, the B.C. *Human Rights Act* was repealed and B.C.'s *Human Rights Code* was enacted in 1973.⁸²

The 1973 *Human Rights Code* established a human rights commission and prohibited discrimination without “reasonable cause” with respect to: publication or display of any “notice, sign, symbol, emblem, or other representation indicating discrimination or an intention to discriminate”; “any accommodation, service, or facility customarily available to the public”; the “opportunity to purchase property”; “tenancy premises”; “rate of pay”; “advertisements for employment”; “occupation or employment”; “membership or intended membership in a trade union, employers’ association or occupational association.”⁸³ The prohibited grounds of discrimination in the 1973 *Human Rights Code* were: race, religion, colour, sex, ancestry, place of origin, marital status, age, political belief, and criminal conviction.⁸⁴

Other grounds were later added to the 1973 *Human Rights Code* and subsequent incarnations of BC’s human rights statute. In 1984, following a major revision of B.C.’s human rights legislation, disability was added to the new *Human Rights Act*.⁸⁵ In 1992, amendments resulted in the addition of family status and sexual orientation as prohibited grounds.⁸⁶ Lawful source of income was added as

⁷⁹ As noted by Howe, *supra* note 26 at 50: “As a result of the Charter, the principle of parliamentary supremacy and of judicial deference to the legislature were replaced by the principle of judicially enforced constitutional rights...after the Charter, the courts had a mandate to uphold constitutional charter rights against government and against ordinary legislation.”

⁸⁰ *BC Human Rights Act, 1969*, *supra* note 51.

⁸¹ *Ibid* at ss 5-6.

⁸² *Human Rights Code of British Columbia Act*, SBC 1973 (2nd Sess), c 119 [*1973 Human Rights Code*]; Lovett & Westmacott, *supra* note 28 at 11.

⁸³ *1973 Human Rights Code*, *ibid* at ss 2-9; Lovett & Westmacott, *supra* note 28 at 12.

⁸⁴ *1973 Human Rights Code*, *supra* note 82; Lovett & Westmacott, *supra* note 28 at 11. The ground of criminal conviction only applies in the context of discrimination in employment and discrimination by unions and associations.

⁸⁵ *Human Rights Act*, SBC 1984, c 22.

⁸⁶ *Human Rights Amendment Act, 1992*, SBC 1992, c 43, ss 2-7.

a protected ground in the context of tenancy in 2002.⁸⁷ However, not every ground applies in every context.⁸⁸

As noted by Lovett and Westmacott, the 1984 *Human Rights Act* represented an ideological shift, and was “designed to narrow the legislation and restrict enforcement powers.”⁸⁹ The responsibility for carriage of a human rights complaint was transferred from the human right commission to the complainant, staff levels were reduced, and investigative services were provided by industrial relations officers employed and managed by the government’s employment services branch.⁹⁰ The B.C. Council of Human Rights was established, with the responsibility to perform intake, adjudicative and educative functions.⁹¹

Miscellaneous amendments were made to B.C.’s human rights legislation between 1984 and 1992. Some of the most significant amendments were enacted in 1992, expanding “the remedial powers of the BC Human Rights Council to deal with complaints raising allegations of systemic discrimination and making specific provision for the establishment of special programs, including employment equity programs.”⁹²

2. The Black Report

In 1993, University of British Columbia professor William W. Black was appointed to examine the *Human Rights Act*. Black conducted public consultations and published two reports, released in 1993 and 1994.⁹³ Lovett & Westmacott summarized the feedback from public consultations, stating that the consultations:

...revealed uniform criticism of the delay in processing complaints as well as concerns about inequality of access (lack of regional offices), lack of public interest representation in the complaint process, lack of adequate resources (for education, research or policy development) and lack of any educational programs. Additionally, the structure of the human rights council made it difficult, if not impossible, for this body to effectively carry out both an impartial adjudicative function and an educational/public interest function. Finally, the legislative scheme was one that focused on processing individual complaints of discrimination with associated individual remedies. Such an individual complaints based system could not effectively operate to identify and eradicate systemic barriers to equality.⁹⁴

Black concluded that the areas most in need of reform were human rights objectives, the structure of protection mechanisms, and resources.⁹⁵ Further, Black determined that:

⁸⁷ *Residential Tenancy Act*, SBC 2002, c 78, s 108.

⁸⁸ For example, family status discrimination is not a ground of discrimination in the context of purchase of property. Also, lawful source of income is a prohibited ground only in the context of tenancy premise, and criminal or summary conviction offence unrelated to employment is listed as a ground exclusively in the sections dealing with employment discrimination and discrimination by unions and associations.

⁸⁹ Lovett & Westmacott, *supra* note 28.

⁹⁰ *Ibid* at 13.

⁹¹ *Human Rights Act*, SBC 1984, c 22, s 10.

⁹² *Ibid*.

⁹³ *Ibid* at 14.

⁹⁴ *Ibid*.

⁹⁵ *Ibid*.

The primary objective of human rights legislation should be that of identifying and eradicating systemic discrimination because not only do persistent patterns of discrimination cause the greatest harm to both society and the people affected but they have the greatest potential for an effective remedy.⁹⁶

Black added the additional key human rights objectives of redressing harm to individual complainants, preventing discrimination through education and training, and monitoring equality trends and patterns.⁹⁷ Black supported the provision of legal representation for all complainants and for respondents who could not afford legal representation.⁹⁸

Black's report recommended reforms related to the structure, roles, procedures and mandate of the Human Rights Council, as well as changes to education and information programs and the scope of the substantive and remedial legislative provisions.⁹⁹

3. The 1996 *Human Rights Code*

Largely in response to the 1994 Black Report, in 1996 the B.C. government replaced the *Human Rights Act* with a "new and expanded *Human Rights Code*, to be administered by a new and strengthened human rights commission that would again perform conciliation and education functions."¹⁰⁰ The new 1996 *Human Rights Code*¹⁰¹ (the *Code*) restructured the former Human Rights Council, separating the adjudicative function (residing with the Human Rights Tribunal) from the administrative, investigative and educational functions (residing with the Human Rights Commission and Human Rights Advisory Council).¹⁰²

The purposes of the *Code* were set out in section 3, and included the elements Black saw as essential to human rights legislation:¹⁰³

- (a) to foster a society in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
- (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
- (c) to prevent discrimination prohibited by the Code;
- (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by the Code;
- (e) to provide a means of redress for those persons who are discriminated against contrary to the Code;
- (f) to monitor progress in achieving equality in British Columbia;
- (g) to create mechanisms for providing the information, education and advice necessary to achieve all of these purposes.

⁹⁶ *Ibid*; Black Report, *supra* note 34 at 11.

⁹⁷ Lovett & Westmacott, *supra* note 28 at 15.

⁹⁸ *Ibid* at 15.

⁹⁹ *Ibid*; Heather M. MacNaughton, "Human Rights Reform: Again?" (2011) 74 Sask LR 235-261 at para 50 [MacNaughton].

¹⁰⁰ Howe, *supra* note 26 at 34.

¹⁰¹ 1996 *Human Rights Code*, RSBC, *supra*, note 11.

¹⁰² Lovett & Westmacott, *supra* note 28 at 15.

¹⁰³ 1996 *Human Rights Code*, RSBC, *supra* note 11; *Ibid* at 15-16.

The *Code* applied to government, trade unions, employer associations and occupational organizations, landlords, individuals and corporations, and covered discrimination in publications, public accommodation, public services, public facilities, purchase of property, tenancies, employment advertisements, wages, employment, and membership in trade unions, employer associations or occupational associations.¹⁰⁴ The *Code* also applied to retaliation resulting from a person making a complaint of discrimination.¹⁰⁵ The Human Rights Tribunal was established as the quasi-judicial body responsible for adjudication of human rights complaints referred to the Commissioner of Investigation and Mediation.¹⁰⁶

In 1999 the *Code* was amended to give the Tribunal the power to make regulations respecting its practice and procedure to facilitate the just and timely resolution of complaints.¹⁰⁷ As noted by Heather MacNaughton, the Tribunal has broad powers:

While the *Code* did not expressly confer power on the Tribunal to consider questions of law, the legislative scheme conferred a broad jurisdiction to deal with all aspects of the discrimination complaints referred to a hearing. This implicitly encompassed the power to consider most constitutional questions relating to the *Code*.

Section 37 of the Code conferred broad remedial powers on the Tribunal, including the power to award unlimited damages for injury to dignity, feelings, and self-respect... [However], [t]he Tribunal did not have ongoing jurisdiction with respect to the enforcement of its remedial orders and settlements.¹⁰⁸

4. Reform in the 2000s

In 2001, as part of a Core Services Review, the Attorney General commissioned the Human Rights Review report, which addressed concerns relating to the administration and interpretation of the *Human Rights Code*, in addition to concerns related to the roles and jurisdictions of different branches of the Human Rights Commission and the Tribunal.¹⁰⁹ The Human Rights Review report did not make recommendations. However, the report did identify a need for reform, and proposed seven “alternative models for the delivery of complaint process and adjudication services under human rights legislation.”¹¹⁰

In May 2002, Bill 53, the *Human Rights Code Amendment Act, 2002*, was introduced for public comment.¹¹¹ Following public comment and revisions of the Bill, the *Human Rights Code Amendment Act, 2002* (Bill 64) was introduced in October 2002.¹¹² The *Act* eliminated the B.C. Human Rights Commission, as well as purposes (f) and (g) of section 3 of the Code. On March 31, 2003, B.C. became the first Canadian jurisdiction to establish a direct-access tribunal. Currently, human rights

¹⁰⁴ *Ibid* at 16.

¹⁰⁵ *Ibid*.

¹⁰⁶ *Ibid* at 19; MacNaughton *supra* note 99 at para 58.

¹⁰⁷ *Ibid* at para 59.

¹⁰⁸ *Ibid* at para 60-61.

¹⁰⁹ See Lovett & Westmacott, *supra* note 28.

¹¹⁰ *Ibid* at 144; MacNaughton, *supra* note 99 at para 72.

¹¹¹ *Ibid* at para 74.

¹¹² *Ibid*.

complaints are filed directly with the Human Rights Tribunal, which remains responsible for all elements of the complaint process.¹¹³

C. Conclusion

In Canada, anti-discrimination legislation primarily developed in response to the atrocities of WWII, with such advancements being led in large part by the state.¹¹⁴ Prior to WWII, the issue of human rights received little political support and discriminatory attitudes were pervasive. This anti-equality climate is attributed to a widespread belief in a social laissez-faire approach.¹¹⁵

Early equality rights laws focused on the grounds of race, religion, ethnicity and place of origin. The first phase of discrimination legislation in Canada occurred just before WWII and was context specific, being located in individual statutes relating to unemployment relief and insurance.¹¹⁶ The adoption by the United Nations of the *Universal Declaration of Human Rights* in 1948 sparked the creation of a more comprehensive human rights response in Canada. Throughout the following two decades, anti-discrimination legislation was developed at the provincial level, generally addressing discrimination in the context of either employment or accommodation. Family status did not figure in these earlier statutes.

Various grounds were added over the years, with age and sex incorporated into the B.C. legislation in 1969 and physical disability in 1976.¹¹⁷ Between 1981 and 2006 the family status ground appeared in all human rights statutes, with the exception of New Brunswick and Quebec—although the latter introduced the slightly more narrow ground of civil status. A major shift in the evolution of human rights legislation in Canada was the consolidation of the assorted human rights acts into unified human rights statutes, with the creation of human rights commissions to administer the acts.

Judicial interpretation played a key role in the expansion of human rights legislation, particularly after the enactment of the *Canadian Charter of Rights and Freedoms* in 1982.¹¹⁸ The Supreme Court of Canada elevated the legal status of human rights legislation to quasi-constitutional,¹¹⁹ and also recognized adverse effect and systemic discrimination.¹²⁰

Since the creation of B.C.'s first consolidated human right statute in 1969, there have been numerous amendments and overhauls. B.C.'s current human rights legislation, the 1996 *Human Rights Code*, prohibits discrimination in the context of publications, accommodation, services, facilities, purchase of property, tenancies, employment advertisement, wages, employment and membership in trade unions and similar associations.¹²¹ The grounds have been expanded to include race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, or age in all contexts, with the additional ground of lawful source of income in the tenancy context and criminal or summary conviction unrelated to employment in

¹¹³ *Ibid* at para 75.

¹¹⁴ Howe, *supra* note 26 at 22.

¹¹⁵ *Ibid* at 23.

¹¹⁶ *Unemployment Relief Act*, *supra* note 40; *Ontario Insurance Act*, *supra* note 41.

¹¹⁷ See Figure 1.

¹¹⁸ Tarnopolsky 1992, *supra* note 65; Howe, *supra* note 26 at 43; Lovett & Wesmacott, *supra* note 28 at 8-9.

¹¹⁹ O'Malley, *supra* note 64.

¹²⁰ O'Malley, *ibid*; *Big M*, *supra* note 69.

¹²¹ *1996 Human Rights Code*, *supra* note 11.

the employment context.¹²² With the elimination of the B.C. Human Rights Commission in 2002, B.C. became the first Canadian jurisdiction to establish a tribunal directly accessible by the public.¹²³

Although the Black Report identified the eradication of systemic discrimination as the primary objective of human rights legislation, statutory reform in the province of B.C. has not moved in a direction that prioritizes this goal.

¹²² Ibid.

¹²³ Lovett & Westmacott, *supra* note 28.

III. Summary of the Family Status Jurisprudence: Exploring Patterns in Decision-making

A. Introduction and Methodology

This Study Paper considers the family status jurisprudence in Canada, with a focus on B.C. The research is current to the end of 2011. The review of cases includes reported decisions of courts, human rights tribunals and labour arbitrators. With a few exceptions, the study is limited to decisions subsequent to *Campbell River*.¹²⁴ To the best of our knowledge, every decision that considers *Campbell River* has been reviewed; however, decisions that do not consider *Campbell River* are also discussed in this paper, where they shed light on the meaning of family status.

This case review includes (a) preliminary decisions by the B.C. Human Rights Tribunal that comment on the scope and meaning of family status discrimination, and (b) court, tribunal and arbitrator decisions on family status discrimination that went to a full hearing. Although we canvassed the entire country, most decisions are from B.C. or Ontario, due to the comparably high volume of decision-making in those two jurisdictions. However, the Study Paper also considers notable decisions emanating from Alberta, Nova Scotia and the federal jurisdiction. Given the focus on B.C., some of the Ontario family status decisions that do not comment on *Campbell River* are not discussed in this paper.

The table at Appendix A summarizes all the family status decisions we reviewed as part of this research project. The table includes the decisions mentioned above as well as the few family status decisions that have been recorded for Saskatchewan, Manitoba and Yukon. We did not locate any reported decisions from Newfoundland, the Northwest Territories or Nunavut that comment on the meaning of family status. New Brunswick and Quebec are also not reflected in Appendix A, as those jurisdictions do not have a family status ground in their provincial human rights statute (see Figures 2 and 3). At the outset of this project we considered including a comparison of the treatment of civil status in Quebec with the interpretation of family status in the rest of Canada. However, the concept of civil status appears to be too different to shed light on the meaning of family status, in part due to the concept having emerged out of a very different social policy context including enhanced state support for childcare.

In order to get a more thorough portrait of family status complaints in B.C., we have also examined reported decisions where complaints under the ground of family status were dismissed under section 27(1) of the B.C. *Human Rights Code*, prior to a full hearing on the merits. The B.C. family status cases dismissed under section 27(1) are summarized at Appendix B.

With a few exceptions, this summary of cases generally does not include nepotism cases. These cases have been excluded because the law in this area is rather settled. The current controversy surrounding the meaning of family status discrimination does not impact the nepotism cases, which have followed a clear and consistent path from the outset, and have already benefited from guidance from the Supreme Court of Canada.

¹²⁴ *Campbell River*, *supra* note 3.

Section III of the Study Paper summarizes a selection of family status cases and examines themes emerging from the jurisprudence on family status discrimination. Chapter B provides an overview of the B.C. Court of Appeal decision in *Campbell River* and the Federal Court decision in *Johnstone*. Both cases have been repeatedly cited as authorities for two divergent approaches to family status discrimination in the context of employment. We return to these two decisions throughout this Study Paper.

One of the most obvious themes of the family status jurisprudence is that a significant number of the cases deal with family caregiving obligations, especially for infants and children. Chapter C provides an overview of the jurisprudence, highlighting a series of decisions that demonstrate this emphasis on family responsibilities that emerges from the cases.

Chapter D examines and compares family status decisions from B.C., Alberta and Ontario—the three jurisdictions illustrating the spectrum of approaches to statutory definitions of family status in Canada. The comparison to Ontario is particularly interesting, because the Ontario *Human Rights Code* contains a statutory definition of family status that is, on its face, restrictive, as compared with B.C. This comparative review illustrates the impact of a statutory definition on the meaning of family status in B.C. and Canada.

Finally, Chapter E examines the line of cases following *Campbell River*, illustrating some problematic patterns in how the meaning of family status is being constrained in the employment context by decision-makers relying on *Campbell River*. The paper explores how notions of choice and extraordinariness are being invoked to distinguish commonplace challenges from barriers worthy of human rights recognition, and discusses how evidence of disability is becoming critical to successfully establishing a *prima facie* case of discrimination. Chapter E demonstrates these patterns and considers why they might be at odds with the purposes of human rights legislation in B.C., as set out in the *Human Rights Code*.

B. *Campbell River* versus *Johnstone*: A Brief Summary of the Leading Authorities on Family Responsibilities Discrimination in Canada

1. Introduction: What is Family Responsibilities Discrimination?

Two of the recent, leading upper level court decisions on the meaning and scope of family status discrimination in the employment context deal with jurisdictions in which the family status ground is not defined by the human rights statute, namely, British Columbia and the federal jurisdiction. *Health Sciences Association of B.C. v. Campbell River and North Island Transition Society*,¹²⁵ a decision of the B.C. Court of Appeal, sought to constrain the scope of family status discrimination such that not every instance of a conflict between a work and family obligation would amount to *prima facie* discrimination and trigger an examination of the duty to accommodate. In doing so the Court fashioned the “serious interference with a substantial family obligation” test. *Johnstone v. Canada (Attorney General)*¹²⁶ rejected the *Campbell River* approach as inappropriately singling out one human rights ground to be subjected to a more stringent test than the *prima facie* discrimination standard to which other grounds were held—a standard generally attributed to the decision of the Supreme Court of Canada in *O’Malley*.¹²⁷ This short chapter summarizes the *Campbell River* and *Johnstone* decisions. Both decisions are referenced frequently throughout this Study Paper, and the tension between the two decisions is one of the rationales for this research project.

We characterize the two decisions as addressing alternative approaches to “family responsibilities discrimination”, rather than the broader category of “family status discrimination”. Both cases considered the standard to be applied when considering whether a conflict between workplace and family responsibilities gave rise to discrimination on the ground of family status. As we explore in Chapter D, the application of the narrower *Campbell River* test has largely been limited to employment discrimination on the ground of family status, as opposed to scenarios involving discrimination in housing or public services. The “serious interference with a substantial family obligation” test has further been generally limited to factual circumstances somewhat paralleling *Campbell River*. The test has mostly been applied in employment circumstances involving childcare issues but not in cases where parental leave benefits or nepotism are involved. However, the expression family responsibilities discrimination is not a creature of the jurisprudence, and instead the concept has emerged out of literature commenting on the cases.

2. *Campbell River*

Campbell River was an appeal from a decision of a labour arbitrator. The case dealt with the circumstances of a mother of a school-aged child with severe behavioural problems. The grievor worked at the transition house operated by the North Island Transition Society, as a part-time employee. Historically she had worked a shift that ended in the early afternoon (running 8:30 a.m. - 3:00 p.m.), allowing her to provide care for her son after school ended. The woman had three other children. Due to a reorganization of the workplace, the employer changed her shift hours to 11:30 a.m. to 6:00 p.m., thereby creating a conflict with her care for her son. The grievor claimed that this change in shift amounted to discrimination regarding a term or condition of employment on the

¹²⁵ *Campbell River*, *supra* note 3.

¹²⁶ *Johnstone*, *supra* note 23.

¹²⁷ *O’Malley*, *supra* note 64.

ground of family status, as the change effectively prevented her from either continuing in the employment position or maintaining both employment and the care of her child.

The grievor had provided her employer with a letter from her son's paediatrician stating that the child "is a very high needs child with a major psychiatric disorder," and that the mother's availability to care for her son after school was "an extraordinarily important medical adjunct to [the son's] ongoing management and progression in life."¹²⁸ After working the new hours from September 4 to September 17, 2001, the grievor attended a meeting of the board to express her concerns about the new hours. Following this meeting, the board issued the grievor a letter advising her that the new hours would be maintained, and one of the findings of the arbitrator was that following receipt of this letter the woman had a severe anxiety attack. On her doctor's advice she did not return to work. She was ultimately diagnosed with post-traumatic stress disorder, and the doctor testified at arbitration that the medical condition was caused by the employment circumstances.

The labour arbitrator found that the grievor had not experienced family status discrimination, finding the meaning of family status limited to the pure status of being a parent, and not extending to cover characteristics of that relationship, such as caregiving responsibilities. The arbitrator concluded that:

[T]hese differing circumstances, many of which may result in individuals trying to balance work and child-care arrangements, are not the kind of circumstances that raise an issue of discrimination based on the prohibited ground of "family status". Rather, the Legislature by deliberately employing the words "family status", was concerned with discrimination based upon the very status of being a parent, or other family member. For example, had the Employer refused to employ the Grievor, because she was the parent of a special needs child, that would, in my view, violate section 13 of the *Human Rights Code*...

Thus, family status in these circumstances deals with the status of parent and child, and not with the individual circumstances of a family's needs, such as those concerning child-care arrangements. I therefore conclude that all parents that experience difficult child-care arrangements, as a result of their employment, are not a class or category that section 13 of the *Human Right Code* seeks to protect.¹²⁹

The arbitrator stated that "the words 'family status' refer to the status of being a parent *per se*, and not to the innumerable (and yet important) circumstances that arise for all families in regard to their daycare needs."¹³⁰ Thus the grievance was dismissed.

At the Court of Appeal there was no issue as to whether a parent-child relationship fit within the rubric of family status. Rather, the issue was whether the meaning of family status included a parent's caregiving responsibilities toward a child, and to what extent an employer was legally obligated to accommodate the parental responsibilities that flowed from the employee's family status. In its decision the Court considered the following broad approach to family status articulated by the Canadian Human Rights Tribunal in *Brown v. Department of National Revenue (Customs and Excise)*:

¹²⁸ *Campbell River*, *supra* note 3 at 14.

¹²⁹ *Campbell River & North Island Transition Society v. Health Sciences Assn. of British Columbia (Howard Grievance)*, (2002) 110 L.A.C. (4th) 289, at 49 and 50.

¹³⁰ *Ibid* at 56.

It is this Tribunal's conclusion that the purposive interpretation to be affixed to s. 2 of the *Canadian Human Right Act* is a clear recognition within the context of “family status” of a parent's right and duty to strike that balance coupled with a clear duty on the part of an employer to facilitate and accommodate that balance within the criteria set out in the Alberta Dairy Pool case [1990] 2 S.C.R. 489]. To consider any lesser approach to the problems facing the modern family within the employment environment is to render meaningless the concept of “family status” as a ground of discrimination.¹³¹

In *Campbell River* the Court found the approach taken in *Brown* to be overly broad because it would mean that every conflict between a job requirement and a family obligation would give rise to a case of *prima facie* discrimination.¹³² In the absence of a persuasive authority on the meaning and scope of family status discrimination, the judges sought to fashion a test for family status discrimination that would capture more than the status of being a parent, but not all circumstances where employment obligations conflicted with parental obligations, the latter broad approach having the “potential to cause disruption and great mischief in the workplace.”¹³³ Justice Low articulated the new standard as follows: “a *prima facie* case of discrimination is made out when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employee.”¹³⁴ He added, “I think that in the vast majority of the situations in which there is a conflict between a work requirement and a family obligation it would be difficult to make out a *prima facie* case.”¹³⁵

On the facts of *Campbell River*, the Court found that the woman’s experience did amount to discrimination under the new test. The matter was then referred back to the arbitrator for a finding on the accommodation issue and any potential remedy.

3. *Johnstone*

The 2007 decision in *Johnstone v. Canada (Attorney General)*¹³⁶ involved an employee returning from a maternity leave who was unable to find a childcare provider that matched her or her husband’s availability, based on their differing shift schedules. The complainant had requested an accommodation in the form of three fixed 12-hour shifts per week. The employer’s accommodation policy required the complainant to accept part-time employment in exchange for fixed shifts. The complainant filed a complaint with the Canadian Human Rights Commission, arguing that the employer’s accommodation policy discriminated against her on the basis of family status. The Commission dismissed the complaint at the screening stage, applying the serious interference test articulated in *Campbell River*.

In its findings the Federal Court Trial Division remitted the decision back to the Canadian Human Rights Commission in part because they used the “serious interference” language. The Court stated that using “serious interference” as a standard was counter to binding jurisprudence. The judge found valid the following critique of *Campbell River* described in the Canadian Human Rights Tribunal decision in *Hoyt v. CNR*:

¹³¹ *Brown v. Department of National Revenue (Customs and Excise)*, [1993] 19 C.H.R.R. D/39 [*Brown*].

¹³² *Campbell River*, *supra* note 3 at 35.

¹³³ *Ibid* at 38.

¹³⁴ *Ibid* at 39.

¹³⁵ *Ibid*.

¹³⁶ *Johnstone*, *supra* note 23.

With respect, I do not agree with the Court's analysis. Human rights codes, because of their status as “fundamental law,” must be interpreted liberally so that they may better fulfill their objectives (*Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536 at p. 547, *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114 at pp. 1134-1136; *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 at pp. 89-90). It would, in my view, be inappropriate to select out one prohibited ground of discrimination for a more restrictive definition.¹³⁷

Justice Barnes noted that, “while family status cases can raise unique problems that may not arise in other human rights contexts, there is no obvious justification for relegating this type of discrimination to a secondary or less compelling status.”¹³⁸ The Court also indicated that *Campbell River* was unduly restrictive due to the fact that “the operative change typically arises within the family and not in the workplace,” and characterized that aspect of the test as “wrong in law.”¹³⁹

The judge set aside the decision of the Commission and referred the matter back to the Commission for a redetermination. The employer in *Johnstone* appealed the Federal Court decision. In its dismissal the Federal Court of Appeal refused to provide an opinion on whether the *Hoyt* or *Campbell River* standard is correct, leaving the state of the law somewhat unclear. In its reasons, the Court merely stated, “that the Commission’s reasons raise a serious question as to what legal test the Commission actually applied in deciding as it did. In our view that is a valid basis for finding the decision of the Commission to be unreasonable, and justifies the order of Justice Barnes referring the matter back to the Commission for reconsideration.”¹⁴⁰

¹³⁷ *Hoyt v. CNR*, [2006] CHR D No 33, at 120 [*Hoyt*].

¹³⁸ *Johnstone*, *supra* note 23 at 29.

¹³⁹ *Ibid.*

¹⁴⁰ *Attorney General of Canada v. Johnstone*, 2008 FCA 101 at 2.

C. Family Status Discrimination: The Impact of Caregiving Responsibilities on Canadian Families

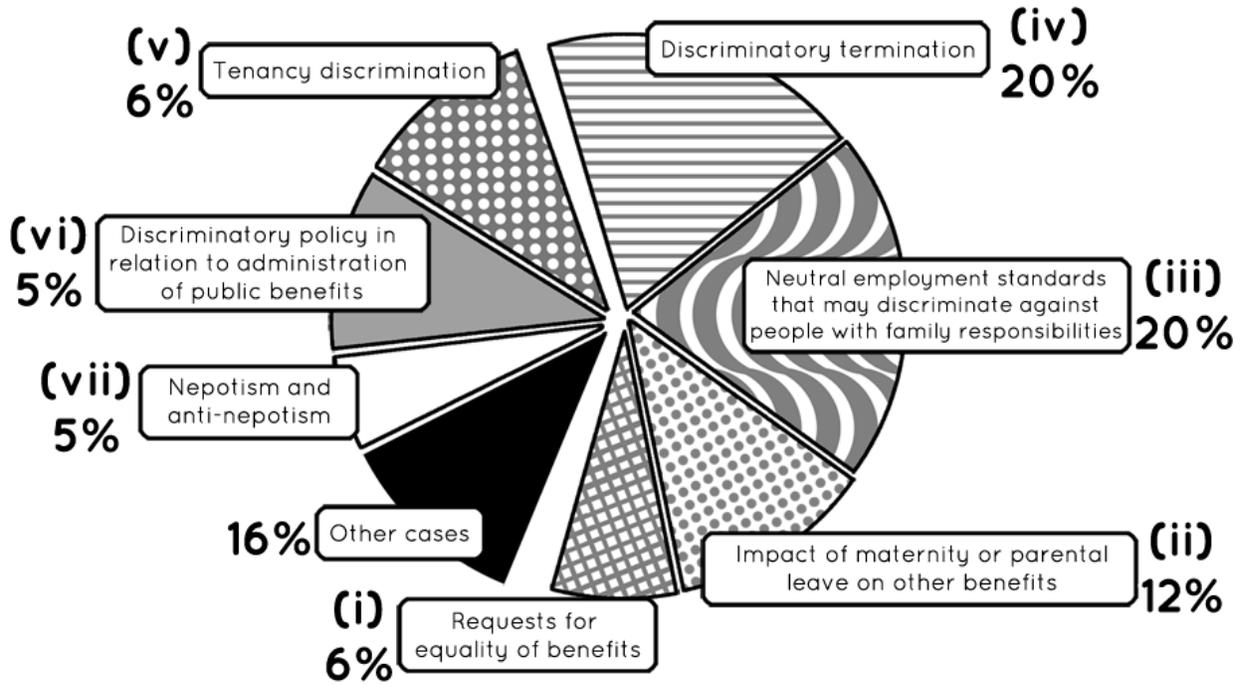
1. Introduction: An Overview of the Family Status Cases

In the absence of a statutory definition of family status in B.C., a concept of family status discrimination can be patched from a review of the factual circumstances underlying the human rights complaints and labour arbitrations interpreting this ground of discrimination. The family status cases include an array of circumstances, but the following themes do emerge from the jurisprudence. Family status cases include decisions that consider:

- i. *Requests for equality of benefits*, often between biological and adoptive parents, or birth fathers and mothers, in particular, in relation to parental or bereavement leave (usually labour arbitrations);
- ii. *The impact of absence from the workplace due to maternity, parental or other leave* related to family obligations on entitlement to other negotiated benefits, such as pay increases and retirement benefits (usually labour arbitrations);
- iii. *Facially neutral employment standards that may discriminate against parents with particular family responsibilities* (such as denials of requests to convert to part-time, requirements to work evening or overnight shifts, elimination of part-time shifts, requests for changes to shifts times and responsibilities during pregnancy);
- iv. *Discriminatory termination linked to family status*, often where there is disagreement amongst the parties as to whether termination was linked to family obligations, or performance issues or other legitimate business rationale;
- v. *Tenancy discrimination linked to young children* (denial of rental accommodation due to family status, often because of children or single parent status); and
- vi. *Discriminatory policy in relation to administration of public benefits* (eg. entitlement to income assistance by under-age parents, adult children living with their parents, or parents with shared custody; foster parent support payments to grandparents);
- vii. *Nepotism* and anti-nepotism cases.

Figure 4, on the following page, is a visual representation of the above breakdown of decisions into categories. The rough percentages used in the pie chart are based on the cases summarized in Appendix A. The calculations reflect a loose estimation of percentages, and are intended to provide a rough portrait that illustrates themes. Insofar as this study excluded most decisions predating *Campbell River*, as well as most preliminary decisions on family status discrimination, the pie chart does not incorporate all decisions by Canadian tribunals and courts on family status. However, even without being fully comprehensive, the visual reveals trends in what kinds of fact patterns are currently being put forward to argue family status discrimination.

Figure 4: Types of Family Status Discrimination



2. Focus on Family and Caregiving Responsibilities

By far a majority of the family status cases deal with family and caregiving obligations. The first four categories set out in the list on page 38 are linked to family responsibilities and leaves associated with providing care, mostly to young children and infants. The tenancy cases generally deal with discrimination linked to the absolute status of being a parent of young children or a single parent. The public benefit cases include a number of cases linked to family caregiving as well. Parental obligations dominate, but there are a few cases pertaining to caregiving in relation to other family members. The purpose of this chapter is to summarize a selection of cases that illustrate this caregiving trend that dominates the family status cases.

Another obvious pattern is that more than half of the cases relate to employment discrimination. As the figure on the previous pages indicates, 58% of the family status discrimination decisions we reviewed—the right side of the pie—arose out of employment circumstances. In B.C. this is a pattern that transcends family status: the B.C. Human Rights Tribunal indicates that in the year 2010-2011 employment cases represented 55% of the overall cases.¹⁴¹ There are many reasons to explain this pattern, including the availability of a trade union to provide access to information on rights as well as legal representation. In Ontario the balance favours employment cases even more strongly: statistics published by the Ontario Human Rights Tribunal indicate that 77% of the applications related to employment discrimination.¹⁴² In other jurisdictions there are so few reported family status decisions—from either labour arbitrators or human rights tribunals—that it is difficult to speak of patterns in decision-making. The majority of the family status employment cases deal with family responsibilities and caregiving.

This chapter considers two clusters of family caregiving-focused cases, examining a selection of decisions from B.C., Ontario and Alberta. Other jurisdictions are not discussed only because there have been few reported decisions on family status in those provinces and territories.

The following section of this chapter (Section 3) reviews a series of grievance arbitrations and tribunal decisions in the employment area. The cases discussed include:

- Arbitrations regarding the financial impact of taking a leave to provide care on entitlement to benefits (category ii);
- Decisions considering facially neutral terms and conditions of employment that arguably had an adverse impact on individuals with particular family responsibilities (category iii); and
- Cases allegedly involving discriminatory termination for reasons related to family caregiving responsibilities (category iv).

The second half of this chapter (Section 4) reviews a series of decisions considering the administration of publically funded benefit programs, in which the complainants argued that a

¹⁴¹ BCHRT Annual Report, *supra* note 15, at 4. The report provides the following breakdown of total claims based on areas of the Code: employment 56%; services 20%; discriminatory publication 7%; tenancy 5%; retaliation 5%; associations 4%; equal pay 2%; advertising 1%; property 0% (5 cases).

¹⁴² “Fiscal Year 2010-2011 - New Applications”, online: Ontario Human Rights Tribunal <<http://www.hrto.ca/hrto/?q=en/node/134>>.

government policy discriminated against categories of individuals on the basis of family status (category vi).

3. Family and Workplace Obligations: Discrimination in Relation to Facially Neutral Requirements

(a) *Coast Mountain*

*Coast Mountain School District No. 82 v. British Columbia Teachers' Federation (Sutherland Grievance)*¹⁴³ was a grievance arbitration concerning a mother who requested to return to work on a part-time basis for the first six months after her maternity leave ended. Given the language of the collective agreement, the request was framed as a request for a six-month part-time extended maternity leave. The grievor alleged discrimination on the ground of sex and family status when the request was denied. The employer required the grievor to either return to her full-time position or request a full-time extended leave, arguing that allowing the grievor to work part-time and share her teaching position would result in educational disruption and additional costs to the employer.

In *Coast Mountain* the arbitrator denied the grievance, concluding that the grievor's circumstances were too commonplace to ground a claim of family status discrimination. The underlying problem was that if Ms. Sutherland's request was granted then the proverbial floodgates would fall open and all female employees would become potentially entitled to part-time work arrangements after their maternity leaves ended. Adopting a *Campbell River* approach to the legal issues, the arbitrator denied the leave because Ms. Sutherland's child was healthy and the leave was not medically required as a result of the child demonstrating any unusual health issues that necessitated his mother's presence.

(b) *Collingwood*

*Collingwood General & Marine Hospital v. Ontario Nurses Association (Gaps in Employment Grievance)*¹⁴⁴ involved three nurses who worked continuously, except for gaps due to maternity leave, for more than 25 years. The grievors had taken leaves, respectively, of three, four and eight years. After her final leave, each grievor found her seniority had been erased. It was, as they found out, the employer's policy to reset an employee's seniority when he or she had taken a leave of more than two years, regardless of the purpose of the leave. The grievors argued that this policy violated the collective agreement and the *Human Rights Code* as it imposed barriers for women raising families, thereby discriminating against women on the ground of family status.

The decision in *Collingwood* is centred around a determination of the appropriate comparator group. The arbitrator asked, "was the appropriate comparator group nurses who had in excess of a two-year gap in employment for reasons other than family status" or "all nurses in the bargaining unit, and, more particularly, those who never had in excess of a two-year gap in employment?"¹⁴⁵ The case was decided based on the principle set out in *Ontario Nurses' Association v. Orillia Soldiers Memorial*

¹⁴³ *Coast Mountain School District No. 82 v British Columbia Teachers' Federation (Sutherland Grievance)*, (2006) 155 LAC (4th) 211 ["*Coast Mountain*"].

¹⁴⁴ *Collingwood General & Marine Hospital v. Ontario Nurses Association (Gaps in Employment Grievance)*, [2006] OLAA No 579 [*Collingwood*].

¹⁴⁵ *Ibid* at 26.

*Hospital*¹⁴⁶ that the comparator group should be narrowly construed if the purpose of the impugned provision is to impact the package of benefits previously negotiated by the union and the employer.

The arbitrator ruled that there was no discrimination, as there were no appropriate comparator groups that could be used by the aggrieved nurses to ground a finding of discrimination. As a result, there was no case of *prima facie* discrimination—particularly as the policy affected all workers equally and with no exceptions, and did not single out pregnant women; rather all gaps in employment were treated in the same manner, be they for the purpose of an extended vacation or parenting. The framing of the comparator group in *Collingwood* reflects an understanding of discrimination that limits the concept of family status discrimination to direct discrimination, in this cases rendering invisible an adverse impact on employees who are mothers.

(c) *Dufferin*

The case of *Dufferin Peel Catholic District School Board v. Ontario English Catholic Teachers Assn (Richardson Grievance)*¹⁴⁷ serves as an interesting counterpoint to the two previously discussed decisions. The arbitrator in *Dufferin* came to a somewhat similar conclusion regarding benefits and parental leaves, but following a rationale that differs from the analysis in *Collingwood*. Like *Coast Mountain*, the *Dufferin* decision concerns grievors who were teachers, and the case tells the story of a group of teachers who stayed home with their children for a longer period than was contemplated within the framework of the collective agreement.

Dufferin involved several teachers who were hired in the years prior to 1979, and took extended maternity leaves until after 1979. The grievors were female teachers hired before 1979 who resigned from their positions in order to extend their maternity leaves beyond the one year allowed under the collective agreement. They were each rehired by the employer months or years later on a date after December 1979. According to the collective agreement, teachers hired after 1979 were not eligible for retirement benefits. Upon returning from their leaves, the grievors were treated as new hires and not given retirement benefits.

In *Dufferin* the arbitrator recognized adverse effect discrimination against the grievors, noting that in terms of a finding of discrimination, the issue was not simply whether the grievors had been singled out for differential treatment. The grievance was allowed in part, limiting benefits to those grievors whose leaves were less than two years, based on a view that leaves longer than two years reflected a lifestyle choice not so connected to the original rationale for parental leave. The arbitrator noted that the original reason for resignation for the grievors “was a direct result of being a woman, becoming pregnant, and subsequently being responsible for childcare,”¹⁴⁸ and thus the women experienced discrimination on the basis of family status. However, for those grievors who remained on leave for longer than two years, there was no discrimination.

The arbitrator concluded that the grievors who took leaves under two years were not appropriately accommodated:

¹⁴⁶ *Ontario Nurses' Association v. Orillia Soldiers Memorial Hospital* (1999), 42 OR (3d) 692 (Ont. C.A.).

¹⁴⁷ *Dufferin Peel Catholic District School Board v. Ontario English Catholic Teachers Assn (Richardson Grievance)*, [2005] OLAA No 187 [*Dufferin*].

¹⁴⁸ *Ibid* at 58.

The question is not only whether there was a maternity leave provision in the collective agreement, because there was, but also whether the subsequent severing of the employment relationship was necessitated because individual employees have not been accommodated to the extent they felt (and we feel) it was required. In that respect, it is undeniable that nothing was offered by the Employer, or available to the teachers, after the initial one-year leave. Thus, it wasn't a question of choice because they had no choice except to resign in order to stay home with their newborn child.¹⁴⁹

(d) *McDonald*

The facts of *McDonald v. Mid-Huron Roofing*¹⁵⁰ differ from the previous three cases in that they concern neither the year following parental leave nor with the experience of female employees caring for young children. Instead the *McDonald* case tells the story of a male employee who took a great number of days off work (fourteen partial or full days) to accompany his wife to pre-natal medical appointments associated with a rather complicated pregnancy that included kidney failure and gallstones. The man was permitted to take a week off when labour was induced for medical reasons, and then advised that he should not request more time off after that. He subsequently left work to take his newborn child to a medical appointment when his wife had to go to emergency for gallstone pain that had caused her to pass out, as he was unable to get anyone else to care for their child. He was fired because he was away from work longer than 20 minutes.

Relying on Supreme Court of Canada jurisprudence, including, *O'Malley*,¹⁵¹ *Meiorin*¹⁵² and *Central Alberta Dairy Pool*,¹⁵³ the Tribunal found that the complainant experienced discrimination based on family status and was not accommodated up to the point of undue hardship. The Tribunal concluded that employer's requirement that the complainant return after 20 minutes did not reflect a proper inquiry into the particular circumstances or a serious consideration of whether the complainant's family related needs could be accommodated.

In *McDonald* the Tribunal noted equality often requires differential treatment:

For the purposes of the *Code*, discrimination is not confined to only those situations in which A is treated differently from B because of personal characteristics (grounds) listed in the legislation. Discrimination for the purposes of the *Code* can also occur when everyone is treated the same, without appropriate recognition of circumstances related to those personal characteristics. A requirement imposed identically on everyone can have the effect of denying the right to equal treatment to people with personal characteristics protected by the *Code*.¹⁵⁴

(e) *Alberta (Solicitor General)*

Alberta (Solicitor General) v. Alberta Union of Public Employees (Jungwirth Grievance) concerned a grievor

¹⁴⁹ *Ibid.* at 56.

¹⁵⁰ *McDonald v. Mid-Huron Roofing*, [2009] OHR TD No 1277 [*McDonald*].

¹⁵¹ *O'Malley*, *supra* note 64.

¹⁵² *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3 [*Meiorin*].

¹⁵³ *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 SCR 489 [*Central Alberta Dairy Pool*].

¹⁵⁴ *McDonald*, *supra* note 150 at 23.

who was a prison guard and mother of an 11-year old child. The grievor had previously worked a rotation that included only mornings and afternoons, because another employee had volunteered to work all the night shifts. When this employee was re-assigned, the employer required all employees working in her area to rotate through night shifts, amounting to a total of 30 night shifts a year for the grievor. The grievor was a single mother, and for various reasons it was difficult for her to find overnight childcare. The grievor proposed alternative scheduling possibilities that would reduce but not eliminate her night shifts, but the employer refused.

The grievor shared joint custody of her child with her ex-husband. She was the primary caregiver and her son lived with her 80% of the time. Her ex-husband was a registered nurse who worked the permanent night shift, and so he could only take care of the child on some of the nights that the grievor would be required to work nights. The grievor's mother was able to provide limited assistance at night because she already provided afternoon care, and the grievor did not feel comfortable having her son stay with other family members: the practice was disruptive for her child and left him "unhappy and anxious".

The arbitrator ruled in favour of the employer, finding that the grievor had not demonstrated that she had thoroughly explored the options for overnight childcare, and thus she had not made out a case for *prima facie* discrimination. The arbitrator stated that before a grievor can make out a case of discrimination she must "provide sufficient evidence of the absence of reasonable alternatives for care."¹⁵⁵ He stated:

A second option would be to arrange to have someone stay at her house on the nights she worked. According to the Grievor this was difficult to arrange. While the Board accepts that arranging night care in one's home is not simple, few details were provided as to why this was not a reasonable alternative. If her mother and other relatives could not stay over, was it not possible to hire someone to provide the care? Was it a cost issue? The Board was provided with no information on these questions.¹⁵⁶

In *Alberta (Solicitor General)* the arbitrator determined that the grievor had provided insufficient evidence as to why it would be unreasonably challenging for her to arrange to have someone stay in her home to care for her son.

4. The Costs of Caregiving and Entitlement to Public Funding to Assist with Caregiving Activities and Family Responsibilities

(a) *Hutchinson*

*HMTQ v. Hutchinson*¹⁵⁷ was a judicial review of a decision of the B.C. Human Rights Tribunal. In 1998 Cheryl Hutchinson had applied under the Ministry of Health's Choice in Supports for Independent Living Program (CSIL) to hire her father as her caregiver. The CSIL program, which has been in existence for more than twenty years,¹⁵⁸ provides funding such that select individuals

¹⁵⁵ *Alberta (Solicitor General) v. Alberta Union of Public Employees (Jungwirth Grievance)*, [2010] AGAA No 5 [*Alberta (Solicitor General)*].

¹⁵⁶ *Ibid* at 71.

¹⁵⁷ *HMTQ v. Hutchinson et al*, 2005 BCSC 1421 [*Hutchinson*].

¹⁵⁸ Karen Spalding, Jillian R. Watkins & A. Paul Williams, *Self Managed Care Programs in Canada: A Report to Health Canada*,

with severe disabilities may become an employer of a caregiver, and assume responsibility for hiring, training and administering payroll—essentially choosing a caregiver who will be paid through Ministry funds.¹⁵⁹ Ministry policy at the time prevented CSIL participants from hiring family members as paid caregivers, a rule founded on the principle that the program was intended to supplement family assistance.

Ms. Hutchinson was a 35-year old woman with cerebral palsy. She had been a quadriplegic since adulthood. She required significant assistance with personal care activities, including bathing, dressing, toileting, meal preparation and mobility. Mr. Hutchinson, who was age 71 at the time of the human rights complaint, had been his daughter’s primary caregiver since she was 13 years old. He was not able to maintain paid employment and had received income assistance during the years that he cared for his daughter. Ms. Hutchinson was approved for the program and sought to hire her father when she was unsuccessful in finding alternative appropriate caregivers. The request was denied and Ms. and Mr. Hutchinson both filed human rights complaints; she argued discrimination based on disability and family status; he argued discrimination based on family status only.

The B.C. Supreme Court upheld the decision of the Tribunal that both complainants had experienced discrimination. Applying the contextual analysis from *Lam*,¹⁶⁰ the Tribunal had concluded that the blanket prohibition against hiring family members offended the dignity of the complainants, given the personal and intimate nature of the care provided and the long history of Mr. Hutchinson providing care—factors not considered under the terms of the policy. The Tribunal found that the impact of the policy was to restrict, rather than support, the independence and autonomy of this woman with severe disabilities. The Ministry was ordered to amend the policy in a manner consistent with the continued employment of Mr. Hutchinson as Ms. Hutchinson’s caregiver under the program, as well as to pay compensation to both complainants, including lost wages to Mr. Hutchinson.

Subsequent to the decision the Ministry amended the policy to permit the hiring of immediate family members in the following narrow circumstances:

1. the client or client support group wishes to pay an immediate family member to provide assessed services that the health authority would otherwise provide either through CSIL or a family care home.
2. the health authority has determined there is no appropriate and available caregiver to provide for any extraordinary or unique needs of the client for one or more of the following reasons:
 - nature and degree of care required.
 - rural or remote location.
 - cultural barriers.
 - communication barriers.
3. the family circumstances of the client have been considered.
4. the client’s care plan includes appropriate respite for the immediate family member.¹⁶¹

Report to the Home and Continuing Care Unit of the Health Care Policy Directorate (Ottawa: Health Canada, 2006) at 14.

¹⁵⁹ “Community Care Services”, online: BC Ministry of Health <<http://www.health.gov.bc.ca/hcc/csil.html>>.

¹⁶⁰ *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 [Law].

¹⁶¹ “Home and Community Care Policy Manual”, Chapter 8, Section H, online: BC Ministry of health

(b) *McGrath*

*British Columbia (Ministry of Children and Family Development) v. McGrath*¹⁶² concerned the decision of the Ministry to discontinue foster care payments to three grandparents (Verkerk, Fox and McGrath) who had obtained custody of their grandchildren. All three grandmothers would have been entitled to receive the support payments had they not obtained legal custody and instead remained foster parents. The complainants stated in their applications that “the Respondent has policies and practices in place to encourage people to provide foster care to children to whom they are related, but then provides those people with less support than it would otherwise provide to non-related foster parents.”¹⁶³ The complainants argued that this distinction amounted to discrimination on the ground of family status, as well as other grounds, arguing discrimination in both service customarily available to the public and employment.

Once they had legal custody of their grandchildren, the grandparents were entitled to receive \$257 - \$271 a month through the “Child in the Home of a Relative Program” of the Ministry for Employment and Assistance (a form of welfare or income assistance), whereas previously they had been entitled to approximately \$800 a month as foster parents administered by the Ministry for Child and Family Development. The Verkerk and McGrath children had additional needs due to disabilities.

All three complainants filed individual applications and were successful at Tribunal in opposing an application to dismiss based on discrimination in services customarily available to the public under section 27 of the *Human Rights Code*. All three judicial reviews were heard by the B.C. Supreme Court together because they raised similar legal questions. The Ministry argued that the *Child, Family and Community Services Act* did not provide for payments to custodial parents to raise children. Foster parent payments are rather temporary payments to caregivers of children in the care of the Director. The question of a policy to provide financial assistance to grandparents raising their grandchildren was a separate issue not before the Court.

The Court dismissed all three complaints. The Court considered the relevant distinction to be foster parent status—a legal status—as opposed to the complainants’ family status. The complainants were denied a benefit because the children were “not in need of protection” and not in the care of the Director. The Court stated that the complainants sought a benefit not contemplated by the legislation. The Court distinguished *Hutchinson*, finding that in *McGrath, Fox and Verkerk* the benefit was not being denied strictly because the grandparents were relatives.¹⁶⁴

<<http://www.health.gov.bc.ca/hc/policy-manual.html>>.

¹⁶² *British Columbia (Ministry of Children and Family Development) v. McGrath* [2009] BCJ No 257 [*McGrath*].

¹⁶³ *McGrath v. British Columbia (Ministry of Children and Family Development)*, 2006 BCHRT 484, at 11. [*McGrath* Tribunal decision].

¹⁶⁴ The BC Human Rights Tribunal recently revisited the issue of Ministry for Child and Family Development discrimination against grandparents on the basis of family status in *Zoost v. British Columbia (Ministry of Children and Family Development)*, [2010] BCHRTD No 156 [*Zoost*]. In *Zoost* the complainant alleged that the Ministry discriminated against her and her son on the ground of family status. The Ministry had refused to classify and pay her as a restrictive foster parent because she had custody of her grandson. *Zoost* was dismissed as having no reasonable prospect of success given that the decision of the Supreme Court was binding and there were no relevant differences that warranted distinguishing the *Zoost* case.

(c) *Hendershott*

The complainant in *Hendershott v. Ontario (Ministry of Community and Social Services)*¹⁶⁵ was a fifteen year old girl who had given birth to twins. She sought financial assistance under the *Ontario Works Act* to support herself and her children. Meghan Hendershott was denied assistance for her own support on the basis that she was a minor, and further denied assistance for the support of her children because she was living with her own parents. Her father filed complaints on behalf of his daughter as well as complaints on his own behalf, alleging discrimination on the ground of family status. At the time of the birth of her children Meghan was living with and financially dependent on her parents. As in a number of cases heard in relation to income assistance, the Ministry argued the relevant distinction was not family status but residency, that is to say, the fact that the complainant lived with her parents. The Ministry also argued that the distinction created no real disadvantage and that the complainant was rather advantaged by having the monetary and non-monetary support of her parents.

The Tribunal considered whether there was a need to provide evidence of substantive inequality in order to make out an argument of discrimination. Referring to the decision of the Supreme Court of Canada in *Tranchemontagne*,¹⁶⁶ the Tribunal noted that in most instances it will be sufficient to establish a case of *prima facie* discrimination by demonstrating a distinction based on a prohibited ground that gives rise to a disadvantage. The Tribunal stated that “[h]owever, family status and marital status claims can cut across gender, race and class lines and are not always imbued with the same sense of history,”¹⁶⁷ making it less evident that it will always be possible in a family status case for a finding of substantive discrimination to flow from a finding of a distinction based on a ground. Thus, in some instances, it will be necessary to consider whether a case gives rise to concerns regarding substantive equality. The Tribunal noted, with reference to the decisions in *Kapp*¹⁶⁸ and *Armstrong*,¹⁶⁹ “[a]t the risk of over-simplification, the Court of Appeal appears to be suggesting that some cases will beg the question “is this really a human rights issue?”¹⁷⁰

Following the reasoning in *B. v. Ontario*,¹⁷¹ the Tribunal determined that the complainant was not required to establish that she is a member of a historically disadvantaged group in order to make out a breach under the *Code*. However, the Tribunal did point out that “there are elements of historical disadvantage at the root of [Meghan Hendershott’s] experience as a teenage mother who is dependent on her parents and the state for the support of her children.”¹⁷²

The complainant and her parents provided evidence of the impact that not receiving assistance had had on the family, and the Tribunal concluded that the distinction in benefits and the denial of assistance to the complainant’s children exacerbated existing disadvantage. The financial loss was close to \$300 per month, which was a significant amount for a girl trying to finish high school. Mr. and Mrs. Hendershott had to stop letting out a room for income, which had a significant negative

¹⁶⁵ *Hendershott*, *supra* note 5.

¹⁶⁶ *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 SCR 513 [*Tranchemontagne*].

¹⁶⁷ *Hendershott*, *supra* note 5 at 46.

¹⁶⁸ *R. v. Kapp*, [2008] 2 SCR 483 [*Kapp*].

¹⁶⁹ *Armstrong v. British Columbia (Ministry of Health)*, 2010 BCCA 56 (leave to appeal dismissed) [*Armstrong*].

¹⁷⁰ *Hendershott*, *supra* note 5 at 51.

¹⁷¹ *B v. Ontario*, *supra* note 16.

¹⁷² *Ibid* at 71.

impact on their income. The complainant was humiliated by having caused financial trouble for her family. The Tribunal noted that the assumption underlying the Ministry's policy, that grandparents would be able to support their grandchildren, was inaccurate.

With respect to the allegation of discrimination in that benefits were not made available to Meghan, the Tribunal found that the *Ontario Works Act* does not apply to minors, and this distinction was not discriminatory. However, the section preventing assistance from being distributed to support children whose parents are living with their parents was discriminatory on the basis of family status. The Tribunal found this distinction to be based on family status as it related to an aspect of the daughter's relationship with her parents, that is to say, the decision denying benefits was based on the fact of a parent-child relationship between her and the individuals with whom she lived.

(d) *Weller*

The reasoning in the *Hendersbott* case differs slightly from the decision of the Alberta Court of Appeal in *Alberta (Ministry of Human Resources and Employment) v. Weller*.¹⁷³ In *Weller* the complainant applied for a social allowance, but was repeatedly denied the "shelter" portion of the allowance as he was living with his mother, consistent with Ministry policy regarding individuals who indicate they are living in the home of a family member and paying rent to the family member. The Tribunal found the complainant was being treated differently than others who were eligible for social assistance solely because he lived with his mother and paid rent to her rather than a non-related landlord, amounting to discrimination. The Ministry of Human Resources and Employment sought a judicial review of the decision. The review was dismissed by the Court of Queen's Bench.

The Ministry successfully appealed that dismissal to the Court of Appeal. Considering the meaning of family status, the Court of Appeal found that the complainant had not experienced discrimination on the basis of family status, as the distinction was based on living arrangements, not family status. Applying contextual factors articulated in *Law*,¹⁷⁴ and considering the decision in *Gosselin*,¹⁷⁵ the Court noted that the complainant was not part of a group that had experienced historic disadvantage, by virtue of his residency status. The facts of *Weller* were notably different from *Hendersbott*, in that the complainant in *Hendersbott* was considered to be vulnerable and marginalized not strictly as a result of being a person receiving income assistance who was dependent on her parents, but more particularly because she was a single parent and a teenage mother struggling to finish high school. Indeed, in *Weller* the Court pointed out that, with respect to the circumstances of single mothers, courts have recognized family status identity as a site of historical disadvantage.¹⁷⁶ However, the respective decisions remain founded on a different conceptualization of whether distinctions drawn by the government with respect to the entitlement to benefits of applicants living with their parents are properly conceptualized as distinctions based on family status: in *Hendersbott* the Ontario Human Rights Tribunal said yes; in *Weller* the Alberta Court of Appeal said no.

The *Weller* case arguably does not belong in this mix, for the factual summaries in the decisions do not clearly illustrate family caregiving obligations. However, the dynamic of adult children returning

¹⁷³ *Alberta (Ministry of Human Resources and Employment) v. Weller* (2006) ABCA 235 [*Weller*].

¹⁷⁴ *Law*, *supra* note 160.

¹⁷⁵ *Gosselin v. Quebec (Attorney General)*, [2002] 4 SCR 429 [*Gosselin*].

¹⁷⁶ *Weller*, *supra* note 173 at 53.

home to live with their parents may speak to a need for assistance and support from the parent. Neither the Human Rights Commission nor the Court of Appeal decision tell us very much about the circumstances of Dennis Weller.

5. Conclusion

The cases discussed in this chapter underscore the omnipresence of family responsibilities and caregiving responsibilities in the family status jurisprudence. This chapter illustrates two patterns in family status decision-making that reflect the impact of family caregiving on families in contemporary Canadian society.

The chapter discusses employment cases and public benefit cases. The employment section considers arbitrations that illustrate the impact of absence from the workplace due to maternity, parental or other leave related to family obligations on entitlement to other negotiated benefits, such as pay increases and retirement benefits. This section also includes grievance arbitrations and tribunal decisions that demonstrate how an employer's facially neutral employment standard—denials of requests to convert to part-time, requirements to work overnight shifts—might have an adverse impact on employees with certain caregiving responsibilities. Another case in the employment section illustrates discriminatory termination of an employee for taking time off work to care for family. The second part of this chapter summarizes cases that address government policies that arguably discriminate against individuals on the basis of their family circumstances.

One notable difference between the employment cases and the public benefit cases is that the first group presents a conflict between a complainant or a union (on behalf of a grievor) and an employer, and the second cluster presents a dynamic where one party is a government Ministry. The circumstances of the latter provide an opportunity for a discussion of the impact of a social policy; however, the decisions still focus on the impact of a policy on the category of individuals involved in the case, and generally, except for the remedy in *Hutchinson*, the decisions provide for a resolution that does not extend beyond the circumstances of the particular individual involved in the case, regardless of the systemic barriers underscored by the case.

Viewed collectively, these cases identify some of the pressures contemporary Canadian families are currently facing. These cases suggest a need for further conversations beyond the confines of litigation. Adjudicative processes are by their very nature focused on the resolution of the particular case at hand, and thus often unable to craft remedies with the capacity to address the systemic discrimination or social barriers that significantly impacted the experience of the grievor or complainant. Since as early as the mid 1990s, human rights critics have called for reform of the B.C. human rights regime to increase the focus on eradicating systemic discrimination. As discussed above, in Chapter II, one of the major recommendations of the Black Report was that the primary objective of B.C. human rights legislation should be the eradication of systemic discrimination, which causes the greatest harm but has “the greatest potential for an effective remedy”.¹⁷⁷ However, this is not a path B.C. has followed. The above cases highlight the shortcomings of the adjudicative processes utilized by the complainants in these cases in addressing systemic barriers, and the failure of statutory reform in B.C. to prioritize the eradication of systemic discrimination, instead favouring an individualistic, case-by-case approach.

¹⁷⁷ Black Report, *supra* note 34.

D. Trends and Distinctions in Defined and Undefined Jurisdictions: A Comparison of British Columbia, Alberta and Ontario

1. Introduction

Canadian human rights legislation reveals three different approaches to defining the family status ground. The B.C. *Human Rights Code* includes family status in a list of prohibited grounds, but does not define the term. This approach is also true of the federal jurisdiction, the Northwest Territories, Yukon and Manitoba.¹⁷⁸ Among the provinces and territories that define the term, two definitions are used in Canada: in Alberta and Nunavut it is the broad status of being “related to another person by blood, marriage, or adoption”;¹⁷⁹ in Ontario, Saskatchewan, Nova Scotia, Prince Edward Island, and Newfoundland and Labrador, the human rights statute defines family status as the status of “being in a parent-child relationship.”¹⁸⁰ Figure 3 in Chapter II illustrates the approaches taken by the various Canadian provinces and territories.

Arguably, the three approaches to a definition can be placed on a spectrum according to breadth, with the undefined concept of family status sitting at the one end, the strict “parent-child relationship” definition figuring at the opposing end of the spectrum, and the definition of being “related by blood, marriage, or adoption” forming a middle ground. If tribunals were to interpret the concept of family status in a literal manner, according to the confines of their respective definitions, it might be easiest to make a claim of family status discrimination in jurisdictions where the ground is undefined, and therefore capable of incorporating a broader scope of complaints. Conversely, in provinces where the term is defined, complainants would face the additional burden of proving that their experience fit within their province's respective definition of family status; thus, it might be more difficult to establish family status discrimination.

At first consideration we know this hypothesis cannot be true, for it is out of the province of B.C., a jurisdiction unfettered by a statutory definition, that the more restrictive family status discrimination test has emerged, in the decision of the B.C. Court of Appeal in *Campbell River*.¹⁸¹ However, from a law reform perspective, the current controversy surrounding the meaning and scope of family status raises the question of whether uncertainty could be cured by legislating meaning. With this possibility in mind, the purpose of this chapter is to explore the impact of statutory definitions of family status on how decision-makers in various Canadian jurisdictions have conceptualized family status discrimination. This analysis compares decisions emanating from B.C., Alberta and Ontario. The undefined jurisdiction we consider is B.C., the focal point of this Study Paper. Alberta and Ontario were chosen as comparators because they are the jurisdictions representing the other two approaches to defining family status that demonstrate the highest volume of decision-making, thereby providing the greatest number of decisions to review.

¹⁷⁸ *Canadian Human Rights Act*, RSC 1985, c H-6; *Human Rights Act*, SNWT 2002, c 18; *Human Rights Act*, RSY 2002, c 116; *The Human Rights Code*, CCSM 1987, c H175.

¹⁷⁹ *Alberta Human Rights Act*, *supra* note 9, at s 44(1)(f); *Human Rights Act*, SNu, *supra* note 9, at s 1.

¹⁸⁰ *Human Rights Code*, RSO, *supra* note 10, at s 10(1); *Saskatchewan Human Rights Code*, *supra* note 10, at s 2(1)(h.1); *Human Rights Act*, RSNS, *supra* note 10, at s 3(h); *Human Rights Act*, RSPEL, *supra* note 10, at s 2(h.11); *Human Rights Act*, 2010 SNL, *supra* note 10, at s 2(i). As noted in Figure 3, New Brunswick does not include family status as a protected ground and Quebec includes the ground of civil status.

¹⁸¹ *Campbell River*, *supra* note 3.

There are primarily two questions at issue in this chapter. First, what role has the statutory definition played, if any, in decision-making? Are certain claims being denied in Alberta or Ontario based on the limits of the statutory definition? Second, are we generally seeing a more consistent approach to defining family status discrimination in Ontario and Alberta? Is the definition playing a clarifying function within those jurisdictions? Incidentally, this chapter also tracks reliance on *Campbell River* in Alberta and Ontario, considering to what extent the decision is being used to curtail the scope of family status discrimination in jurisdictions where family status is defined in the human rights statute.

This case review suggests that currently the definitional approach taken in a jurisdiction has some impact on the scope and meaning of both family status and family status discrimination in that province or territory. However, the impact is not great. Since a large number of the reported tribunal and arbitration decisions on family status discrimination pertain to circumstances involving a parent and child relationship in which the individuals are related by blood, marriage or adoption—a familial connection that fits the criteria set out in both types of statutory definition—the definitional approach becomes somewhat moot, and thus decisions contain minimal discussion of the meaning of family status. As is repeatedly a theme of this Study Paper, reported decision-making has proven to provide a partial portrait of family status discrimination, and in this study we see that the impact of a definition may be to some extent obscured by similarities in the facts underlying the majority of cases.

In terms of issues addressed in reported decisions, the pressing and controversial question appears to be not so much what kind of relationships are included, but what kinds of barriers and distinctions amount to discrimination—an answer not resolved by any of the existing statutory approaches to defining family status. In Canada, statutory definitions focus on the type of family relationship, rather than the nature of treatment or barriers experienced by a complainant.

This comparative review suggests that differing approaches to carving out the scope of family status discrimination are emerging out of the comparator jurisdictions. While *Campbell River* is often, but not consistently, applied in B.C., especially in cases where the factual circumstances parallel *Campbell River*, i.e., work schedule conflicts with childcare responsibilities, the *Campbell River* approach to limiting the scope of family status discrimination is not dominant in either Alberta or Ontario. In some very recent decisions coming out of Alberta and Ontario we see arbitrators applying what they characterize as a test that amalgamates aspects of *Campbell River* and *Johnstone*; however, insofar as this approach retains the “serious interference with a substantial parental or family duty or obligation” barometer, this allegedly amalgamated test is a sign that *Campbell River* is now becoming more persuasive outside B.C.

This review of decisions includes court cases as well as decisions of human rights tribunals and labour arbitrators, and focuses largely on decisions subsequent to *Campbell River*. This chapter highlights a selection of cases in order to illustrate the meaning of family status in B.C., Alberta and Ontario. The chapter highlights cases that present slightly atypical fact patterns, thereby pushing the envelope in terms of what kinds of personal relationships might fall within the category of family status, and notes cases where the statutory definition is referenced to widen or narrow the scope of family status. A small number of cases that involve caregiving responsibilities characteristic of parent and child relationships are also discussed in order to illustrate the authoritative power of *Campbell River* in the various jurisdictions. However, cases following the *Campbell River* approach are

explored in greater detail in the Chapter E of this Study Paper, which focuses on the conceptual implications of language underlying the *Campbell River* approach.

2. British Columbia

(a) The Influence of *Campbell River* in B.C.: The Concepts of Family Status and Family Status Discrimination

The leading authority in B.C. in terms of family status discrimination remains *Campbell River*. However, even within B.C., the Court of Appeal decision is not consistently followed. Although the decision is often relied on in cases involving a request for an employer to accommodate parenting responsibilities,¹⁸² facts bearing a strong similarity to those underlying *Campbell River*, the Tribunal has found the *Campbell River* test to be inappropriate for a non-employment context,¹⁸³ and has distinguished the test in some employment decisions.¹⁸⁴ Further, *Campbell River* is not consistently applied in all family status cases where parental duties are at issue. Figure 5 on the following page identifies a selection of recent court, tribunal and arbitration decisions on family status, using shading to denote which decisions follow *Campbell River*, *Johnstone* or neither approach. The figure provides a visual representation of the comparable dominance of the competing approaches articulated in *Campbell River* and *Johnstone*.

It is important to note that while *Campbell River* sought to provide greater clarity in the context of an undefined and potentially extremely broad ground of discrimination, the decision provides a definition of *family status discrimination*, whereas statutory definitions apply to the concept of *family status*—two related but different concepts. The former refers to types of treatment or barriers to access captured by the concept of discrimination; the latter identifies the relationships included in the category of family. As Tribunal member Lyster noted in *Miller*:

I tend to agree with the B.C. Teachers Federation that the term “family status” ought, absent textual or other indications of a contrary legislative purpose, to be given the same meaning wherever it appears in the *Human Rights Code*. Further, had the Court of Appeal defined “family status”, that definition would be binding on this Tribunal.

The difficulty with the BCTF's submissions, however, is that the Court of Appeal did not define “family status” in *Health Sciences Association of B.C. v. Campbell River and North Island Transition Society*. The Court of Appeal did refer to the “definition” of “family status” in saying that “if the term ‘family status’ is not elusive of definition, the definition lies somewhere between the two extremes urged by the parties”: para. 39. But the Court of Appeal did not, in fact, go on to define “family status”.

¹⁸² See for example, *Evans v University of British Columbia*, [2008] BCJ No 1453 [*Evans*]; *Coast Mountain*, *supra* note 143; *Falardeau v Ferguson Moving and others*, 2009 BCHRT 272 [*Falardeau*]; *Gao v Minco Mining*, (2010) BCHRT 204.

¹⁸³ *Stephenson v. Sooke Lake Modular Home Co-operative Assn.* (No. 1) (2007) BCHRT 341 [*Stephenson*]; *Rodriguez and others v. Coast Mountain Bus Company and another* (No. 3), 2008 BCHRT 427.

¹⁸⁴ *Haggerty v. Kamloops Society for Community Living*, (2008) BCHRT 172; *Miller v. BC Teachers Federation*, (2009) BCHRT 34 [*Miller*]; *Brown v. PML & Wightman*, (2010) BCHRT 93; *Cavanaugh v. Sea-to-Sky Hotel* (No. 2), (2010) BCHRT 209.

Figure 5: Court, HR Tribunal, and labour decisions since *Campbell River*

courts	HR tribunals	labour decisions
<ul style="list-style-type: none"> • Meiorin Grievance [1999] 3 SCR 3 		
<ul style="list-style-type: none"> • HSABC v. Campbell River [2004] BCCA 260 		
<ul style="list-style-type: none"> • HMTQ v. Hutchinson et al. [2005] BCSC 1421 		<ul style="list-style-type: none"> • Defreitas Grievance [2005] OLAA No 396
<ul style="list-style-type: none"> • Johnstone v. Canada (AG) [2007] 3 FCR D-4 	<ul style="list-style-type: none"> • Hoyt v. CNR (2006) CHRT 33 • Rennie v. Peaches and Cream Skin Care Ltd. (2006) AHRC 13 • Esposito v. BC (No. 2) (2006) BCHRT 300 	<ul style="list-style-type: none"> • Reynolds Grievance [2006] NSLAA No 15 • Sutherland Grievance [2006] BCCAAA No 187 • Sommerville Grievance [2006] CLAD No 371
<ul style="list-style-type: none"> • Evans v. UBC (2008) BCSC 1026 	<ul style="list-style-type: none"> • Stephenson v. Sooke Lake Modular Homes (no 1) (2007) BCHRT 341 	<ul style="list-style-type: none"> • Kitchen Grievance [2007] OLAA No 673
<ul style="list-style-type: none"> • Olivera v. Ontario [2008] OJ No 622 	<ul style="list-style-type: none"> • Haggerty v. Kamloops Society for Community Living (2008) BCHRT 172 • Rodriguez v. Coast Mountain Bus Co. (2008) BCHRT 427 • Heintz v. Christian Horizons (2008) HRTO 2 	<ul style="list-style-type: none"> • Kanayochukwu Grievance [2008] OLAA No 668
<ul style="list-style-type: none"> • Nipissing Condo Corp. no. 4 v. Kilfoyl [2009] OJ 3718 	<ul style="list-style-type: none"> • Hiebert v. Martin-Liberty Realty (2009) MHRBOA 	<ul style="list-style-type: none"> • Rajotte v. Canada Border Services Agency [2009] PSST No 25
<ul style="list-style-type: none"> • Killam Properties Inc v. Frail [2009] NSJ No 653 	<ul style="list-style-type: none"> • Rawleigh v. Safeway Canada Ltd (2009) AHRC 6 	<ul style="list-style-type: none"> • Warling Grievance [2009] OGSBA No 88
<ul style="list-style-type: none"> • Miller v. BC Teachers' Federation (2009) BCHRT 34 • McDonald v. Mid-Huron Roofing (2009) HRTO 1306 • Fraser v. SecurTek Monitoring Solutions Inc. (2009) SHRT 2 • Junego v. Peel (Regional Municipality) (2009) HRTO 1849 	<ul style="list-style-type: none"> • Johnstone v. Canada (AG) (2010) CHRT 20 • Whyte, Seeley and Richards v. CHRC and CNR (2010) CHRT 23 • Brown v. PML & Wightman (2010) BCHRT 93 • Gao v. Minco Mining (2010) BCHRT 204 • Cavanaugh v. Sea-to-Sky Hotel (no 2) (2010) BCHRT 209 • Khalifa, Melissa v. Indian Oil and Gas Canada (2010) CHRT 21 	<ul style="list-style-type: none"> • Bender Grievance [2009] OLAA No 447 • Wilkins Grievance [2009] BCCAAA No 152
<ul style="list-style-type: none"> • AT & VT v. General Manager OHIP 2010 ONSC 2398 • Kelly v. PEI [2010] PEIJ No 12 	<ul style="list-style-type: none"> • Saroyan v. Deco Automotive (2011) HRTO 255 • Malcolm v. Yukon College [2011] YHRBAD No. 2 • Van Staalduijn v. BC (2011) BCHRT 226 • Baines v. 0781380 BC Ltd. (2011) BCHRT 266 	<ul style="list-style-type: none"> • Castro Grievance [2010] OLAA No 667 • Laba Grievance [2010] OLAA No 715 • Jungwirth Grievance [2010] AGAA No 5
<ul style="list-style-type: none"> • DWR v. DJR 2011 ABQB 608 • Saskatoon Health Authority v. Bear [2011] SJ 594 	<ul style="list-style-type: none"> • Saroyan v. Deco Automotive (2011) HRTO 255 • Malcolm v. Yukon College [2011] YHRBAD No. 2 • Van Staalduijn v. BC (2011) BCHRT 226 • Baines v. 0781380 BC Ltd. (2011) BCHRT 266 	<ul style="list-style-type: none"> • Loranger Grievance [2011] OLAA No 24 • Parental Benefits Grievance [2011] BCCAAA No 12 • Layoff Notice Grievance [2011] BCCAAA No 54
<p>The bases highlighted in bold text indicate those cases focussing on employment issues</p> <p>The cases outlined in white indicate those cases which follow the reasoning set out in <i>Campbell River</i></p> <p>The cases outlined in dark grey indicate those cases which follow the <i>Meiorin/Hoyt/Johnstone</i> reasoning</p> <p>The cases outlined in light grey follow neither approach</p>		

Rather, what the Court of Appeal did was to describe the circumstances in which a *prima facie* case of discrimination in family status in employment would be established...¹⁸⁵

In recent jurisprudence the confines of family status discrimination have been discussed in quite a number of decisions that say little about the categories of relationships captured by the concept of family status. Many of these cases involving family responsibilities discrimination involve parenting responsibilities and childcare issues. However, a selection of recent decisions provides some insight into the scope of family status in B.C.

(b) Expanding the Scope of Family Status in B.C.

In B.C. the meaning of family status is at least as broad as the Ontario definition: a number of cases have confirmed that the definition “includes discrimination on the basis that a person is associated with children.”¹⁸⁶ Although, as is the case in other jurisdictions, most family status decisions pertain to parent and child relationships, the discussion below highlights a number of decisions that problematize the scope of family status.

(i) The Meaning of “Child”

Mahdi v. Hertz Canada further clarified the meaning of child. In this case the complainant requested three days bereavement leave following the death of his daughter, who died shortly after being born, at 21 weeks gestation. The complainant’s family held a funeral for the stillborn child. The respondent employer refused the leave, citing a policy that the leave was not available with respect to infants who lived less than 24 hours. The Tribunal considered whether family status applied to a relationship involving infant children who die under circumstances that might be considered a miscarriage.

In refusing to dismiss the case as having no reasonable prospect of success, Member Beharrell noted the absence of a definition in B.C. supports a broad approach to family status:

Family status is not defined in the *Code*. In some decisions of the Tribunal family status had been defined as including the status of being in a parent-child relationship, or a person associated with children: those definitions should not be considered to be exhaustive. For example, it is possible that “family status” could include the status of having lost a child either through miscarriage or through stillbirth.¹⁸⁷

(ii) Cohabiting Relationship

Berezan v. M.R. Photo & Cameras Ltd. concerned two employees in a same-sex cohabiting relationship who were simultaneously dismissed from positions they had held for a number of years, ostensibly due to performance and economic reasons. The complainants filed an application

¹⁸⁵ *Miller, ibid*, at 22-24.

¹⁸⁶ *Stephenson, supra* note 183 at 29, citing *Wickham and Wickham v. Mesa Contemporary Folk Art and others*, 2004 BCHRT 134.

¹⁸⁷ *Mahdi v. Hertz Canada*, (2008) BCHRT 245 at 55 [*Mahdi*] (emphasis hers).

alleging discrimination on the basis of sexual orientation and family status. Member Beharrell denied the application to dismiss the claim based on sexual orientation, but dismissed the claim based on family status under s. 27(1)(b). Her dismissal is preceded by language encouraging an expansive approach to family status:

There may certainly be cases in which a relationship involving a cohabiting but not legally married same-sex couple will be found to constitute a complaint on the ground of marital or family status. In such cases, the information supporting such a finding is in the possession of the complainants. In this case, given the lack of detail in the complaint relating to the grounds of family or marital status, and the dearth of information provided by the complainants in response to the respondents' application, I find that the acts or omissions alleged in the complaint, in relation to the ground of family status and marital status, do not constitute a contravention of the *Code*. I therefore dismiss that part of the complaint under s. 27(1)(b).¹⁸⁸

The above words may suggest that lesbian couples who live together will not be presumed to be family in the absence of additional information about the nature of the particular relationship. Alternatively, the reasoning may speak to a general lack of reply from the complainants with respect to the particular section 27 application at issue. The case summary is not explicit in this regard.

However, the Tribunal has previously recognized lesbian couples and their children as family. In *Gill* the Tribunal found that Vital Statistics discriminated against a woman who was the same sex partner of a birth mother, as well as the child of the same sex couple, based on the grounds of sex, sexual orientation and family status, by denying the complainant a right to be registered as a parent on birth documentation.¹⁸⁹ This case joined two applications by separate lesbian couples. *Gill* contains very little discussion of the nature of the same sex relationships at issue, other than discussion of the processes through which the respective couples conceived a child.

(iii) Marriage-like Relationship

In *L. v. B.C. (Ministry of Children and Family Development)*, the complainant, a 16-year old girl living with her 20-year old boyfriend, was denied financial and other services from the Ministry consistent with the Ministry policy of denying assistance to youth who were in a marriage-like relationship. In denying the application to dismiss the part of the complaint that alleges discrimination based on family status under s. 27, Member Juricevic stated, “in my view, L’s allegations of discrimination with respect to family status or marital status, if proven, could constitute a contravention of the *Code* against the Ministry.”¹⁹⁰ As compared with *Berezan*, this young woman’s co-habiting relationship fell within the ambit of family. The relevant distinction is likely that the relationship was characterized as “marriage-like,” rather than that it was heterosexual; although, one wonders whether the marriage-like quality ought to go more to marital status, as opposed to family status, given that the B.C. *Code* includes both grounds.

(iv) Custodial Non-parents

¹⁸⁸ *Berezan v. M.R. Photo & Cameras Ltd. (c.o.b. Photo Express Foto Source)*, [2010] BCHRT No 42, at 47 [*Berezan*].

¹⁸⁹ *Gill v. Murray*, [2001] BCHRTD No 34 [*Gill*].

¹⁹⁰ *L. v. BC (Ministry of Children and Family Development)*, [2011] BCHRTD No 214, at 64.

McGrath v. British Columbia (Ministry of Children and Family Development), discussed in Chapter C, concerned the decision of the Ministry to discontinue foster care payments to three grandparents who had obtained custody of their grandchildren, support payments the grandmothers would have otherwise been entitled to receive had they not obtained legal custody and instead remained foster parents. The complainants argued that this distinction amounted to discrimination on the ground of family status. In the Tribunal decision Member Humphreys extended the concept of family status as follows: “[i]n *Watkins v. Cypibot*, 2000 BCHRT 13, a stepmother/stepsons relationship was found to be included in the ground of family status. In my view, the relationship between a custodial parent (who stands in the place of the parent) and a child in custody can be included in family status.”¹⁹¹

As discussed above, the tribunal decision was ultimately overturned, the judge finding the relevant distinction was based on the lack of foster parent status—a legal status—rather than family status.¹⁹² However, this original Tribunal decision in *McGrath* does appear to cast the net of family status beyond the definition of “being related by blood, marriage or adoption,” insofar as Member Humphreys characterized the discrimination as being against a custodial parent. Although the complainants were biologically related to the children over whom they had custody, the case is not framed as addressing discrimination against grandparents.

(v) Parents

*Baines v. 0781380 B.C. Ltd*¹⁹³ involved a complainant whose father was hospitalized out of town, requiring life-threatening surgery. She requested several days’ leave to care for her father, and arranged for coverage by other staff. She subsequently requested a number of additional scheduled shifts off to be with her family and care for her father. She failed to show for a number of shifts and the evidence of the complainant and the respondent differed on whether she had properly notified the employer. The complainant was offered a number of options for subsequent shift coverage, including taking vacation time or an unpaid leave, and the complainant indicated she would work the following shift. She was placed on leave when she missed the following shift and refused to accept a leave to attend to family matters. In refusing to dismiss the complaint, Member Marion indicated that a relationship between a woman and her father fell within the ambit of family status, citing *B. v. Ontario*.¹⁹⁴

(vi) Family Friends

In *Mathieu v. Victoria Shipyards Co.* the complainant alleged the employer discriminated against him by showing preferential treatment to family friends in hiring practices and shift scheduling. In considering the application to dismiss under s. 27(1), Member Beharrell characterized the concept of “family friend” as being outside the scope of family status. She stated:

As noted by the Tribunal in a number of cases (see, for example, *Wang v. Oceanfood Industries*, 2006 BCHRT 378, para. 15 and *La Saw v. Meridian Medical*, 2009 BCHRT 351, para. 22), the

¹⁹¹ *McGrath* Tribunal decision, *supra* note 163, at 32. *Verkerk v. British Columbia (Ministry of Employment and Income Assistance)* 2007 BCHRT 472 dealt with similar circumstances and the member took a similar view of the scope of family status.

¹⁹² *McGrath*, *supra* note 162.

¹⁹³ *Baines v. 0781380 BC Ltd*, [2011] BCHRTD No 266 [*Baines*].

¹⁹⁴ *Ibid* at 40, relying on *B v. Ontario*, *supra* note 16.

relationship of “family friend” is simply too remote to ground a claim of discrimination on the basis of family status. I agree, and find that the ground of family status does not extend to protecting employees from being discriminated against in preference to other individuals with whom the employer has a non-familial relationship. I therefore dismiss that part of the complaint based on allegations that the Employer name-requested or continued to employ “friends” of supervisors under s. 27(1)(c) of the *Code* as against both the Employer and the Union Respondents.¹⁹⁵

However, the Tribunal did note that the preferential treatment of family members over other employees, if proven, could amount to discrimination:

As the Supreme Court of Canada outlined in *B. v. Ontario (Human Rights Commission)*, (2002) 3 S.C.R. 403, family status includes both the absolute status of being a family member, and the relative status of a particular family relationship. Further, an allegation that a complainant has been adversely treated because he or she is not in an absolute or relative family status may also constitute a breach of the *Code*: *Thomson v. Eurocan Pulp and Paper Company*, 2002 BCHRT 32.¹⁹⁶

The part of the complaint alleging preferential treatment to family members was not dismissed as having no reasonable prospect of success.

3. Alberta

The *Alberta Human Rights Act* defines family status as the status of being “related to another person by blood, marriage, or adoption.”¹⁹⁷ A small number of reported tribunal and arbitration decisions coming out of Alberta consider the meaning of the family status ground, and no recorded decisions present facts that do not clearly fit within the statutory definition.¹⁹⁸ *Campbell River* is considered but not applied, and decision-makers follow an approach more consistent with the *Johnstone* line of reasoning.

(a) The Meaning of Family Status

(i) Absolute Status of being an Adopted Person

In *Pringle v. Alberta Municipal Affairs* the complainant applied for her original birth certificate from Alberta Vital Statistics, but was denied a certificate as she had been adopted. The *Vital Statistics Act* precluded the agency from divulging any information about her birth parents without a court order. The complainant alleged that this decision was discriminatory on the basis of her family status as an adopted person. Although the complaint was not successful, and the case focuses largely on the policy rationale for the statutory provision, the question of whether the facts fall within the

¹⁹⁵ *Mathieu v. Victoria Shipyards Co.*, [2011] BCHRTD No 188, at 78.

¹⁹⁶ *Ibid* at 133.

¹⁹⁷ *Alberta Human Rights Act*, *supra* note 9.

¹⁹⁸ The low number of family status decisions is, in part, of function of the small number of human rights cases being adjudicated in Alberta. The Alberta Human Rights Commission links to CanLII's database as the repository of all of its decisions, and the CanLII database contains only 137 decisions heard since 2000. See Government of Alberta, Alberta Human Rights Commission, “Decisions,” online: <<http://www.albertahumanrights.ab.ca/decisions.asp>.> These low numbers make it challenging to draw broad picture of analysis of decision-making trends in Alberta.

definition of family status is resolved early on in the decision. Referring to the definition contained within the *Human Rights, Citizenship and Multiculturalism Act*, Panel Chair Colley-Urquhart stated, “the basis for the discrimination that is occurring with the complainant is her family status, as an adopted person. Family status includes the complainant’s status as an adopted person.”¹⁹⁹

(ii) Characteristics of a Parental Relationship (Co-residency)

In *Weller v. Alberta Human Resources and Employment*,²⁰⁰ discussed in Chapter C, the complainant applied for social assistance, but was repeatedly denied the “shelter” portion of the allowance as he was living with his mother, consistent with Ministry policy regarding individuals who indicate they are living in the home of a family member and paying rent to the family member. Considering the meaning of family status, the Court found that the complainant had not experienced discrimination on the basis of family status, as the distinction was based on living arrangements, not family status.²⁰¹ Applying contextual factors articulated in *Law*,²⁰² and considering the decision in *Gosselin*,²⁰³ the Alberta Court of Appeal noted that the complainant was not part of a group that had experienced historic disadvantage, strictly by virtue of his residency status.

(iii) Characteristics of a Spousal Relationship

Rennie v. Peaches and Cream Skin Care Ltd concerned a female employee with three children. She had worked for the employer for twelve years, and she was exceptional at her work. Following her third maternity leave, she was required to work one evening shift until 7 pm and another until 6 pm, as she had in previous years. Evening shifts had become a challenge for the complainant because her previous childcare providers were no longer available in the evening. It was not clear on the evidence whether the complainant was making efforts to secure alternative evening childcare; however, her husband did not want her to work evenings. The complainant was fired because she refused to work at least one evening shift a week until 7 pm.

In its decision, the Tribunal characterized family status to include circumstances related to the complainant’s marital relationship, including her husband’s opposition to evening work. Panel Chair Baergen stated:

If the concept [of family status] is definable, and I understand it correctly, then the state of her relationship with her husband—beyond the simple fact that they are married—is an aspect of Ms. Rennie’s family status. Since his refusal to help babysit contributed to the problem which eventually saw her fired, it is impossible for me to find her, alone, guilty of not doing her part to respond to the accommodation offered by her employer. The fact that Ms. Rennie left her husband in February 2006 may well indicate that the relationship had not been strong for some time. The October 2004 episode took place only 17 months before the separation. One can argue that she could have done more to find a sitter, but to argue that she was solely responsible for the conflict with her husband, or that she was largely responsible for it—a conflict that eventually ended in a separation—is to speculate without grounds. I am of the

¹⁹⁹ *Pringle v. Alberta Municipal Affairs*, [2003] AHRC 7, at 18.

²⁰⁰ *Weller v. Alberta Human Resources and Employment*, [2004] AHRC 7.

²⁰¹ *Weller*, *supra* note 173.

²⁰² *Law*, *supra* note 160.

²⁰³ *Gosselin*, *supra* note 175.

opinion that, all things considered, it is highly possible that Ms. Rennie was unable to make babysitting arrangements to suit her employers' request.²⁰⁴

Based on this reasoning, the Tribunal found that a *prima facie* case of discrimination had been established. However, applying *Meiorin*,²⁰⁵ and citing neither *Campbell River* nor *Johnstone*, the Tribunal found that it would have been “impossible to accommodate Ms. Rennie without imposing undue hardship” on the employer.²⁰⁶ Although not highlighted elsewhere, perhaps the most interesting aspect of this case is the characterization of family status as including dynamics of a particular marital relationship.

(b) Family Responsibilities Discrimination in Alberta: The Impact of *Campbell River*

Similar to the *Rennie* case discussed above, in *Rawleigh v. Canada Safeway Ltd.* the Tribunal considered *Campbell River*, *Hoyt*, *Brown* and *Johnstone*, but ultimately found that the complainant established a case of *prima facie* discrimination, considering mainly *O'Malley*²⁰⁷ and *Meiorin*.²⁰⁸ The Tribunal concluded that the employer did not accommodate the complainant to the point of undue hardship.

Rawleigh involved a complainant with three young children and a wife who suffered from retinitis pigmentosa, an eye condition characterized by severe headaches and progressive and significant loss of vision, as well as a Chiari 1 malformation, a condition that involved the “throat closing off when lying flat, vomiting in her sleep and seizures.”²⁰⁹ The medical letter provided indicated Mrs. Rawleigh’s vision was limited, that she had difficulty functioning at night, and it was “extremely important for her to have her husband home at night in case there was an emergency.”²¹⁰ The complainant worked a rotation that included nights. He filed a human rights complaint when his employer did not permit him to stay off the night crew permanently.

The information sheet “Marital and Family Status,” published by the Alberta Human Rights Commission, is referenced in both *Rennie* and *Rawleigh*. The policy arguably interprets family status discrimination in slightly broader terms than *Campbell River*, emphasizing upper level jurisprudence preceding the decision. In particular, the information sheet states:

Employers' responsibilities

An employer is required to make *reasonable accommodation* in situations where marital status or family status may interfere with an employee's ability to perform his or her duties in the workplace. However, if it can be shown that an employee cannot perform his or her duties because of family or marital status, and the requirements of the job to be performed are shown to be *bona fide occupational requirements*, or if making accommodation would cause the employer *undue hardship*, the employer may refuse to employ, may re-deploy, or if all else fails may consider dismissing that employee.

²⁰⁴ *Rennie v. Peaches and Cream Skin Care Ltd.*, (2006) AHRT 13, at 53 [*Rennie*].

²⁰⁵ *Meiorin*, *supra* note 152.

²⁰⁶ *Ibid* at 58.

²⁰⁷ *O'Malley*, *supra* note 64.

²⁰⁸ *Rawleigh v. Canada Safeway Ltd.*, [2009] AHRC, 6 at 236 [*Rawleigh*].

²⁰⁹ *Ibid* at 92.

²¹⁰ *Ibid* at 93.

For example, an employee may request a change in work shifts because of family responsibilities. The employer should accommodate the request if at all possible. However, if there are not enough employees to meet the extra demand, thus placing additional stress on the other employees and hiring more staff is financially not possible (i.e. undue hardship), then the onus is on the employee to make other family arrangements in order to continue working in the same job.²¹¹

One of the Alberta decisions to undertake the most thorough consideration of family status discrimination jurisprudence is *Alberta (Solicitor General)*, briefly discussed in Chapter C. The arbitrator noted at the outset that, “there is a lack of consensus among courts and arbitrators over the threshold of what constitutes discrimination on the basis of family status.”²¹² *Alberta (Solicitor General)* involved a correctional officer whose schedule was changed, thereby creating child care challenges in relation to the care of her seven year old son. The grievor had previously worked a rotation that included only mornings and afternoons, because another employee had volunteered to work all the night shifts. When this employee was re-assigned the employer required all employees working in her area to rotate through night shifts, amounting to a total of 30 night shifts a year. The grievor was a single mother and for various reasons it was difficult to find evening childcare. The grievor argued discrimination based on family status and requested a solution that would reduce the number of night shifts she had to work, rather than a full exemption of night shifts. The employer argued that the threshold set by *Campbell River* was high and the grievor did not meet it.

In his majority decision for the panel, Arbitrator Ponak noted that while *Johnstone* and *Campbell River* identify divergent approaches, “both cases accept that under human rights legislation, family status encompasses parental obligations with respect to child rearing.”²¹³ Comparing the two approaches, the arbitrator did not clearly follow either approach. He concluded that, “in the case of family status, an employee also bears the onus of providing sufficient evidence of the absence of reasonable alternatives for care.”²¹⁴ The arbitrator determined that, on the facts, the grievor did not meet this evidentiary burden. Thus the grievor failed to establish a *prima facie* case.

On the whole, *Campbell River* does not appear to be the leading authority in Alberta, and, with the exception of the *Rennie* case, few decisions have included a pronouncement that further clarifies the meaning of family status in Alberta.

4. Ontario

(a) The Scope of Family Status: Limitations of the Ontario Definition

The Ontario *Human Rights Code* defines family status as the status of “being in a parent-child relationship.”²¹⁵ In 2006, the Ontario Human Rights Commission published *The Cost of Caring*, a

²¹¹ “Marital and Family Status,” online: Government of Alberta, Alberta Human Rights Commission <http://www.albertahumanrights.ab.ca/publications/bulletins_sheets_booklets/sheets/protected_grounds/family_and_marital_status.asp>(emphasis from the original).

²¹² *Alberta (Solicitor General)*, *supra* note 155.

²¹³ *Ibid* at 50.

²¹⁴ *Ibid* at 69.

²¹⁵ *Human Rights Code*, RSO 1990, *supra* note 10 at s. 10(1).

report that resulted from a significant stakeholder consultation on the family status ground.²¹⁶ The report and consultation followed the publication of a discussion paper that included a review of a great deal of the jurisprudence to date on family status discrimination, with a particular emphasis on Ontario.²¹⁷ The report characterized the definition contained in the Ontario *Human Rights Code* as too narrow:

The *Code*'s current definition of family status is under inclusive and may have an adverse impact on a number of groups protected by the *Code*. The *Code* should be amended to include a broader range of relationships that is more reflective of current family and caregiving relationships in Ontario. As well, legislation and programs providing entitlements and protections for caregiving should reflect the needs of the broad range of caregiving responsibilities and family relationships currently existing in Ontario. It is a best practice for employers, service providers, and landlords to ensure that their policies, programs, and practices accommodate and include the broad range of family structures and caregiving relationships that currently exist in Ontario.²¹⁸

At the time of its study the Commission wrote that the Ontario definition had been interpreted to include adoptive families, foster-families, and gay or lesbian parents.²¹⁹ The Commission also characterized decisions in the area of housing discrimination as the site of expansion of the concept of family status to include protection for pregnant women, single parent families, and “parents who are not legally married.”²²⁰ However, the Commission emphasized the exclusion of the following familial relationships from the definition:

...the *Code* provides no protection for an individual who is providing long-term care for an adult sibling who is living with a disability, or is providing elder care for an aging aunt or grandparent. Nor is there any protection for dependency relationships that are not based on blood ties. Some have argued that laws should be expanded to protect a greater range of dependency relationships. As well, the focus of the *Code* on the nuclear family might be considered ethno-centric, given the importance of the extended family in some cultures. The question may then be raised as to whether the definition of family status in the *Code* should be expanded to cover a broader range of dependency relationships.²²¹

The Commission's *Policy on Guidelines on Discrimination Because of Family Status*, published as a result of the research and consultation, further characterizes the definition as omitting other key familial relationships, such as “relationships with siblings, or with members of the extended family, such as grandparents and grandchildren, aunts and uncles, nieces and nephews, and cousins. It [the definition] excludes the kinds of ‘chosen families’ often adopted by LGBT [lesbian, gay, bisexual,

²¹⁶ *The Cost of Caring*, *supra* note 14.

²¹⁷ Ontario Human Rights Commission, *Human Rights and the Family in Ontario: Discussion Paper* (2005) [*Human Rights and the Family in Ontario*].

²¹⁸ *The Cost of Caring*, *supra* note 14 at 24-25.

²¹⁹ *Human Rights and the Family in Ontario*, *supra* note 217 at 14, citing *Moffatt v. Kinark Child and Family Services* as authority; *The Cost of Caring*, *supra* note 14 at 30.

²²⁰ *The Cost of Caring*, *ibid* at 35.

²²¹ *Ibid*.

transgendered] persons, as well as the diverse forms of support networks developed by persons with disabilities.”²²²

The Ontario Human Rights Commission takes the position that family status includes caregiving relationships other than strict parent and child relationships, for example, elder care,²²³ relying on the following words of the Board of Inquiry:

[S]omeone acting in the position of a parent to a child is, in our view, embraced by this definition; for example, a legal guardian or even an adult functioning in fact as parent. Occasionally, for example, due to death or illness of a relative or friend, someone will step in and act as parent to a child of the deceased or incapacitated adult. Thus, if a nephew were to reside with an aunt for an indefinite period, in our view their relationship would fall within the meaning of “family status” ...

However, an expansive approach that includes caregiving of adults is not borne out in the language of decision-making in Ontario, and few reported decisions appear to have tested that hypothesis. In general, while the net of family status may have widened, the concept is still constrained to dynamics where an adult is caring for a child, acting in the place of a parent. In contrast with B.C., the family responsibilities accommodation cases are less dominant, and the meaning of family status does appear to be limited by the narrow statutory definition.

(i) Single Mothers

A number of decisions confirm that the Ontario definition includes the status of being a single mother. *Flamand v. DGN Investment*²²⁴ involved a woman who was denied rental accommodation. The complainant argued discrimination on the basis of ethnicity (she was Aboriginal) and her family status (she was a single mother). In refusing to rent the woman an apartment, the respondent made discriminatory remarks to the complainant about her ethnicity, expressing displeasure at her being Aboriginal, and her family status, including a prejudicial belief that single mothers were bad tenants on account of their dependency on social benefits and their involvement with the Children's Aid Society. The Tribunal found the behaviour and comments constituted discrimination on both the grounds of ethnicity and family status, namely, the absolute status of being a single mother, rather than the particular identity and relative status as a mother of a child.

In *Hope v. Maplewood Painting*, the Tribunal found that an Aboriginal woman, a single mother with two young boys, experienced discrimination on the basis of sex, race, ancestry and family status. The discriminatory treatment took the form of persistent inappropriate behaviour and statements by her employer, which included sexual harassment and sexual assault. The Vice-chair Leslie Reaume stated that, “the harassment of the complainant was based on the unique intersection of the grounds with which the complainant self-identifies. As the Commission argued, the complainant was harassed on the basis of her status as an Aboriginal single mother and that identity is an important part of the context of her complaint.”²²⁵ The Vice-chair noted in assessing the appropriate remedy, that “the complainant also testified about how acutely vulnerable she felt as an Aboriginal single-

²²² Ontario Human Rights Commission, *Policy on Guidelines on Discrimination because of Family Status* (2009) at 9.

²²³ *Ibid* at 10.

²²⁴ *Flamand v. DGN Investment*, [2005] OHRTD No 10.

²²⁵ *Hope v. Maplewood Painting*, [2009] OHRTD No 594, at 65 [*Hope*].

mother with respect to both the experience of being harassed, and the limited choices she felt were available to her to combat the respondent's behaviour.”²²⁶

(ii) Same-sex Relationships and Foster Parenting Relationships

In 2000, the Ontario Board of Inquiry found that family status included “families headed by same-sex spouses or single gay or lesbian parents,” as well as foster parenting relationships.²²⁷ The complainant in *Moffat* was a child protection worker and also a gay man in a same sex relationship with a longstanding partner. The complainant entered a foster-type relationship with a youth with whom he had developed a mentoring relationship during the course of his employment. The man was terminated in the context of significant workplace speculation over whether he had AIDS, as well as false accusations that he had begun a sexual relationship with the youth.

The Board of Inquiry found that the widespread rumours and speculation in the workplace constituted a poisoned work environment linked to sexual orientation, rather than family status, and that the employer failed to properly investigate the complainant’s allegations of unfair treatment. However, while the employer had poorly handled the dismissal of the complainant, the reasons for the termination were not linked to sexual orientation, family status or perceived disability, but rather to the complainant’s poor judgment in allowing the youth to have a girlfriend sleepover in the same bed.

(iii) Biological versus Adoptive Parents

In *A.T. & V.T. v. The General Manager, the Ontario Health Insurance Plan*, the Ontario Superior Court considered a review of a decision of the Health Services Appeal and Review Board on the eligibility of recently immigrated children to provincially funded health care. A.T. and V.T. immigrated to Canada with their mother when they were aged 19 months and five months, respectively. Their father was a Canadian citizen. According to the *Health Insurance Act*, new residents of Ontario were required to wait three months to qualify for insurance, although there were specific exceptions to this rule; in particular, children adopted from Ontario were not subject to the wait period, nor were children born in Ontario to an insured person. A.T. required hospital treatment during that three-month period, and the family was billed over \$100,000. The litigation guardian argued discrimination on the basis of family status and place of origin.

The Court found that the children did experience differential treatment on the basis of family status, because it was A.T. and V.T.’s family status as biological, rather than adoptive, children that prevented access to benefits. The Court noted that in both types of circumstances the timing of arrival to Ontario is beyond the control of the children. The Court applied a *Charter* analysis to determine whether the distinction violated the *Charter* or the *Code*, and concluded that discrimination had not occurred because “this was not a distinction that would in any way demean them [A.T. and V.T.] or suggest that they were less worthy of respect in our society than adopted children.”²²⁸

²²⁶ *Ibid* at 84.

²²⁷ *Moffatt v. Kinark Child and Family Services*, [1998] OHRBID No 19 at 14 [*Moffatt*].

²²⁸ *A.T. & V.T. v. The General Manager, the Ontario Health Insurance Plan*, 2010 ONSC 2398, at 96. [*A.T. & V.T.*]

(iv) Characteristics of a Parental Relationship (Co-residency)

Hendershott v. Ontario (Ministry of Community and Social Services),²²⁹ discussed above, concerned a 15-year old mother of twins who was deemed ineligible for financial assistance under the *Ontario Works Act* to support herself and her children because she and her children were living with her parents. The Tribunal found the denial of benefits to the young mother to be a legitimate distinction related to financial need, but determined that the denial of benefits to the twins was discrimination based on family status. The Tribunal determined that a regulatory distinction drawn on the basis of the characteristics of the complainant's relationship with her parents, namely, financial dependency and co-residency, gave rise to family status discrimination.

(v) No Parent-child Relationship

A number of decisions treat the statutory definition as exhaustive. The Tribunal recently held that the definition of family status does not include the status of being a grandparent, which was characterized as not being in “a parent and child type of relationship.”²³⁰ Interestingly, however, the facts of the case involved a grandmother who had been primary caregiver for her other grandchild, for a period of time prior to the circumstances giving rise to the complaint. In a previous decision on the case, the Tribunal stated, “[h]owever, under s. 10(1) of the *Code*, the term ‘family status’ is defined as ‘the status of being in a parent and child relationship.’ That is, the status of being in a grandparent and grandchild relationship is not protected by the *Code*.”²³¹ The Tribunal also dismissed a complaint for not making out a case of *prima facie* discrimination on the ground of family status where the circumstances involved a nephew and cousin and no parent-child relationship.²³²

(b) Family Responsibilities Discrimination and the Impact of *Campbell River* in Ontario

In the initial years following the B.C. Court of Appeal decision in *Campbell River*, there was minimal reliance on the serious interference standard in Ontario. However, in recent years *Campbell River* appears to be gaining impact in Ontario, disguised as an amalgam of *Johnstone* and *Campbell River* approach.

McDonald,²³³ discussed above in Chapter C, concerned an employee who was permitted to take a great number of days off work to accompany his wife to prenatal medical appointments associated with a complicated pregnancy. Ultimately, the employer advised him that he should not request any more time off. He was fired when his wife had a medical emergency and he left work to bring his infant son to a medical appointment.

Relying on *O'Malley*, the Tribunal found that, in the absence of an effort to ascertain the complainant's needs, the refusal to allow the complainant adequate time to take his son to the medical appointment had an adverse impact that constituted discrimination. In its conclusion the Tribunal cited *Ontario Human Rights Commission's Policy and Guidelines on Discrimination Because of Family*

²²⁹ *Hendershott*, *supra* note 5.

²³⁰ *Fortier v. Child and Family Service Timmins and District*, [2010] OHRTD No 17 at 11.

²³¹ *Fortier v. Child and Family Services of Timmins and District*, [2009] OHRTD No 951 at 11.

²³² *Capocci v. York Catholic District School Board*, [2009] OHRTD No 106.

²³³ *McDonald*, *supra* note 150.

*Status*²³⁴ and commented on the importance of inclusive workplace design. Neither *Campbell River* nor *Johnstone* are considered.

In *Saroyan v. Deco Automotive* the complainant had historically worked the midnight shift at his workplace. He was moved to the afternoon shift when the employer eliminated the midnight shift, as there were insufficient funds to keep running the previous schedule. The complainant claimed this business decision prevented him from fulfilling his childcare obligations, and that the employer had to accommodate him by letting him keep his old shifts. The employer provided evidence that it had made efforts to give the complainant time to find childcare alternatives, by virtue of delaying the change of schedule twice. The employers thus argued that there was a *bona fide* reason for the change, and that they had accommodated the complainant up to the point of undue hardship. The Tribunal found there was no discrimination as the employer had fulfilled any duty to accommodate, without making any finding on whether family status discrimination had occurred.²³⁵

In terms of Ontario decisions on family responsibilities discrimination, *International Brotherhood of Electrical Workers, Local 636 v. Power Stream Inc. (Bender Grievance)* contains one of the most comprehensive considerations of past jurisprudence, including *Campbell River*. In this case the employer eliminated eight-hour shifts in favour of ten-hour shifts, viewing it as inefficient to have employees beginning their shifts at different times. The four grievors argued the ten-hour shifts discriminated against them on the basis of family and marital status, because of the impact on their ability to carry out childcare responsibilities and interact with their children.

In his decision Arbitrator Jesin rejected the *Johnstone* approach as overly broad, in the sense that it rendered any employer action that adversely impacted a family or parental obligation as *prima facie* discriminatory. The arbitrator characterized the *Johnstone* approach as “particularly problematic as these cases do not attempt to define what a parental or family obligation worthy of protection may be.”²³⁶ The arbitrator declared *Campbell River* to create an overly stringent standard insofar as the test refers to a change initiated by an employer. However, other than that qualification, Arbitrator Jesin appears to uphold the *Campbell River* test: he stated, “I am not however in agreement with the criticism expressed over the restrictive nature of the test set out in *Campbell River*,”²³⁷ and applied the “serious interference with a substantial parental duty” standard in the end, albeit while articulating a number of questions to assist decision-makers in applying the test.

The arbitrator refers to a requirement that the employee make efforts at self-accommodation, that is to say, explore changes to their personal circumstances, such as childcare arrangements and the distribution of responsibilities as between spouses, before discrimination be considered. On the facts of the case, which involved four grievors, the arbitrator found that one grievor’s inability to continue to participate in his child’s extracurricular activities did not amount to discrimination. However, another grievor, for whom the schedule change disrupted a “carefully crafted” shared custody arrangement that was in the best interests of the whole family, experienced family status discrimination.

²³⁴ *Supra* note 222.

²³⁵ *Saroyan v. Deco Automotive*, [2011] OHR TD No 225.

²³⁶ *International Brotherhood of Electrical Workers, Local 636 v. Power Stream Inc. (Bender Grievance)*, (2009) 186 LAC (4th) 180 at 54 [*Power Stream*].

²³⁷ *Ibid* at 60.

In *Alliance Employees Union, Unit 15 v. Customs And Immigration Union (Loranger Grievance)* the arbitrator characterized the *Power Stream* decision as “an amalgam” of the standards articulated in *Campbell River* and *Johnstone*, and followed this allegedly hybrid approach. *Alliance Employees Union* involved a grievor who asked for an accommodation that excluded any travel outside Ottawa during the last five to six months of his wife’s pregnancy. The need for exceptional treatment was due to his wife’s pregnancy being high risk. His son had special needs (ADHD), which necessitated the presence of a second caregiver, and the grievor was his son’s only other caregiver. While the employer expressed a willingness to consider options for accommodating the son’s child care needs, the employer would not agree to a travel exemption. As a matter of fact, Mr. Loranger’s wife miscarried early in her second trimester, and the grievor was never required to travel during the relevant period of time.

The arbitrator found that the union had not made out a case of *prima facie* discrimination because, on the evidence, “Mr. Loranger failed to make any rational assessment of childcare alternatives,”²³⁸ concluding, “I cannot find on the evidence before me that Mr. Loranger had a substantial interference with his parental or marital obligations.”²³⁹ Interestingly, while the arbitrator indicated he was following the *Power Stream* approach, in identifying the standard to be met he references “substantial interference with a parental obligation” rather than “serious interference with a substantial parental obligation.” This abbreviated articulation of the test may or may not prove to be significant in forthcoming decisions.

5. Conclusion

In B.C., the lack of a statutory definition has to some extent motivated a broad approach to clarifying the kind of relationships captured by the umbrella term “family”. Family includes stillborn babies who die before they are full term, in circumstances that might be characterized as a miscarriage. Family relationships include marriage-like relationships (including those involving youth) and possibly other cohabiting, dating relationships that might somehow otherwise fall short of the concept of “marriage-like.” Family status also likely includes the relationship between a child and the person who has custody of the child, even in circumstances where that adult is not a biological parent. However, family status does not include the concept of family friends. Family status may include the relationship between an adult and her parent. To date, decision-makers do not appear to have considered whether grandparents or other biological and extended family members are included in B.C. The inclusion of marriage-like and cohabiting dating relationship indicates a broader approach than has been taken by Ontario, which is limited by the statutory definition of parent-child relationship.

In Ontario, same-sex relationships and heterosexual relationships fall within the definition of family status, in a context involving a child, as do foster-parenting relationships. Family status includes discrimination based on being a single parent, as well as characteristics of a parental relationship, such as co-residency. The statutory definition has been invoked to limit the definition to exclude a grandmother, as well as discrimination based on other biological family, such as a nephew or cousin. The pattern of decision-making suggests that such biological family members might be captured by

²³⁸ *Alliance Employees Union, Unit 15 v. Customs And Immigration Union (Loranger Grievance)*, (2011) 205 LAC (4th) 343 at 51 [*Alliance Employees Union*].

²³⁹ *Ibid* at 57.

the concept of family status in B.C. In Ontario, the concept of family status is constrained by the definition to circumstances involving the care of children or the status of being a parent.

In Alberta, where there have been comparatively fewer decisions considering the scope and meaning of family status, family status discrimination includes distinctions based on adoption. Family status also includes characteristics of a spousal relationship, such as the stability of a relationship and the views of the complainant's husband, in a context where the husband's attitude shed light on the complainant's capacity to negotiate childcare decisions with her husband.

In terms of this review, Ontario is the jurisdiction with the most restrictive statutory definition. The impact of the rigidity of the definition is not fully apparent on a review of jurisprudence, since a great deal of the reported family status discrimination cases emanating from Ontario pertain to circumstances linked to parenting; however, it is likely that the restrictive definition discourages individuals from filing complaints that do not fit squarely within the parent-child framework. Based on its policies and other writings, the Ontario Human Rights Commission recommends a broader approach to family status that includes other caregiving type relationships; however, that broad approach is not borne out in the limited jurisprudence that considers family status discrimination outside of a parent-child relationship.

In some ways one of the most notable features of this review is the invisibility of many types of families. Although there is some variety, the cases do not represent a broad spectrum of family configurations or caregiving relationships.

The Alberta and Ontario Human Rights Commissions have published policies on family status discrimination in the employment context. Both policies recommend employers make efforts to accommodate employees' family responsibilities, suggesting a broader interpretation of employer responsibilities than is espoused in *Campbell River*. Indeed, in the early years following *Campbell River*, decision-makers in Alberta and Ontario appeared to rely on upper level human rights jurisprudence such as *O'Malley*,²⁴⁰ *Central Alberta Dairy Pool*²⁴¹ and *Meiorin*²⁴² in their decisions, much more than *Johnstone* or *Campbell River*—even in circumstances where the parties were citing both cases.

Campbell River was decided in 2004. Considering Figure 5, it appears that in B.C. the *Johnstone* approach has held more persuasive power before human rights tribunals, whereas in the arbitral context *Campbell River* has been followed slightly more often than *Johnstone*. This dynamic is becoming increasingly true of other jurisdictions. Since 2009 we have seen significant discussion of *Campbell River* and *Johnstone* in Ontario and Alberta decisions. While there is reference to an amalgamated test in one Ontario decision, the *Campbell River* approach may be gaining support, at least by labour arbitrators, and Ontario and Alberta may be moving toward an approach more consistent with B.C. These recent decisions—*Alberta (Solicitor General)*, *Power Stream*, and *Alliance Employees Union*—illustrate support outside B.C. for *Campbell River*. Although in these cases the arbitrators echo the concern, expressed by some decision-makers in B.C., that family responsibilities discrimination should not be limited to circumstances where a barrier to participation in the workforce arises as a result of a change in terms and conditions of employment initiated by the

²⁴⁰ *O'Malley*, *supra* note 64.

²⁴¹ *Central Alberta Dairy Pool*, *supra* note 153.

²⁴² *Meiorin*, *supra* note 152.

employer, the three above referenced arbitrations consider *Campbell River* persuasive and speak of either “serious interference with a substantial parental obligation” or “substantial interference with a parental obligation” in their reasoning. Although the arbitrator in *Alliance Employees Union* indicates he is following an approach that amalgamates aspects of *Campbell River* and *Johnstone*, the reasoning in these three cases remains very reminiscent of *Campbell River*. Still, *Alberta (Solicitor General)* appears to be the only strong endorsement of *Campbell River* in Alberta. In Ontario *Campbell River* may have acquired greater significance, but its authoritative power remains uncertain. In general, *Campbell River* is not consistently followed in B.C. and has limited authority outside B.C.

In B.C. we find that a broad approach to family relationships (in terms of the statutory definition of family status) appears to be balanced against a narrow approach to family status discrimination—or at least that is the state of the law as embodied by *Campbell River*. This dynamic is more true of the arbitral context than of the B.C. Human Rights Tribunal, which has occasionally seen fit to distinguish *Campbell River*. At the time of writing, the meaning of family status appears to be evolving.

E. Family Status Discrimination: An Excavation of the Language of *Campbell River*

1. Introduction

A key controversy surrounding the meaning of the family status ground is reflected in the tension between, on the one hand, the approach taken in the federal jurisdiction—as espoused in *Hoyt*²⁴³ and *Johnstone*²⁴⁴—and on the other hand, the line of cases following the interpretive framework set out in the B.C. Court of Appeal decision in *Campbell River*.²⁴⁵ *Campbell River* arguably created a new test to replace the traditional *prima facie* standard used to assess whether circumstances amount to discrimination. In *Hoyt* and *Johnstone* the tribunal and the Federal Court rejected the *Campbell River* approach as requiring for family status a higher standard of proof to demonstrate discrimination than is required in relation to either other grounds of discrimination or family status discrimination in non-employment contexts. The Court characterized the *Campbell River* decision as running counter to upper level human rights jurisprudence.

The purpose of this chapter is to undertake a kind of archeological expedition through recent family status jurisprudence with a focus on *Campbell River*, in order to explore the implications of the *Campbell River* analytical framework in a manner that is perhaps not possible within the confines of human rights decision-making, which must of necessity focus on the case at hand. The rationale for this investigation is a sense that, in addition to potentially being at odds with human rights jurisprudence, the *Campbell River* line of cases presents a number of conceptual problems not previously articulated in decisions that land on either side of the analytical tug-of-war over the meaning of family status discrimination, or in case commentary.

This chapter explores how reasoning found in some of the cases following *Campbell River* draws distinctions that are both conceptually problematic, and appear to be founded in a lack of recognition for the manner in which Canadian families have evolved over the last few decades. This chapter focuses on three themes emerging from the *Campbell River* jurisprudence: (1) the trend of distinguishing between ordinary versus extraordinary family obligations; (2) the reliance on a second distinction between voluntary versus chosen responsibilities; and (3) a medicalization of family status discrimination suggested by the reliance on medical evidence and other proof of disability.

This chapter is divided into two parts that embody a moving toward and then away from the cases: part 1 (Section 2) digs deeper into the language of the cases, excavating the reasoning for the three ideological themes identified above; part 2 (Section 3) then steps away from the jurisprudence, situating the cases within a larger socio-economic context and juxtaposing the language against the historical purposes of human rights legislation. The ultimate goal of this exercise is to think out loud about where the jurisprudence *could* be taking us, rather than to come to any solid conclusions about where it *should* go. In the end this chapter concludes with more questions than answers, in the hopes that identifying some problematic themes underlying patterns of reasoning will provide further opportunity for re-considering approaches to family status discrimination, either from within the human rights paradigm or otherwise within social policy. For one of the questions we are left

²⁴³ *Hoyt*, *supra* note 137.

²⁴⁴ *Johnstone*, *supra* note 23.

²⁴⁵ *Campbell River*, *supra* note 3.

with after considering the family status jurisprudence is whether the human rights cases are expected to do so much in terms of rights protection precisely because other areas of social policy—areas that that impact on access to full participation in the labour force and fulfilling family responsibilities — have been so neglected.

2. The Dig: *Campbell River* and Beyond

(a) A Review of *Campbell River*

As the facts of *Campbell River* are important to the following analysis, this chapter briefly revisits the facts underlying the decision.²⁴⁶ *Campbell River* was an appeal from a decision of a labour arbitrator. The case dealt with the circumstances of a mother of a school-aged child with severe behavioural problems. The grievor worked at the transition house operated by the North Island Transition Society as a part-time employee. Historically she had worked a shift that ended in the early afternoon (running 8:30 a.m. to 3:00 p.m.), allowing her to provide care for her son after school ended. Due to a reorganization of the workplace, the employer changed the grievor's shift hours to 11:30 am to 6:00 p.m., thereby conflicting with her care for her son. The grievor claimed that this change in shift amounted to discrimination regarding a term or condition of employment on the ground of family status, as the change effectively prevented her from either continuing in the employment position or maintaining both employment and the care of her child.

The grievor had provided her employer with a letter from her son's paediatrician stating that the child "is a very high needs child with a major psychiatric disorder," and that the mother's availability to care for her son after school was "an extraordinarily important medical adjunct to [the son's] ongoing management and progression in life."²⁴⁷ After working the new hours from September 4 to September 17, 2001, the woman attended a meeting of the board to express her concerns about the new hours. Following the meeting, the board issued the grievor a letter advising her that the new hours would be maintained, and one of the findings of the arbitrator was that following receipt of this letter the grievor had a severe anxiety attack. On her doctor's advice she did not return to work. She was ultimately diagnosed with post-traumatic stress disorder, and the doctor testified at arbitration that the medical condition was caused by the employment circumstances.

In *Campbell River* the judges sought to fashion a test for family status discrimination that would capture more than the status of being a parent but not all circumstances where employment obligations conflicted with parental obligations, the latter broad approach having the "potential to cause disruption and great mischief in the workplace."²⁴⁸ Justice Low articulated the standard as follows: "a *prima facie* case of discrimination is made out when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employee."²⁴⁹ He added, "I think that in the vast majority of the situations in which there is a conflict between a work requirement and a family obligation it would be difficult to make out a *prima facie* case." The Court found that this mother's experience did

²⁴⁶ A more lengthy discussion of *Campbell River* can be found in Chapter B.

²⁴⁷ *Campbell River*, *supra* note 3 at 14.

²⁴⁸ *Ibid* at 38.

²⁴⁹ *Ibid*.

amount to discrimination under the new test. The matter was then referred back to the arbitrator for a finding on the accommodation issue and any potential remedy.

(b) Themes and Patterns underlying the *Campbell River* Approach

This chapter focuses on three conceptual themes that appear in *Campbell River* and cases relying on the *Campbell River* test: (i) a distinction between extraordinary versus normal or ordinary family obligations; (ii) a distinction between family responsibilities that are a function of choice as opposed to obligation; and (iii) a medicalization of the concept of family status discrimination that suggests family status barriers must be bolstered by evidence of disability in order to give rise to family status discrimination. Section (b) identifies where these analytical trends appear in decision-making; section (c) discusses the appropriateness of such reasoning, given the broader purposes of human rights law in B.C.

(i) Extraordinary versus Ordinary Family Obligations

Possibly the most obvious theme that emerges from a number of the cases following *Campbell River* is the notion that family responsibilities must somehow be extraordinary and atypical in order for a person's experience to amount to discrimination.

The language of extraordinariness comes up in the judicial review decision in *Evans v. University of British Columbia*,²⁵⁰ a case that concerned the return to work of Tracey Evans following her maternity leave. At Tribunal Ms. Evans had argued, amongst other allegations, that she experienced discrimination based on a term and condition of employment when the employer refused to extend her leave until her spot in UBC daycare would become available in September 2006. Ms. Evans had returned to work for three days in July 2006 before filing a human rights complaint. The employer stated that the leave was denied for operational reasons. The Court noted that in considering whether Ms. Evans had experienced discrimination the Tribunal relied on *Campbell River*, and “concluded that an employee on maternity or parental leave knows of the responsibility to make suitable childcare arrangements by the date of the return to work and that, as a result, there was nothing extraordinary about the petitioner's situation.”²⁵¹ In other words, Ms. Evans' experience of barriers to returning to full-time employment post-maternity leave did not reflect discrimination because other women experience similar challenges. Difficulties locating appropriate and acceptable childcare were considered too commonplace to ground a family status discrimination argument.

Similar language appears in *Coast Mountain School District No. 82 v. British Columbia Teachers' Federation (Sutherland Grievance)*,²⁵² discussed in Chapter C, a grievance arbitration concerning a mother who requested to return to work on a part-time basis for the first six months after her maternity leave ended. The arbitrator dismissed the argument that the grievor had experienced discrimination on the ground of family status largely because the grievor's child was healthy. The arbitrator distinguished the case from a previous grievance, *Carewest*,²⁵³ which had involved a woman with a history of breastfeeding challenges and a baby with weight gain problems and other health issues that made breastfeeding the only source of food. He concluded:

²⁵⁰ *Evans*, *supra* note 182.

²⁵¹ *Ibid* at 42.

²⁵² *Coast Mountain*, *supra* note 143.

²⁵³ *Carewest* (2000) 93 LAC (4th) 129.

There is no dispute about the genuineness of Ms. Sutherland's desire, in the late fall of 2003, as her one-year maternity leave was coming to an end, to use the extra time off associated with the half-time job sharing arrangement that she had requested, rather than returning to her full-time incumbency, to provide enhanced maternal care and upbringing to her child. However, neither can it be suggested that the facts and circumstances were anything but commonplace. At the end of the one-year maternity leave, Ms. Sutherland's 11-month old child was in good health and, as best I can gather, was progressing normally.²⁵⁴

*Falardeau*²⁵⁵ dealt with the right of a single father with sole custody of his ten year old son to refuse overtime work. The son's daycare charged ten dollars a minute for a pick-up after 6:00 pm. Mr. Ferguson often had to work overtime, and his family or girlfriend were generally able to assist. Mr. Ferguson was a mover and usually did a number of moves in one day. His hours of work varied, depending upon the time of day that the last move of the day was completed, and so he could finish anywhere between 2:00 pm and 8:00 pm. He was fired on one occasion when he refused to begin a new job after 4:00 pm, knowing that starting a new move at 4:00 pm would result in a late shift end time.

The Tribunal found there was no discrimination on the basis on family status. Referring to *Campbell River*, the member concluded:

There was no evidence that his son had any special needs, or that Mr. Falardeau was uniquely qualified to care for him. Although these factors are not required to establish a "substantial" parental obligation, the evidence in this case established no other factors which would take Mr. Falardeau's case out of the ordinary obligations of parents who must juggle the demands of their employment, and the provision of appropriate care to their children. I am unable on these facts to find a "serious interference with a substantial parental or other family duty or obligation."²⁵⁶

(ii) Family Choices versus Family Obligations or Needs

Another distinction found in cases that follow *Campbell River* is the notion that some parental or family responsibilities are a function of choice rather than pure obligation. There is a sense that voluntarily assumed duties cannot be at the foundation of argument that a barrier to full participation in the workplace triggers family status discrimination.

The most powerful demonstration of this reasoning is found in *Canadian Staff Union v. Canadian Union of Public Employees (Reynolds Grievance)*.²⁵⁷ This case concerned a grievor who was not considered for the position of Research Representative for the Atlantic Region because he was unwilling to relocate from St. John's to Halifax, due to family obligations, including responsibilities to a child, partner and aged mother. The Atlantic Region was comprised of

²⁵⁴ *Coast Mountain*, *supra* note 143 at 39.

²⁵⁵ *Falardeau*, *supra* note 182.

²⁵⁶ *Ibid* at 32.

²⁵⁷ *Canadian Staff Union v Canadian Union of Public Employees (Reynolds Grievance)* [2006] NSLAA No 15 [*Canadian Staff Union*].

Nova Scotia and Newfoundland. The grievor had worked for the employer for over 15 years, had an excellent work record and all the required qualifications, and was the applicant with the greatest seniority.

The facts of *Canadian Staff Union* involve separation and blended families, and the case is notable for involving a grievor with an undeniably complex web of family responsibilities as well as schedule coordination between ex-spouses. The facts present a scenario likely uncommon when human rights statutes were created decades ago, but increasingly representative in an era of family separation, blended families and an aging population.

The grievor had two sons with a wife from whom he was legally separated. The grievor had joint custody of the boys, aged 15 and 19, and the children spent every second week with their father, although they spent more or less time with either parent depending on the needs of either parents' schedule. The grievor's ex-wife would not agree to move the children to Halifax, nor did the children wish to move. The grievor had a new partner with whom he resided, and she had joint custody of her 13-year old son from her previous relationship. The grievor's partner could not relocate from St. Johns without sacrificing her career, and her child's father was unlikely to permit the move. In practicality the move would end the grievor's new relationship, disrupt his custody arrangement, and significantly reduce the amount of time the grievor would be able to spend with his children.

On top of these circumstances, the grievor's mother was 90 years old and lived semi-independently in a "seniors' building". His mother had suffered heart surgery, a broken shoulder and other ailments. Although she remained mentally alert and capable of many activities of daily living, she required assistance with groceries, appointments and other activities that required transportation. The grievor's sister also assisted his mother but was soon going to have less time to help, and there was no other family member in Newfoundland to assume the additional family caregiving for his mother other than the grievor.

Although there was an issue in this case as to whether the family status ground applied to the circumstances, given the state of the law at the time of the grievance (the Newfoundland human rights statute did not then include the family status ground), the arbitrator found that the union had not made out a case of *prima facie* discrimination because "it was the grievor's choice, not his marital and family responsibilities, that precluded him from moving to Halifax."²⁵⁸ The arbitrator relied on *Campbell River* and described the facts before him as "a far cry from *Campbell River*."²⁵⁹ He stated:

The problems involved in moving for work have been exacerbated in the modern world of broken and blended families. The grievor's sons undoubtedly benefit greatly from his regular presence in St. John's but they require no special care from him, and he could have arranged for their maintenance in his absence. The same is true of his partner's son, to whom he has no legal obligation. Stressful as it often is on personal relationships, countless couples live apart for prolonged periods because of job requirements. Proper concern for aged parents has

²⁵⁸ *Ibid* at 9.

²⁵⁹ *Ibid* at 138.

adversely affected many careers, undoubtedly to the credit of those who chose not to put work above all.

If the grievor's partner, mother and children could not have moved to Halifax, he could have moved alone and commuted periodically at his own cost. In *Campbell River* Ms. Howard's difficulties were much more than impractical, highly inconvenient or economic; they were traumatic for her and her ill son, and she did not seek the change that brought them on.

I say this with nothing but the greatest respect for the grievor and the values that have led him to refuse to move to Halifax.²⁶⁰

The grievor is commended for prioritizing family responsibilities. However, the arbitrator determined that these chosen responsibilities could not lie at the foundation of a human rights argument.

In *Alliance Employees Union*, discussed in Chapter D, the arbitrator condemned the grievor's choices as being the source of his difficulty in managing family responsibilities. Mr. Loranger was the father of a child with a disability (ADHD). The child "needed constant monitoring and the use of medication. Mr. Loranger testified that his son was a 'handful' at the best of times and 'impossible' during the worst of times."²⁶¹ His wife was pregnant and the couple considered the pregnancy high-risk due to previous miscarriages and her advanced age. The grievor felt he was needed at home to help care for the boy when he was out of school, because the child "was violent and would be too much for his wife to handle," and also because his wife did not wish to be alone with her son.²⁶² The grievor's position required occasional travel to Montreal, and he sought an accommodation from his employer, requesting that, during the final months of his wife's pregnancy, he not be required to travel outside of the city, so that he could be available on short notice to care for his child. The employer agreed to an accommodation, but not a blanket exemption from travel.

The arbitrator dismissed the grievance because the interference was not deemed serious or substantial. Most travel was limited to Montreal which, from Ottawa, was possible to do within normal work hours, and, as a matter of fact, Mr. Loranger's wife miscarried early in her second trimester and the grievor was never required to travel during the relevant period of time. The grievor's evidence was that he and his wife never left their child alone with a childcare provider in the evening unless the boy was already asleep. The grievor had two sisters-in-law in the city, whom the grievor said would be unable to assist because they worked full-time. In any event, the grievor did not trust them to take care of his son.

In dismissing the grievance the arbitrator condemned the grievor for not exploring childcare alternatives. The arbitrator seemed doubtful of the extended family's unavailability to assist on days when the grievor might be expected to travel. Without expressing any understanding of how challenging it might have been to locate appropriate childcare for a child who exhibited such demanding behaviour, the arbitrator stated: "the fact of the matter is that despite having a special

²⁶⁰ *Ibid* at 142-144.

²⁶¹ *Alliance Employees Union*, *supra* note 238 at 16.

²⁶² *Ibid* at 18.

needs child, Mr. Loranger and his wife chose not to arrange for a back-up plan.”²⁶³ In a sense the grievor was considered the author of his difficult circumstances.

Reasoning based on a notion of choice is a prominent factor in one Ontario labour arbitration on family status discrimination that makes no mention of *Campbell River. Dufferin*,²⁶⁴ discussed in Chapter C, involved several female teachers who were hired in the years prior to 1979, and took extended parental leaves. Upon returning from their leaves, the grievors were treated as new hires and not given retirement benefits. According to the collective agreement, teachers hired after 1979 were not eligible for retirement benefits, and so the decision to take an extended parental leave had resulted in a loss of benefits.

The grievance was allowed in part, limiting a remedy to those grievors whose leaves had lasted less than two years. The arbitrator found that the women experienced discrimination on the basis of family status because the original reason for resignation “was a direct result of being a woman, becoming pregnant, and subsequently being responsible for childcare.”²⁶⁵ Referring to choice, the arbitrator concluded, that “it is undeniable that nothing was offered by the Employer, or available to the teachers, after the initial one-year leave. Thus, it wasn't a question of choice because they had no choice except to resign in order to stay home with their newborn child.”²⁶⁶ However, the arbitrator determined that leaves longer than two years reflected a lifestyle choice beyond the original purpose behind parental leave, and so there was no continuing discrimination for teachers who remained out of the workforce for more than two years.

This language of choice comes up again in decision-making regarding family status discrimination in *Alberta (Solicitor General)*²⁶⁷ and *Power Stream*,²⁶⁸ both discussed above in Chapter D.

(iii) Disability and the Medicalization of Experience

In *Campbell River* it was the medical evidence of the paediatrician as to the importance of the mother's availability to her son that pushed this case into the realm where family status discrimination had occurred: Justice Low concluded that for this mother maintaining her son's well-being was a “substantial parental obligation” given all the circumstances. Possibly just as significant, although discussed less often in subsequent cases, was the presence of evidence that the grievor herself had a disability: the union had provided medical evidence that the grievor suffered from post-traumatic stress disorder. So in *Campbell River* both the parent *and* the child had disabilities.

A number of family status cases underscore this theme that medical evidence of a disability is what transforms a mundane or normal parenting responsibility into an obligation triggering a human right that requires accommodation. A significant number of the successful family status employment discrimination arguments involve a child or other family member with a disability or special needs. Although in *Falardeau*, the Tribunal member indicated that

²⁶³ *Ibid* at 54.

²⁶⁴ *Dufferin*, *supra* note 147.

²⁶⁵ *Ibid* at 58.

²⁶⁶ *Ibid* at 56.

²⁶⁷ *Alberta (Solicitor General)*, *supra* note 155.

²⁶⁸ *Power Stream*, *supra* note 236.

evidence of special needs was not required to establish a substantial parental obligation, the pattern of decision-making, and the repeated stress on the health of a child, suggests otherwise. Disability and a discussion of a child's special care needs figure prominently in determinations of whether a person's family responsibilities are extraordinary or normal.

Rawleigh,²⁶⁹ discussed in Chapter D, involved a complainant who had worked for Canada Safeway for over 27 years. His wife suffered from an eye condition characterized by severe headaches and progressive and significant loss of vision, as well as a condition that involved vomiting in her sleep and seizures. The medical letter provided indicated that as a result of her conditions it was "extremely important for her to have her husband home at night in case there was an emergency." The Rawleighs had three children, aged one, three and five. Mr. Rawleigh worked a rotation that included nights.

Mr. Rawleigh filed a human rights complaint when his employer did not permit him to stay off the night crew permanently. Mr. Rawleigh was required to choose a part-time position or a demotion in order to avoid night rotation. Significant medical evidence of Mrs. Rawleigh's medical condition was provided at the hearing, and the panel indeed concluded that *prima facie* discrimination had been established.

The special needs of a child was also a significant factor in the arbitrator allowing a grievance in *Canada Post*.²⁷⁰ This case concerned a casual employee who had two children, one of whom exhibited behavioural issues that created challenges finding childcare. Amongst other problems, the child was required to withdraw from his preschool due to his behaviour, and the grievor had contacted the Ministry for Child and Family Development for support and assistance in managing her child's aggressive behaviour. Her husband worked significant hours during the summer months and her parents had recently become unavailable to provide care for her son.

Initially the grievor requested three months leave to care for her children, but the employer refused, based on the language of the collective agreement, and so the grievor converted to on-call status. Around this time the employer policy changed to require a 70-75% acceptance rates for called-on shifts, an interpretation of the requirement that on-call employees must be "reasonably available" for work. After a period of time the grievor's shift acceptance rate was reviewed and she was dismissed for working less than the 70-75% target. The arbitrator found that a *prima facie* case of family status discrimination was established and there was no evidence of efforts at accommodation. The grievor had refused the short notice shift offers due to childcare not being available, in part because of her child's special needs. In *Canada Post*, the arbitrator applied *Campbell River*, finding that the employer's change to policy had resulted in a "serious interference with a substantial parental or other family duty", and that the grievor's refusal of shifts was directly related to her parental obligations. Although there is some discussion of whether the grievor's challenging circumstances were sufficiently unique to fit the family status discrimination test, the child's challenging behaviour is one factor in why the arbitrator found the grievor's shift acceptance rate to be not unreasonable under all the circumstances.

²⁶⁹ *Rawleigh*, *supra* note 208.

²⁷⁰ *Canada Post Corp. v. Canadian Union of Postal Workers (Sommerville Grievance)* [2006] CLAD No. 371 [*Canada Post*]

Reference to an absence of a disability or special medical need appears in other cases discussed above, such as *Coast Mountain*, *Canadian Staff Union* and *Falardeau*. In both of these cases the decision-maker determined that a case of *prima facie* discrimination had not been made out because the children in question were healthy and there was no evidence of special needs or disability.

3. Concerns about the *Campbell River* Approach

(a) Extraordinary versus Normal; Choice versus Obligation or Need—Conceptually Impoverished Binaries

Although the theme of extraordinariness surfaces in a number of cases that rely on *Campbell River*, there is not an obvious conceptual connection between the notion of a “serious interference with a substantial family duty” and the issue of the extraordinariness of an obligation. Extraordinariness does not flow from the extent of the interference with the ability of an employee to manage family obligations, nor is the ordinariness of a parenting responsibility connected to whether the obligation is substantial or significant. Rather, the ordinariness issue seems more connected to the concerns regarding limiting the scope of family status discrimination in order to avoid putting excessive demands on the employer and society to support employees. It is a question of controlling the floodgates. Similarly, there is also no discussion of whether the mother in the *Campbell River* case somehow “chose” her challenging childcare circumstances. Neither the extraordinary/normal or choice/obligation binaries are directly attributable to *Campbell River*, even though the case is relied upon as authority for these distinctions being relevant to whether discrimination has occurred.

Taken out of the context of family status discrimination, there is a kind of logical incoherence to the binaries of extraordinary versus normal and choice versus obligation in terms of consideration of parenting obligations. What is a normal child? Parenting challenges likely more accurately fall along a continuum and some parents will experience greater barriers to participation in the work realm due to factors associated with: disability and illness of a child or parent; separation and divorce; death of a spouse; single parenthood; more or less support from extended family and friends; additional family caregiving needs of extended family; poverty; availability of affordable childcare in different communities; bad luck and other unexpected events. There are a great number of circumstances that can pose heightened challenges to balancing work and family responsibilities. The family status employment cases rely on evidence of disability to distinguish the normal from the extraordinary, disregarding or downplaying other barriers.

The concept of choice is also similarly bereft. In *Canadian Staff Union* it is a reasonable question whether the grievor should be permitted to work offsite from Newfoundland; still, it is troubling to see the grievor’s family responsibilities characterized as less worthy of accommodation than the challenges faced by the grievor in *Campbell River*. These two grievors faced very different barriers to maintaining fulfilling employment and balancing work and family responsibilities; however, only the barriers that were reducible to disability issues amounted to family status discrimination.

Deliberate or not, there is a double meaning to the reference to change and choice in *Canadian Staff Union*. It is possible that the notion of choice referred to the change in terms of employment—*Campbell River* dealt with a change in work hours imposed by the employer whereas *Canadian Staff Union* dealt with a work location modification an employee was going

to request if he were a successful job applicant. True, the grievor in *Canadian Staff Union* can be said to bear some responsibility for his circumstances in the sense that he is applying for a promotion; in contrast, the grievor in *Campbell River* experienced a change initiated by the employer. However, the idea that a change in conditions of employment must be initiated by the employer in order to ground a claim of family status discrimination has been rejected by most arbitrators and tribunals.

There is a sense that grievors and applicants cannot expect accommodation when they are the authors of their circumstances, through choices of where to live, what school to choose for their children, and whether to assist with the care of family members. The language of choice, as invoked in some of the cases following *Campbell River*, appears founded on an individualist model of human relations that likely runs counter to the intuitive response most of us would have toward family and parental responsibilities. From a broader public policy perspective, is it not desirable to encourage and support workers to be actively involved in their children's lives, as well as to discourage us from abandoning our elders? B.C. Human Rights Tribunal member Parrack articulated a concern regarding what she characterized as a dichotomy of preference versus need that is attributed to *Campbell River* in the decision in the *Esposito v. B.C. (Ministry of Skills, Development and Labour)*:

In my view, to frame the issue in this manner fails to recognize that women with children typically bear a significant and ongoing responsibility for the care of their children. As the case law and statistics clearly establish, a significant number of women participate in the labour force, even when they have young children at home. It is difficult to accept that, in these cases, this is a "preference" rather than a "need." In some cases, it may be both. To frame the issue in this manner serves to undermine the significant and necessary role that women play in both the labour and domestic spheres of their lives. Women have a substantial parental obligation to care for their children. To argue otherwise, seems to me, to be misguided.²⁷¹

Although in the above quotation the Tribunal is speaking of the caregiving responsibilities of women for their children, the comments apply to caregiving more broadly. To reduce family responsibilities to choices and preferences may be misguided, or at least unhelpful, if the goal is to address social barriers to participation in the workforce.

Although some family responsibilities are assumed voluntarily, many factors beyond the choices of a worker can impact on family responsibilities. Does a woman who chooses to separate herself from an abusive partner choose to be a sole support single parent with complex scheduling issues? Was there any defensible alternative available to the grievor in *Canadian Staff Union* than choosing to assist his aging mother? Family responsibilities flow from a complex network of choices and actions, many beyond the control of an individual. The larger and more challenging issue surrounding the notion of family responsibilities discrimination may be the social reality that care for members of the larger community is an ongoing necessity, and people require care and assistance regardless of the richness of their personal network of family support. Viewed from another perspective, as a society we all have a vested interest in ongoing reproduction, especially in the context of an aging

²⁷¹ *Esposito v. B.C. (Ministry of Skills, Development and Labour)*, [2006] BCHRTD No 300 at 134.

population and declining workforce. Although children are the legal responsibility of their parents, raising children is a social and economic necessity.

(b) The Conceptual Relationship between Family Status and Disability

The review of cases presented in this chapter raises the question of why is disability privileged as a way of separating the mundane from the extraordinary. The emphasis on disability would make sense in a context where a complainant or grievor is arguing discrimination based on the combined grounds of family status and disability. Certainly it is often the case that a person's experience of discrimination is linked to multiple grounds, and there is an artificiality to the exercise of trying to distil a person's experience to one aspect of his or her complex social identity, e.g., to highlight only one of the categories of race, gender, disability or family status. As was well articulated by Nitya Iyer in her paper "Disappearing Women: Racial Minority Women in Human Rights Cases,"²⁷² in lived experience discrimination is often a site of intersectionality, and the reductionism inherent in the requirement to connect experience to a single specific ground in order to make out a case of discrimination can effectively erase the role of other aspects of identity in shaping experience.

However, the *Campbell River* cases tell a different story of intersectionality. Here disability is *required* to elevate the experience of barriers to participation linked to family arrangements and responsibilities to the realm of family status discrimination. If evidence of disability is required to prove family status discrimination then what is the conceptual rank of the family status ground? Does it become a secondary ground that requires evidence of another ground to make out a case of discrimination? Is family status not enough? What is the impact on human rights decision-making if we start to rank grounds? Is such an approach tenable? Certainly, the *Campbell River* cases do not reflect a deliberate downgrading of family status to less than an autonomous ground; however, the pattern of decision-making is arguably reducing the conceptual self-sufficiency of the family status ground.

Practically and strategically, the key role of medical evidence of disability is connected to the struggle to hold back the floodgates. Medical evidence is considered to be objective and scientific, and so disability becomes a supposedly neutral way to place a limit on what circumstances will amount to family status discrimination. Decision-makers defer to the physician, who confirms the child or parent is indeed disabled, thereby providing evidence of family status discrimination. But if the issue is expert evidence—and this chapter is certainly not intending to encourage greater reliance on "experts" to clarify personal experiences of social barriers—why are decision-makers relying on *medical* experts? This reliance on the evidence of a physician may make sense in the disability accommodation cases from which this pattern of relying on the medical expert may stem, but is the doctor an expert in barriers to full and free participation in the work realm? Why not a social scientist with expertise in another area connected to childcare, work overload, or systemic barriers to participating in the workplace?

²⁷² Nitya Iyer (then Nitya Duclos) "Disappearing Women: Racial Minority Women in Human Rights Cases", (1993) 6 Canadian Journal of Women and the Law 25. See also Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 Queen's L.J. 179.

In *Campbell River*, which dealt with a child and a mother with medically documented disabilities, the focus on medical evidence is understandable. However, there is a danger that the facts of *Campbell River* have become so dominant that the cases are arbitrarily narrowing the scope of family status ground. The language of *Canadian Staff Union* provides a particularly troubling example of such reasoning. Although the language of disability does not figure prominently in the decision, the absence of a disability or special needs argument is a key feature in the case's failure. In *Canadian Staff Union* the grievor is lauded for both wanting to be a part of his sons' ongoing lives and assisting his aging mother. However, in the absence of medical evidence of his children's special needs, there is no evidence that remaining in his sons' lives amounted to a family obligation: the arbitrator stated, "[t]he grievor's sons undoubtedly benefit greatly from his regular presence in St. John's but they require no special care from him, and he could have arranged for their maintenance in his absence."²⁷³

(c) The Extraordinariness of Experience and the Scope of Protection under Human Rights Law

A final conceptual concern about the role of the notion of extraordinariness in the *Campbell River* line of cases is the idea that the commonplace cannot ground a claim of discrimination. As we discuss in greater detail in Section II (Chapter A) of this Study Paper, in Canada human rights legislation was a post WWII phenomenon, a part of the global imperative to end fascism following the exposure of the scope of suffering brought on by the Holocaust.²⁷⁴ Human rights legislation was not so much a function of social change as a forerunner in promoting a shift in values. For while interest groups were instrumental in the birth of equality rights legislation, the state took leadership early on in the development of human rights law in Canada.²⁷⁵ This is not to deny overt and significant state sponsored legal discrimination in the interwar years and earlier, nor to ignore more subtle legal discrimination in subsequent years. The point is that human rights legislation was not created to reflect dominant values. Rather, human rights statutes developed to promote an equality consciousness, to remove barriers erected by racism, and to enhance access to opportunities, regardless of social identity.

The language of the 1996 B.C. *Human Rights Code* reflects this perspective:

Purposes

3 The purposes of this Code are as follows:

- (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
- (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
- (c) to prevent discrimination prohibited by this Code;
- (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code...²⁷⁶

²⁷³ *Canadian Staff Union*, *supra* note 257 at 142.

²⁷⁴ Howe, *supra* note 26 at 25.

²⁷⁵ *Ibid* at 35.

²⁷⁶ 1996 *Human Rights Code* RSBC, *supra* note 11.

The purpose of the *Code* is to eliminate discrimination. There is no statutory limitation that experiences of barriers to participation, or patterns of inequality, that are commonplace cannot amount to discrimination, and the law does not suggest that discriminatory practices are more acceptable because they are widespread. As statistical evidence discussed in *Janzen v. Platy Enterprises Inc.* revealed,²⁷⁷ sexual harassment was an extremely common workplace practice at the time of the Supreme Court of Canada decision. However, the extent of the problematic practice bore no conceptual relationship to whether the behaviour amounted to discrimination. Arguably, the ordinariness of the behaviour points rather to the urgency in addressing the problem.

This dynamic of the extraordinary versus the ordinary points precisely to the *raison d'être* of human rights law. It may be true that the existence of barriers to participation in the workforce—especially for women who are now often working full-time in the workforce and caring for young children, and often transitioning back to the workforce when their children are still infants—are most commonplace. The expectations placed on the worker, the separation of work and family, are arguably premised on the now inaccurate model of the nuclear family, characterized by a sole (male) breadwinner and a stay-at-home (female) partner who cares full-time for children and other family members. But should the fact that many women experience such challenges, a point underscored in a number of the family status discrimination cases, mean that discrimination has not occurred? This kind of rationalization could conceivably legitimize many practices public policy now recognizes as being offensive to human rights, such as terminating a woman's employment because she becomes pregnant. It is illogical to suggest that the prevalence of unfair treatment makes it acceptable from a human rights standpoint.

The sheer number of workers now facing challenges balancing family responsibilities may limit the capacity in some instances to accommodate a worker; but it does not erase discrimination. There is a long history in human rights discrimination of conceptually separating the tests for discrimination and accommodation. Once a complainant has made out a *prima facie* case of discrimination based on a ground enumerated in the *Code*, the burden shifts to the respondent to establish a defense.²⁷⁸ The three-part test for making out a defence to discrimination, established in *Meiorin*, requires the employer to prove on a balance of probabilities that:

- a) The employer adopted the standard for a purpose rationally connected to the performance of the job;
- b) The employer adopted the particular standard in the honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
- c) The standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show [this]... it must be demonstrated that it is impossible to

²⁷⁷ *Janzen v. Platy Enterprises Inc.* [1989] 1 SCR 1252.

²⁷⁸ See for example, *Health Employers Association of BC (Kootenay Boundary Regional Hospital) v. BC Nurses' Union*, [2006] BCJ No 262, 2006 BCCA 57 at. 34-37; *Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115*, [2006] BCJ No 263, 2006 BCCA 58 at. 28.

accommodate the individual employees sharing the characteristic of the claimant without imposing undue hardship on the employer.²⁷⁹

The undue hardship analysis would seem to provide ample opportunity for addressing the possibility and feasibility of accommodation. However, the language of extraordinariness and choice that figures in the *Campbell River* cases, being rooted in a concern regarding holding back a flood of cases, arguably pulls elements of the undue hardship analysis into the test for establishing *prima facie* discrimination. This theoretical move represents a fundamental shift in human rights analysis.

4. Conclusion

To this day, there remains no consensus in the jurisprudence over the appropriate conceptual approach for analyzing family status discrimination in the employment context. The cases continue to present a conceptual tug-of-war focused on whether *Campbell River* or *Johnstone* articulated the better approach. This chapter reviews a number of human rights tribunal and grievance arbitration decisions that rely on *Campbell River* to narrow the scope of family status discrimination. The chapter offers a criticism of decisions that rely on *Campbell River* that attempts to sidestep the tug-of-war, providing an alternative perspective. The hope is that the discussion will not only offer food for thought in the ongoing dialogue over whether *Campbell River* or *Johnstone* presents the better approach, but will also contribute to a discussion about whether the jurisprudence is even the ideal site, or should be the only site, to be engaging in these important conversations about supporting family responsibilities.

Underlying many of the family status discrimination decisions on family responsibilities is a concern regarding holding back a flood of claims that will result if family status discrimination is broadly defined. It is true that the labour arbitration system and human rights regime may be unable to address a massive amount of family status discrimination cases arising out of important but commonplace childcare challenges. The human rights approach is individualistic, carving out individual remedies for particular complaints and grievances. This individualized approach places the burden on employers, unions and employees to address the question of social and community responsibility for the care of dependents and other family members requiring support, care or assistance. A broad interpretation of family status potentially places responsibility on small employers to modify their workplaces. In the absence of law and policy reform elsewhere, family responsibilities discrimination complaints will only increase in number as our population ages and families experience heightened caregiving demands—at significant cost to employers, complainants, trade unions, and the human rights infrastructure. However, it will be difficult to craft truly responsive solutions to problems of inclusive workplace design through the reactive, individualistic paradigm of human rights litigation.

One lesson to be learned from the family status jurisprudence is possibly that the problem of inclusive workplace design and the challenge of supporting B.C. families with caregiving responsibilities are too big for human rights litigation to handle on its own. The ubiquitous and commonplace nature of the issues raised in these cases highlight the challenges of relying

²⁷⁹ *Meiorin*, *supra* note 152 at 54.

on human rights litigation to address family responsibilities discrimination. Both the potential volume of cases and the human rights system's limitations in fashioning remedies that reach beyond the circumstances of an individual case point to a need for government intervention. It may be time for public policy to step in. Human rights cases map out the tension between who should bear a greater part of the burden in supporting women to participate in the workforce as between the worker and the employee. The role of a social democratic government remains largely invisible within this articulation of the problem.

The purposes of human rights statutes are often much broader than those of labour statutes, being aimed at fostering systemic and social change, and eliminating barriers to full equality. Although many of the family status discrimination cases arise out of a labour arbitration context, they interpret human rights principles and have a significant impact on human rights jurisprudence in the employment context. This chapter argues that the line of family status discrimination cases following *Campbell River* presents some conceptually problematic distinctions that risk diluting the power of human rights legislation, as well as threatens to take us down a path of creating a hierarchy of grounds of discrimination.

It may be true that giving content to “family status” presents conceptual challenges, in part because family status it is a different kind of ground than, for example, race, religion, colour, nationality, ancestry or place of origin—grounds that appeared in the original anti-discrimination legislation in B.C. and the rest of Canada.²⁸⁰ Family status arguably denotes an aspect of identity that is perhaps different from the sites of persecution and discrimination referenced in other grounds, albeit in a manner that is hard to articulate. Whereas family status attaches to close relationships, other grounds relate more to individual identity. Although, comparisons across ground are difficult: we are born into our race, disability tends to be a function of circumstances beyond our control, and we do not choose our place of origin. The language of choice and extraordinariness comes up in reasoning perhaps because decision-makers are uncomfortable with attaching human rights significance to something so common and private as the family unit. Although it is not the case that everyone is so fortunate as to have a family, or even a supportive family, everyone has a status in relation to family, even if that status is a lack of family. The family status cases discussed in this chapter demonstrate how challenging it has been to flesh out the meaning of family status discrimination.

²⁸⁰ The *Fair Employment Practices Act* S.B.C. 1956, c. 16 prohibited discrimination based on race, religion, colour, nationality, ancestry or place of origin. Today we may think of religion as a mutable aspect of one social identity, but this is a more recent phenomenon: historically religious identity was a much more stable concept and people tended to be born into a religious group.

IV. Comparative Approaches

This Study Paper considers the meaning of family status discrimination in B.C. Given the absence of a statutory definition in this province, this section of the Study Paper looks outside common law Canadian jurisdictions for guidance and alternative approaches. The following two chapters consider legislation and other legal instruments created in jurisdictions outside Canada that might shed light on the scope and meaning of family status and family status discrimination in B.C., or offer alternative approaches worth consideration.

A. International Law: Conventions, Covenants and European Directives Relevant to Family Status Discrimination

1. Overview

In the sphere of international human rights law, discrimination related to family status has been addressed most commonly in the context of labour and employment rights. However, the family status ground is not specifically referenced in international human rights instruments. Rather, conventions of the International Labour Organization have been passed which speak directly to protecting the rights of workers with family responsibilities. Also, some United Nations texts and pieces of European legislation have addressed family responsibilities discrimination as a means of protecting women from sex discrimination.

2. The United Nations

A review of major relevant United Nations conventions and covenants²⁸¹ reveals that family status or similar grounds of discrimination have not generally been included in a list of enumerated grounds of discrimination.²⁸² However, the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) addresses the issue of women's reproductive rights, and speaks to the issue of supporting workers to meet their family responsibilities.

Adopted by the General Assembly of the United Nations in 1979, and ratified by members in 1980²⁸³ as a binding treaty encompassing many of the values originally embodied by the 1967 United Nations Declaration on the Elimination of Discrimination against Women,²⁸⁴ the CEDAW has been characterized as being both an “international bill of rights” and “an agenda for action” in terms of advancing women's equality.²⁸⁵ The CEDAW incorporates “provisions for maternity protection and child care [which] are proclaimed as essential rights and are incorporated into all areas of the

²⁸¹ The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child.

²⁸² See the discussion of the Universal Declaration in Section II.

²⁸³ Ratified by Canada on December 10, 1981. See United Nations Treaty Collection, online: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#12>.

²⁸⁴ “Short History of CEDAW Convention”, online: United Nations, Division for the Advancement of Women <<http://www.un.org/womenwatch/daw/cedaw/history.htm>>.

²⁸⁵ *Ibid.*

Convention, whether dealing with employment, family law, health [care] or education.”²⁸⁶ In particular, Article 11 provides that:

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures: [...]

(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities.²⁸⁷

While the text of the CEDAW is limited to maternity and childcare protections, the spirit of the CEDAW suggests a wider concern for general protections that allow parents to undertake their familial obligations without discrimination in areas of public life.

The 1967 Declaration on the Elimination of Discrimination Against Women states:

1. All appropriate measures shall be taken to ensure to women, married or unmarried, equal rights with men in the field of economic and social life, and in particular:

(a) The right, without discrimination on grounds of marital status or any other grounds, to receive vocational training, to work, to free choice of profession and employment, and to professional and vocational advancement...

2. In order to prevent discrimination against women on account of marriage or maternity and to ensure their effective right to work, measures shall be taken to prevent their dismissal in the event of marriage or maternity and to provide paid maternity leave, with the guarantee of returning to former employment, and to provide the necessary social services, including child-care facilities.²⁸⁸

At least every four years, countries that have ratified the CEDAW must submit a report to the UN CEDAW Committee documenting their country’s status in meeting the articles of the convention, and the Committee publishes commentaries specific to each country, identifying areas for improvement in meeting the standards set out in the CEDAW.²⁸⁹

3. The International Labour Organization

The International Labour Organization (ILO) has considered similar issues related to discrimination in employment arising from family responsibilities. In the Preamble to the ILO Workers with Family

²⁸⁶ Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981[CEDAW].

²⁸⁷ *Ibid.*

²⁸⁸ Declaration on the Elimination of Discrimination against Women, GA Res. 2263(XXII), UN GAOR, 22d Sess. (1967).

²⁸⁹ See CEDAW Country Reports, online: United Nations, Division for the Advancement of Women <<http://www.un.org/womenwatch/daw/cedaw/reports.htm>>.

Responsibilities Convention No. 156, adopted in 1981, specific recognition is given to the fact that the problems of workers with family responsibilities are part of larger public concerns which should be taken into account in national policymaking, and to the need to ensure “effective equality of opportunity and treatment as between men and women workers with family responsibilities and between such workers and other workers.”²⁹⁰ The Convention applies not only to people who have family responsibilities in respect of their dependent children, but also to people who have responsibilities for “other members of their immediate family who clearly need their care or support, where such responsibilities restrict their possibilities of preparing for, entering, participating in or advancing in economic activity.”²⁹¹ Thus, the Convention is drafted in the spirit of ensuring accommodation and equal treatment of workers with family responsibilities, including but not limited to childcare responsibilities.

Article 3 of the Convention states:

Article 3

1. With a view to creating effective equality of opportunity and treatment for men and women workers, each Member shall make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities.²⁹²

The Workers with Family Responsibilities Convention goes beyond preventing discrimination in the workplace. For example, member states are directed to take account of the needs of workers with family responsibilities in community planning, including the development of community services such as childcare and family services and facilities.²⁹³

Canada has not ratified the Workers with Family Responsibilities Convention.²⁹⁴ However, Canada has ratified a number of the documents set out in the preamble of the Workers with Family Responsibilities Convention as precursors to its creation,²⁹⁵ and Canada remains a member of the ILO.

The ILO Workers with Family Responsibilities Recommendation No. 165 reiterates much of what is in the Workers with Family Responsibilities Convention, but also contains strong language regarding the obligation of the State to ensure the availability of affordable childcare. Article 6 states the responsibility of Member States in the following broad terms:

²⁹⁰ Workers with Family Responsibilities Convention, 1981, (ILO No. 156), adopted 23 June 1981, entered into force 11 August, 1983 [Workers with Family Responsibilities Convention]. See ILOLEX Database of International Labour Standards, online: <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C156>>.

²⁹¹ *Ibid*, Article 1

²⁹² *Ibid*, Article 3

²⁹³ *Ibid*, Article 5. See also Articles 4 and 6-8. Part-time workers are afforded similar protections under the ILO Part-time Work Convention No.175.

²⁹⁴ *Ibid*.

²⁹⁵ For example, the Equal Remuneration Convention, 1951 (ILO C100) and the Discrimination (Employment and Occupation) Convention, 1958 (ILO C111).

II. National Policy

6. With a view to creating effective equality of opportunity and treatment for men and women workers, each Member should make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities.²⁹⁶

Subsequent articles address childcare specifically. Article 9 states:

9. With a view to creating effective equality of opportunity and treatment for men and women workers, all measures compatible with national conditions and possibilities should be taken—

(a) to enable workers with family responsibilities to exercise their right to vocational training and to free choice of employment;

(b) to take account of their needs in terms and conditions of employment and in social security; and

(c) to develop or promote child-care, family and other community services, public or private, responding to their needs.²⁹⁷

Article 16 also more generally prohibits direct discrimination on the grounds of family status:

16. Marital status, family situation or family responsibilities should not, as such, constitute valid reasons for refusal or termination of employment.²⁹⁸

4. European Union Legislation

In the Preamble to the European Parliament's directive on the equality of men and women in employment,²⁹⁹ consideration is given to the need to reconcile family and work responsibilities through measures such as flexible working time. In particular, effective measures could include "appropriate parental leave arrangements which could be taken up by either parent, as well as the provision of accessible and affordable childcare facilities and care for dependent persons."³⁰⁰ The body of the directive covers both direct and indirect discrimination. Moreover, the directive encourages Member States to engage in dialogue with social partners to promote flexible working arrangements in order to facilitate reconciliation of work and private life.³⁰¹ Thus, the legislation has an overtone of accommodation for people of varying family status, without using the term family status specifically.

²⁹⁶ Workers with Family Responsibilities Recommendation, 1981, (ILO No. 165), adopted June 23, 1981. See ILOLEX Database of International Labour Standards, online: <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?R165>>.

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.*

²⁹⁹ Directive 2006/54/EC Of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

³⁰⁰ *Ibid.*, Preamble (11)

³⁰¹ *Ibid.*, Article 21.

The 1997 EU Part-time Workers Directive³⁰² aims to protect the rights of part-time workers, with particular regard given to the importance that the parties to the agreement attach to, among other things, reconciling professional and family life.³⁰³ The Directive states:

Clause 4: Principle of non-discrimination

1. In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds.

2. Where appropriate, the principle of *pro rata temporis* shall apply.³⁰⁴

5. Conclusion

Certain international covenants and conventions may be somewhat helpful in clarifying the scope of the concept of family status discrimination in B.C. human rights legislation, but no international instrument provides a definitive characterization of the term. At the international level, accommodation of family responsibilities and the impact of family responsibilities on a worker to participate fully in the economic and social realm are generally framed as matters of sex equality, and caring for children is viewed as a state and community responsibility, rather than strictly as the responsibility of individual parents or families. Conceptualization of family responsibilities in this manner suggests that human rights litigation, generally limited to remedies involving the parties to a proceeding, may not present the ideal approach for addressing barriers to participation.

³⁰² European Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on Part-Time Work concluded by UNICE, CEEP and the ETUC, online: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0081:EN:NOT>> [Framework Agreement on Part-Time Work].

³⁰³ Other European legislation may provide some insight into protection to the family, and by extension, persons with family status. For example, the Charter of Fundamental Rights of the European Union (http://www.europarl.europa.eu/charter/pdf/text_en.pdf) confers on the family legal, economic and social protection, though “family” is not defined, nor is any further explanation or example given as to what this means. However, more extensive research into how this has been interpreted in the courts would have to be undertaken before forming conclusive views on how this could be of use in better interpreting the family status ground of discrimination.

³⁰⁴ Framework Agreement on Part-Time Work, *supra* note 302.

B. International Comparative Review: Human Rights and Employment Law

The family status ground is somewhat unique to Canadian human rights legislation. Below we discuss approaches to family status discrimination taken in human rights and employment legislation in selected comparative jurisdictions, including the United States, the United Kingdom, New Zealand, Australia, Hong Kong and South Africa.

A number of themes emerge from this review. American jurisdictions more commonly use the term “familial status” to capture discrimination related to a parent-child relationship, including pregnancy discrimination. Australian states generally bypass the concept of family status in favour of grounds that capture the concept of caregiving specifically. The Australian approach opens up protection to a broader category of relationships than is captured by biological family, and certainly well beyond the scope of parent-child relationships, specifically including, for example, grandparents, grandchildren and siblings in most jurisdictions, and capturing relationships characterized by substantial dependency in others. New Zealand and Hong Kong adopt a hybrid of the Australian and Canadian approaches, defining family status within the statute to include caregiving responsibilities. Both the terms “family status” and “family responsibilities” figure in South African equality rights legislation, and South Africa takes a slightly unique approach to family status, defining the concept to include both membership in a family and the “social, cultural and legal rights and expectations associated with such status.”

Finally, family status discrimination is indirectly addressed through employment law in some jurisdictions. In recent years, both the U.K and New Zealand have legislated a right to request accommodation of family responsibilities into employment legislation, creating a legal framework for asserting a need for accommodation without first proving discrimination. Some treatment that might otherwise be framed as a human rights violation, and as a form of family status discrimination in particular, can thus be addressed outside of the language of human rights. Further, in Germany and the Netherlands, legislation grants workers the right to request to convert to part-time status. Coupled with the European Union Directive on discrimination against part-time employees, this approach this creates an entitlement to reduce hours without losing the benefits typically associated with full-time employment in Canada.

1. Human Rights Legislation

(a) The United States

At the federal level, the United States Government has generally not classified family or familial status as a protected class, with the exception being the *Fair Housing Act*.³⁰⁵ However, despite the absence of a specific federal statute prohibiting family status discrimination or family responsibilities discrimination, individuals have brought successful claims under various U.S. federal laws, such as Title VII, § 1983, the *Family and Medical Leave Act*, the *Americans with Disabilities Act*, and the *Employee*

³⁰⁵ 42 U.S.C.A. § 3601 [*Fair Housing Act*].

Retirement Income Security Act.³⁰⁶ In the U.S., at least in the employment context, family responsibilities discrimination is primarily litigated as a form of sex discrimination.³⁰⁷

(i) Fair Housing Legislation

Under the U.S. Code *Fair Housing Act* it is unlawful:

- (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of ...familial status...
- (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of...familial status...
- (c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on...familial status...
- (d) To represent to any person because of ...familial status...that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.
- (e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular...familial status...³⁰⁸

The *Fair Housing Act* includes the following definition of familial status:

- (k) “Familial status” means one or more individuals (who have not attained the age of 18 years) being domiciled with--
 - (1) a parent or another person having legal custody of such individual or individuals; or
 - (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.³⁰⁹

A minority of U.S. States have also adopted familial status as a protected class under fair housing laws, including: California,³¹⁰ Connecticut,³¹¹ Delaware,³¹² District of Columbia,³¹³ Florida,³¹⁴

³⁰⁶ Kathleen L. Bogas and Charlotte Croson, “Family Responsibilities Discrimination” (January 2009) Mich. B.J. 18, online: <<http://www.michbar.org/journal/pdf/pdf4article1457.pdf>>.

³⁰⁷ Centre for WorkLife Law, “Current Law Prohibits Discrimination based on Family Responsibilities and Gender Stereotyping”, Issue Brief, 2006, and “Litigating Flexibility”, Issue Brief, 2007, online: <<http://www.worklifelaw.org/IssueBriefs.html>>.

³⁰⁸ *Fair Housing Act*, *supra* note 305 at § 3604 (a-e).

³⁰⁹ *Ibid* at § 3602 (k).

³¹⁰ West's Ann. California Gov. Code § 12955.

³¹¹ Connecticut General Statutes Ann. § 46a-64c.

³¹² Delaware Statute TI 6 § 4603.

³¹³ District of Columbia Statute § 2-1402.21.

³¹⁴ Florida Statute § 760.23.

Georgia,³¹⁵ Hawaii,³¹⁶ Kentucky,³¹⁷ Maine,³¹⁸ Maryland,³¹⁹ Montana,³²⁰ Nevada,³²¹ New Hampshire,³²² New York,³²³ North Carolina,³²⁴ Oregon,³²⁵ Rhode Island,³²⁶ South Carolina,³²⁷ South Dakota,³²⁸ Tennessee,³²⁹ Virginia,³³⁰ West Virginia,³³¹ and Wisconsin.³³²

Stephanie Bornstein and Robert J. Rathmell, in *Caregivers as a Protected Class?: The Growth of State and Local Laws Prohibiting Family Responsibilities Discrimination*, have analyzed both the federal, state, and local applications of familial status discrimination and have concluded that most states and many localities that adopted familial status as a protected class either use identical or very similar language to the *Fair Housing Act* definition.³³³ Bornstein and Rathmell reveal that the majority of laws, codes, and ordinances preserve the “four key elements of the FHA definition: (1) an individual under 18; (2) who is domiciled with a parent or legal custodian or designee with written permission from a parent or custodian; (3) or status as a pregnant woman; or (4) a person in the process of securing legal custody.”³³⁴ In other words, the emphasis is on parent-child relationships.

(ii) Employment Discrimination on the Basis of Familial Status

Only a few American jurisdictions explicitly prohibit family or familial status employment discrimination, and usually only at a city or town level. The exceptions to this are New Jersey, Michigan, and the District of Columbia, which prohibit familial status discrimination at state and district wide levels.³³⁵

Michigan prohibits discrimination in employment, housing, or real estate based on familial status,³³⁶ employing a definition almost identical to that found in the *Fair Housing Act*. Familial status is defined as:

³¹⁵ Georgia Statute § 8-3-200.

³¹⁶ Hawaii Statute § 515-3.

³¹⁷ Kentucky Statute § 344.360.

³¹⁸ Maine Statutes T. 5 § 4582.

³¹⁹ Maryland State Govt. § 20-702.

³²⁰ Montana Statute 49-2-305.

³²¹ Nevada Revised Statutes § 118.100.

³²² New Hampshire Statute § 354-A:10.

³²³ McKinney's Executive Law § 296(2a)(a).

³²⁴ North Carolina Statute § 41A-4.

³²⁵ Oregon Statute § 659A.421(2).

³²⁶ Rhode Island Statute § 34-37-2.

³²⁷ South Carolina Statute § 31-21-40.

³²⁸ South Dakota Statute § 20-13-20.

³²⁹ Tennessee Statute § 4-21-601.

³³⁰ Virginia Statute § 36-96.1.

³³¹ West Virginia Statute § 5-11A-5.

³³² Wisconsin Statute § 106.50(h).

³³³ Stephanie Bornstein and Robert J. Rathmell, *Caregivers as a Protected Class?: The Growth of State and Local Laws Prohibiting Family Responsibilities Discrimination* (Center for WorkLife Law, University of California, Hastings College of the Law, December 2009) at 13, online: <<http://www.worklifelaw.org/pubs/LocalFRDLawsReport.pdf>> [Bornstein & Rathmell].

³³⁴ *Ibid.*

³³⁵ The state of Connecticut prohibits family responsibilities discrimination and Alaska prohibits discrimination on the grounds of parental or marital status.

³³⁶ *Elliot-Larson Civil Rights Act*, Michigan Compiled Laws Annotated 37.2102.

1 or more individuals under the age of 18 residing with a parent or other person having custody or in the process of securing legal custody of the individual or individuals or residing with the designee of the parent or other person having or securing custody, with the written permission of the parent or other person. For purposes of this definition, “parent” includes a person who is pregnant.³³⁷

Similarly, the District of Columbia prohibits discrimination based on familial status and defines familial status as:

[O]ne or more individuals under 18 years of age being domiciled with: (1) a parent or other person having legal custody of the individual; or (2) the designee, with written authorization of the parent, or other persons having legal custody of individuals under 18 years of age. The protection afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or in the process of securing legal custody of any individual under 18 years of age.³³⁸

The New Jersey Administration Code also prohibits discrimination on the basis of family, but applies this only to state employers.³³⁹ Familial status is not defined in the Code, but is defined in the *Law Against Discrimination*.³⁴⁰ Although the definition is focused on parent-child relationships, different language is used:

Familial status means being the natural parent of a child, the adoptive parent of a child, the resource family parent of a child, having a “parent and child relationship” with a child as defined by State law, or having sole or joint legal or physical custody, care, guardianship, or visitation with a child, or any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.³⁴¹

There are fifty-one local ordinances using the term familial status to prevent discrimination in a town, city, or county across the U.S.³⁴² Of those fifty-one, twenty-one ordinances provide no definition of familial status within the Code.³⁴³ These localities are Juniper Bay, FL,³⁴⁴ Tampa Bay, Florida,³⁴⁵ Leavenworth, Kansas,³⁴⁶ Topeka, Kansas,³⁴⁷ Paducah, Kentucky,³⁴⁸ Medford, Massachusetts,³⁴⁹ Albion, Michigan,³⁵⁰ Shelby, Michigan,³⁵¹ Wayne County, Michigan,³⁵² Monroe,

³³⁷ Michigan Compiled Laws Annotated 37.2103(e).

³³⁸ Bornstein & Rathmell, *supra* note 333 citing District of Columbia Code § 2-1401.02 (11A).

³³⁹ New Jersey Admin. Code § 4A:7-3.1 (2009).

³⁴⁰ N.J. Stat. Ann. § 10:5-5 (II), cited in Bornstein & Rathmell, *supra* note 333.

³⁴¹ New Jersey Admin. Code § 4A:7-3.1 (2009), cited in Bornstein & Rathmell, *supra* note 333.

³⁴² There are 4 localities that prohibit discrimination based on family responsibility, which are not included in this discussion: *See* Bornstein & Rathmell, *supra* note 333 at Appendix A (see Appendix A detail link, online: <<http://www.worklifelaw.org/pubs/LocalFRDLawsDetail.html>>) citing Crested Butte, Colo. Code §§ 2-4-20, 10-1-10 to -11-60 (2009); Champaign, Ill. Code §§ 17-1 to -5; Montgomery County, Maryland Code §§ 27-1 to -21 (2007); Ann Arbor, Michigan prohibits FRD. Ann Arbor, Michigan Code §§ 9:150-:164 (2007).

³⁴³ Bornstein & Rathmell, *supra* note 333 at 13.

³⁴⁴ *Ibid* citing Jupiter, Fla. §§ 15-11 to -69.6 (2008)(Public employment only).

³⁴⁵ *Ibid* citing Tampa, Fla. Code §§12-16 to -51 (2008).

³⁴⁶ *Ibid* citing Leavenworth, Kan. Code §§ 58-36 to -45, 58-66 to -72 (2007).

³⁴⁷ *Ibid* citing Topeka, Kan. Code §§86-111 to -137 (2007)(Public employment discrimination only).

³⁴⁸ *Ibid* citing Paducah, Ky. Code §§58-1 to -3, 58-61 to -63 (2007).

³⁴⁹ *Ibid* citing Medford, Mass. Code §§ 2-151 to -548 (2007).

New Jersey,³⁵³ Newark, New Jersey,³⁵⁴ Passaic, New Jersey,³⁵⁵ Rocky Hills, New Jersey,³⁵⁶ Wanaque, New Jersey,³⁵⁷ Westchester County, New York,³⁵⁸ Beaverton, Oregon,³⁵⁹ Benton County, Oregon,³⁶⁰ Corvallis, Oregon,³⁶¹ Hillsboro, Oregon,³⁶² Lansdowne, Pennsylvania,³⁶³ and West Chester, Pennsylvania.³⁶⁴

There are five localities that adopt definitions in other, non-related, sections of the state code.³⁶⁵ These localities are West Palm Beach, Florida,³⁶⁶ Multnomah, Oregon,³⁶⁷ Portland, Oregon,³⁶⁸ Salem, Oregon,³⁶⁹ and Chico, Texas.³⁷⁰ Again, all definitions limit status to parent-child like relationships.

³⁵⁰ *Ibid* citing Albion, Mich. Code §§54-26 to -60 (2007)(Public employment discrimination only).

³⁵¹ *Ibid* citing Shelby, Mich. Code §§2-141 to -179 (2007)(Public discrimination only).

³⁵² *Ibid* citing Wayne County, Mich. Code §§ 120-191 to -193 (2007)(Prohibits only in public contracting).

³⁵³ *Ibid* citing Monroe, N.J. Code §§ 50-1 to -7 (2008).

³⁵⁴ *Ibid* citing Newark, N.J. Code § 2:2-84.4(Public employment discrimination only).

³⁵⁵ *Ibid* citing Passaic, N.J. Code §§ 35-1 to -15 (2008)(Public employment discrimination only).

³⁵⁶ *Ibid* citing Rocky Hill, N.J. Code §§ 24-1 to -20 (2008)(Public employment discrimination only).

³⁵⁷ *Ibid* citing Wanaque, N.J. Code §§ 29-1 to -24 (2008)(Public employment discrimination only).

³⁵⁸ *Ibid* citing Westchester County, N.Y. Code §§ 700.01-.18 (2008). Exec. Work Order No. 5-2002.

³⁵⁹ *Ibid* citing Beaverton, Or. Code §§ 5.16.005 - .060.

³⁶⁰ *Ibid* citing Benton County, Or. Code §§ 28.005 - 115 (2009).

³⁶¹ *Ibid* citing Corvallis, Or. Code §§ 1.23.010 - .120 (2009).

³⁶² *Ibid* citing Hillsboro, Or. Code §§9.34.010-.040 (2007).

³⁶³ *Ibid* citing Lansdowne, Pa. Code §§ 38-1 to -5 (2008).

³⁶⁴ *Ibid* citing West Chester, Pa. Code § 37A-1 to -7 (2008).

³⁶⁵ *Ibid.* at Appendix A (see Appendix A detail link, online:

<<http://www.worklifelaw.org/pubs/LocalFRDLawsDetail.html>>).

³⁶⁶ *Ibid* citing West Palm Beach, Fla. Code §§ 42-31 to -46 (2008). “Familial status” is not defined in Article II, Equal Opportunity Code. “Family” is defined as “one or more individuals who have not attained the age of 18 years being domiciled with a parent or another person having legal custody of such individual or individuals’ or the designee of such parent or other person having such custody, with the written permission of such parent or other person.” West Palm Beach, Fla. Code at § 42-32.

³⁶⁷ *Ibid* citing Multnomah, Oregon Code §§ 9.010 - .260 (2009). “**Familial status** has the meaning as provided in ORS 659.010(9).” § 9.010. The Oregon Revised Statutes section governing unlawful discrimination in labor and employment defines “familial status” as the relationship between one or more individuals who have not attained 18 years of age and who are domiciled with: (A) A parent or another person having legal custody of the individual; or (B) The designee of the parent or other person having such custody, with the written permission of the parent or other person.” *Id.*

³⁶⁸ *Ibid* citing Portland, Oregon Code §23.01.050(B) (2009). “The Portland City Code leaves the definition to state law specifying that “[a]ll other terms used in this ordinance are to be defined as in Oregon Revised Statutes Chapter 659.” Section 659A.001 of the Oregon Revised Statutes, governing unlawful discrimination in labor and employment, defines familial status “as the relationship between one or more individuals who have not attained 18 years of age and who are domiciled with: (A) A parent or another person having legal custody of the individual; or (B) The designee of the parent or other person having such custody, with the written permission of the parent or other person.””

³⁶⁹ *Ibid* citing Salem, Oregon Code Ch. 97 (2009). “Familial status is not defined in Ch. 97, but Salem code references ORS. ORS 659A.001 defines familial status as “the relationship between one or more individuals who have not attained 18 years of age and who are domiciled with: (A) A parent or another person having legal custody of the individual; or (B) The designee of the parent or other person having such custody, with the written permission of the parent or other person . . . Familial status ‘includes any individual, regardless of age or domicile, who is pregnant or is in the process of securing legal custody of an individual who has not attained 18 years of age.’”

³⁷⁰ *Ibid* citing Chico, Texas Code §§ 31.40-.41 (2008). “Familial Status is not defined in Chapter 31, §§ 31.01-.127. The City of Chico adopts and incorporates by reference the Local Government Code of Texas. Section 301 of the Texas Fair Housing Act defines familial status discrimination for purposes of housing as “[a] discriminatory act is committed because of familial status if the act is committed because the person who is the subject of discrimination

Among the other localities, twenty have created a definition that is identical or similar to the one contained in the federal *Fair Housing Act*³⁷¹ and is limited to parent-child relationships and pregnancy discrimination.

In their study, Bornstein and Rathmell found that only nine localities differed substantially from the *Fair Housing Act* definition of familial status.³⁷² They found that four localities omit elements (3) and (4) of the Federal *Fair Housing Act* definition, i.e., exclude from protection pregnancy discrimination as well as individuals in the process of securing legal custody. This is the approach taken in Miami Beach, Florida, Winfield, Kansas, Portland, Oregon, and Harrisburg, Pennsylvania.³⁷³ Each of these localities restricts their definition to the first two key elements of the Fair Housing definition,³⁷⁴ thereby limiting protection to parents, people with legal custody of a child, and designates with written permission from the parent.

The other anomalies are as follows. In Tucson, Arizona the Code eliminates pregnancy as a class and also adds custodial relationships created by court order such as foster parents.³⁷⁵ Cambridge, Massachusetts departs from the traditional definition and defines “family status” more broadly as “the actual or supposed condition of having minor children living with the individual or not,” but not including pregnancy.³⁷⁶ In Ypsilanti, Michigan the definition is also drastically different from the norm: familial status is “the state of being related by blood of affinity to the fourth degree.”³⁷⁷

State College, Pennsylvania and Monroe County, Florida both include the relationships covered by the traditional *Fair Housing Act* definition, as well as expanded definitions.³⁷⁸ The State College definition is expanded to include “the state of being married, single, divorced, separated, widowed,” “the state of being pregnant” and “a parent...stepparent, foster parent, or grandparent of a minor child,” or of being “a provider of care to a person or persons in a dependent relationship...whether in the past, present, potentially in the future, or pursuant to employer perception”. The Monroe County definition also includes “any familial relationship whatsoever... including living with a same sex partner or a dependent parent.”³⁷⁹ Both of these latter approaches recall the expansive concepts of caregiver discrimination, discussed below, that we see in many Australian jurisdictions.

In general, what we see in American legislation is a reference to familial status as opposed to family status, and inclusion of a statutory definition that limits family status discrimination to parent-child and custodial relationships, as well as pregnancy discrimination.

is pregnant; domiciled with an individual younger than 18 years of age in regard to whom the person is the parent or legal custodian; or has the written permission of the parent or legal custodian for domicile with that person; or in the process of obtaining legal custody of an individual younger than 18 years of age. Texas Local Government Code Annotated § 301.004 (Vermont 2008).”

³⁷¹ *Ibid.*

³⁷² *Ibid* at 13.

³⁷³ *Ibid* at 14, referring to Miami Beach, Florida. Code § 62-31; Winfield, Kansas Code § 42-1, Portland, Oregon Code § 23.01.050(B); and Harrisburg, Pennsylvania Code § 4-101.6(o).

³⁷⁴ (1) an individual under 18; (2) who is domiciled with a parent or legal custodian or designee with written permission from a parent or custodian.

³⁷⁵ *Ibid* at 14, citing Tucson, Arizona Code e § 17-11(g).

³⁷⁶ *Ibid* citing Cambridge, Massachusetts Code § 2.76.030(6).

³⁷⁷ *Ibid* citing Ypsilanti, Michigan Code §§ 58-62

³⁷⁸ *Ibid* at 14 citing State College, Pennsylvania Ordinance 1887; Monroe County, Fla. Code §§ 13-102.

³⁷⁹ *Ibid.*

(b) New Zealand

The *Human Rights Act* of New Zealand includes “family status” under a lengthy list of prohibited grounds of discrimination, and codifies the following definition of the ground within the list of grounds:

Family status, which means—

- (i) Having the responsibility for part-time care or full-time care of children or other dependents; or
- (ii) Having no responsibility for the care of children or other dependents; or
- (iii) Being married to, or being in a civil union or de facto relationship with, a particular person; or
- (iv) Being a relative of a particular person...³⁸⁰

The reference to relatives expands the scope beyond parent-child relationships. The definition of family status makes it clear that both relative and absolute status discrimination, as well as instances of family responsibilities discrimination, are prohibited. The *Act* further clarifies that some forms of preferential treatment for people with family responsibilities is permissible under the law:

74 Measures relating to pregnancy, childbirth, or family responsibilities

For the avoidance of doubt it is hereby declared that preferential treatment granted by reason of—

- (a) a woman’s pregnancy or childbirth; or
- (b) a person’s responsibility for part-time care or full-time care of children or other dependants—

shall not constitute a breach of this Part.³⁸¹

Family status is thus defined to include family responsibilities. However, as the employment law section of this chapter illustrates below (section 2), New Zealand has taken a dual approach to responding to family status discrimination, for it has also addressed the issue under its employment legislation.

(c) Australia

Most Australian jurisdictions take an explicitly human rights approach to family responsibilities accommodation; however, the term “family status” is seldom used. Rather, terms such as “carer” and “family responsibilities” appear in their human rights legislation as enumerated grounds. Although all Australian jurisdictions address family responsibilities more directly than in Canada or the United States, there is variation across the country.

³⁸⁰ *Human Rights Act 1993* (N.Z.), s 21(1)(l). The Act also defines marital status, disability and sexual orientation within the list of grounds.

³⁸¹ *Ibid*, s 74.

(i) Federal Jurisdiction

The federal *Sex Discrimination Act* was created to give effect to obligations of the Commonwealth under the CEDAW and other international instruments.³⁸² In 1992 the *Act* was amended to prohibit discrimination on the ground of family responsibilities specifically in the employment context.³⁸³ Under the law, family responsibilities means “to care for or support a dependant child of the person; or any other immediate family member who is in need of care or support,” including a spouse, as well as a child, parent, grandparent, grandchild or sibling of the employee or the employee’s spouse, where spouse includes former spouse, de facto partner and former de facto partner.³⁸⁴ The Commonwealth approach is somewhat unique by virtue of addressing family responsibilities discrimination as a form of sex discrimination, an approach that flows from the historical purpose of the *Act*, as articulated below in the legislation:

3 Objects

The objects of this Act are:

- (a) to give effect to certain provisions of the *Convention on the Elimination of All Forms of Discrimination Against Women* and to provisions of other relevant international instruments; and
- (b) to eliminate, so far as is possible, discrimination against persons on the ground of sex, marital status, pregnancy or potential pregnancy or breastfeeding in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs; and
- (ba) to eliminate, so far as possible, discrimination on the ground of family responsibilities in the area of work; and
- (c) to eliminate, so far as is possible, discrimination involving sexual harassment in the workplace, in educational institutions and in other areas of public activity; and
- (d) to promote recognition and acceptance within the community of the principle of the equality of men and women.³⁸⁵

The statute defines family responsibilities discrimination as follows:

7A Discrimination on the ground of family responsibilities

For the purposes of this Act, an employer discriminates against an employee on the ground of the employee’s family responsibilities if:

- (a) the employer treats the employee less favorably than the employer treats, or would treat, a person without family responsibilities in circumstances that are the same or not materially different; and
- (b) the less favorable treatment is by reason of:
 - (i) the family responsibilities of the employee; or
 - (ii) a characteristic that appertains generally to persons with family responsibilities;or

³⁸² *Sex Discrimination Act 1984* (Cth) [*Sex Discrimination Act*].

³⁸³ *Human Rights and Equal Opportunity Amendment Act*, (No. 2) 1992 No. 180 of 1992, Schedule.

³⁸⁴ *Sex Discrimination Act 1984*, s 4A.

³⁸⁵ *Ibid*, s 3 (emphasis ours).

- (iii) a characteristic that is generally imputed to persons with family responsibilities.³⁸⁶

The Commonwealth statute may apply concurrently with the relevant state or territorial human rights law discussed below.

(ii) Western Australia

The *Equal Opportunity Act* of Western Australia is the only Australian statute to include the family status ground. The law prohibits discrimination on the grounds of family responsibilities or family status. The terms are broadly and collectively characterized as follows:

35A . Discrimination on the ground of family responsibility or family status

- (1) For the purposes of this Act, a person (in this subsection referred to as the *discriminator*) discriminates against another person (in this subsection referred to as the *aggrieved person*) on the ground of family responsibility or family status if, on the ground of—
- (a) the family responsibility or family status of the aggrieved person; or
 - (b) a characteristic that appertains generally to persons having the same family responsibility or family status as the aggrieved person; or
 - (c) a characteristic that is generally imputed to persons having the same family responsibility or family status as the aggrieved person, the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who does not have such a family responsibility or family status.
- (2) For the purposes of this Act, a person (in this subsection referred to as the *discriminator*) discriminates against another person (in this subsection referred to as the *aggrieved person*) on the ground of family responsibility or family status if the discriminator requires the aggrieved person to comply with a requirement or condition—
- (a) with which a substantially higher proportion of persons not of the same family responsibility or family status as the aggrieved person comply or are able to comply; and
 - (b) which is not reasonable having regard to the circumstances of the case; and
 - (c) with which the aggrieved person does not or is not able to comply.³⁸⁷

Family status discrimination appears to apply only in the context of employment and education, which gives the ground more limited scope than other grounds of discrimination, which may apply in other circumstances, such as accommodation or services.

Family responsibilities or family status are also defined collectively in the statute as follows:

family responsibility or family status, in relation to a person, means—

- (a) having responsibility for the care of another person, whether or not that person is a dependant, other than in the course of paid employment; or

³⁸⁶ *Discrimination Act 1991* (ACT) s 7A.

³⁸⁷ *Equal Opportunity Act 1984* (WA), PART IIA, s 35A

- (b) the status of being a particular relative; or
- (c) the status of being a relative of a particular person.³⁸⁸

(iii) New South Wales

The New South Wales is considered to be a leader in relation to legislation of family responsibilities discrimination, its language serving as a model for other Australian jurisdictions.³⁸⁹ The *Anti-discrimination Act* of New South Wales contains a specific section addressing “[d]iscrimination on the ground of a person’s responsibilities as a carer”.³⁹⁰ This 2001 addition to their human rights statute defines discrimination to include both differential and similar treatment:

49T What constitutes discrimination on the ground of a person’s responsibilities as a carer

- (1) A person (the perpetrator) discriminates against another person (the aggrieved person) on the grounds of the aggrieved person’s responsibilities as a carer if, on the ground of the aggrieved person having responsibilities as a carer, the perpetrator:
- (a) treats the aggrieved person less favorably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person who does not have those responsibilities, or
 - (b) requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons who do not have such responsibilities comply or are able to comply, being a requirement that is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply.³⁹¹

The law further defines discrimination against an employee caregiver as follows:

49V Discrimination against applicants and employees

- (1) It is unlawful for an employer to discriminate against a person on the ground of the person’s responsibilities as a carer:
- (a) in the arrangements the employer makes for the purpose of determining who should be offered employment, or
 - (b) in determining who should be offered employment, or
 - (c) in the terms on which the employer offers employment.
- (2) It is unlawful for an employer to discriminate against an employee on the ground of the person’s responsibilities as a carer:
- (a) in the terms or conditions of employment that the employer affords the employee, or
 - (b) by denying the employee access, or limiting the employee’s access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment, or

³⁸⁸ *Ibid.* at s. 4(1).

³⁸⁹ Sara Charlesworth et al, *Balancing Work and Family Responsibilities: Policy Implementation Options* (Melbourne: RMIT University Centre for Applied Social Research, 2002).

³⁹⁰ *Anti-Discrimination Act 1977* (NSW), No. 48, PART 4B.

³⁹¹ *Ibid.*, s 49T.

- (c) by dismissing the employee, or
- (d) by subjecting the employee to any other detriment.³⁹²

Like the B.C. *Human Rights Code*, the law contains a legitimate occupational requirement exception. In this heavily codified jurisdiction, aspects of human rights law that have been defined by jurisprudence in Canada, such as the meaning of unjustifiable (undue is the Canadian equivalent term) hardship, are spelled out in the *Act*. The *Anti-discrimination Act* of New South Wales defines unjustifiable hardship as follows:

49U What constitutes unjustifiable hardship

In determining what constitutes unjustifiable hardship for the purposes of this Part, all relevant circumstances of the particular case are to be taken into account, including:

- (a) the nature of the benefit or detriment likely to accrue to or be suffered by any persons concerned, and
- (b) the effect of the relevant responsibilities as carer of a person concerned, and
- (c) the financial circumstances of and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship.³⁹³

“Responsibilities as carer” is defined to include children for whom the carer has parental responsibility and immediate family members including the carer’s spouse, former spouse, grandchild, step grandchild, parent, step-parent, grandparent, step-grandparent, brother, sister, step-brother, step-sister, as well as the carer’s spouse’s immediate family members, and former spouse’s immediate family members, including relationships by adoption, guardianship, fostering, and half siblings.³⁹⁴ Caregivers who are not family members in some sense, such as close friends, community volunteers and neighbours, appear to be excluded from protection.

(iv) Victoria

The *Equal Opportunities Act* of Victoria uses the language of attributes in place of grounds. The list of attributes includes “parental status or status as a carer.”³⁹⁵ The statute requires an employer to accommodate an employee’s responsibilities as carer and uniquely goes so far as to insert examples of accommodation into the language of the legislation. The *Act* states:

17 Employer must accommodate employee’s responsibilities as parent or carer

(1) An employer must not, in relation to the work arrangements of an employee, unreasonably refuse to accommodate the responsibilities that the employee has as a parent or carer.

Example

An employer may be able to accommodate a person's responsibilities as a parent or carer by offering work on the basis that the person could work additional daily hours to provide for a shorter working week or occasionally work from home.³⁹⁶

³⁹² *Ibid.* The *Equal Opportunity Act 1984* (WA) s 35A contains similar language.

³⁹³ *Anti-Discrimination Act 1977* (NSW), *supra* note 390 at 49U.

³⁹⁴ *Ibid.*, s 49S.

³⁹⁵ *Equal Opportunity Act 2010* (Vic), s 6.

³⁹⁶ *Ibid.*, s 17.

There is also no limitation of caring for family members under the Victorian law. Rather, a “carer” is defined as “a person on whom another person is wholly or substantially dependent for ongoing care and attention, other than a person who provides that care and attention wholly or substantially on a commercial basis.”³⁹⁷ A broad approach to explicitly defining the concept of carer beyond the realm of parenting is reflected in most Australian jurisdictions. The *Equal Opportunities Act* of Victoria contains one of the most inclusive definitions, however.

(v) Other Australian States and Territories

The states of Queensland and Tasmania prohibit discrimination on the grounds of parental status and family responsibilities.³⁹⁸ In the human rights statute of Queensland, family responsibilities means “to care for or support a dependant child of the person; or any other member of the person's immediate family who is in need of care or support” and “parental status means whether or not a person is a parent.”³⁹⁹ The *Equal Opportunity Act* of South Australia prohibits discrimination on the grounds of caring responsibilities,⁴⁰⁰ based on a definition identical to the one referenced in the *Anti-Discrimination Act* of Queensland.⁴⁰¹ In the *Equal Opportunity Act*, family responsibilities discrimination is defined as follows, capturing direct and indirect discrimination:

- (6) For the purposes of this Act, a person discriminates on the ground of caring responsibilities
- (a) if he or she treats another unfavourably because of the other's caring responsibilities or proposed caring responsibilities; or
 - (b) if he or she treats another unfavourably because the other does not comply, or is not able to comply, with a particular requirement and—
 - (i) the nature of the requirement is such that a substantially higher proportion of persons without caring responsibilities comply, or are able to comply, with the requirement than of those with caring responsibilities; and
 - (ii) the requirement is not reasonable in the circumstances of the case; or
 - (c) if he or she treats another unfavourably on the basis of a characteristic that appertains generally to persons with caring responsibilities, or on the basis of a presumed characteristic that is generally imputed to persons with caring responsibilities; or
 - (d) if he or she treats another unfavourably because of an attribute of or a circumstance affecting a relative or associate of the other, being an attribute or circumstance described in the preceding paragraphs.⁴⁰²

The *Discrimination Act* of the Australian Capital Territory prohibits discrimination on the ground of status as a parent or carer.⁴⁰³ Parenthood, defined to mean whether or not the person is a parent,⁴⁰⁴

³⁹⁷ *Ibid*, s 4(1).

³⁹⁸ *Anti-Discrimination Act 1991* (Qld), ss 7(d) and (o); *Anti-Discrimination Act 1998* (Tas), ss 16(i) and (j).

³⁹⁹ *Anti-Discrimination Act 1991* (Qld), Schedule.

⁴⁰⁰ *Equal Opportunity Act 1984* (SA), s 85T (1)(e).

⁴⁰¹ *Ibid*, s 5(3).

⁴⁰² *Ibid*, s 85T(6)

⁴⁰³ *Discrimination Act 1991* (ACT) s 7(e).

⁴⁰⁴ *Anti-Discrimination Act* (NT), s 4(1).

is a prohibited ground of discrimination under the *Anti-Discrimination Act* of the Northern Territory.⁴⁰⁵

(d) Hong Kong

Under Hong Kong human rights legislation the concept of family status is very much tied to family responsibilities. First passed in 1997, the *Family Status Discrimination Ordinance* of Hong Kong defines family status discrimination to capture circumstances where individuals with family responsibilities are unable to meet the requirements of neutral terms and conditions of employment:

A person discriminates against a person who has family status in any circumstances relevant for the purposes of any provision of this Ordinance if—

- (a) on the ground of the second-mentioned person's family status or that person's particular family status (“the relevant family status”) he treats that person less favourably than he treats or would treat another person who does not have family status or the relevant family status, as the case may be; or
- (b) he applies to that person a requirement or condition which he applies or would apply equally to a person who does not have family status or the relevant family status, as the case may be, but—
 - (i) which is such that the proportion of persons with family status or the relevant family status, as the case may be, who can comply with it is considerably smaller than the proportion of persons who does not have family status or the relevant family status who can comply with it;
 - (ii) which he cannot show to be justifiable irrespective of whether or not the person to whom it is applied has family status or the relevant family status, as the case may be; and
 - (iii) which is to that person's detriment because he cannot comply with it.⁴⁰⁶

Family status is defined as “the status of having responsibility for the care of an immediate family member.”⁴⁰⁷

(e) South Africa

South Africa’s comprehensive human rights legislation, the *Promotion of Equality and Prevention of Unfair Discrimination Act, 2000* (Act 4 of 2000)⁴⁰⁸ was enacted in 2000 to give effect to the section 9 equality clause of the Bill of Rights in the *Constitution of the Republic of South Africa, 1996*. The purposes of the Act are “to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith.”⁴⁰⁹ The *Equality Act* includes the following definitions of “family status” and “family responsibility”:

⁴⁰⁵ *Ibid*, s 19(1)(g).

⁴⁰⁶ *Family Status Discrimination Ordinance* CAP 527, s 5.

⁴⁰⁷ *Ibid*, s 2.

⁴⁰⁸ *Promotion of Equality and Prevention of Unfair Discrimination Act, 2000* (Act 4 of 2000) [*Equality Act*].

⁴⁰⁹ *Ibid*. Section 2 of Chapter 1 of the *Equality Act* sets out the following objectives:

- (a) to enact legislation required by section 9 of the Constitution;
- (b) to give effect to the letter and spirit of the Constitution, in particular—
 - (i) the equal enjoyment of all rights and freedoms by every person

- (xi) “family responsibility” means responsibility in relation to complainant’s spouse, partner, dependent, child or other members of his or her family in respect of whom the member is liable for care and support
- (xii) “family status” includes membership in a family and the social, cultural and legal rights and expectations associated with such status;⁴¹⁰

The *Equality Act* defines “prohibited grounds” as:

- (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or
- (b) any other ground where discrimination based on that other ground—
 - (i) causes or perpetuates systemic disadvantage;
 - (ii) undermines human dignity; or
 - (iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).⁴¹¹

While “family status” and “family responsibility” are not included in the enumerated list of “prohibited grounds” in paragraph (a), either ground could be captured under paragraph (b) if a complainant established “one or more of the conditions set out in paragraph (b) of the definition of ‘prohibited grounds.’”⁴¹² Further, section 34 provides a directive that “special consideration must be given to the inclusion of these grounds in paragraph (a) of the definition of ‘prohibited grounds’ by the Minister.”⁴¹³

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- (ii) the promotion of equality;
 - (iii) the values of non-racialism and non-sexism contained in section 1 of the Constitution;
 - (iv) the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution;
 - (v) the prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16 (2) (c) of the Constitution and section 12 of this Act;
 - (c) to provide for measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability;
 - (d) to provide for procedures for the determination of circumstances under which discrimination is unfair;
 - (e) to provide for measures to educate the public and raise public awareness on the importance of promoting equality and overcoming unfair discrimination, hate speech and harassment;
 - (f) to provide remedies for victims of unfair discrimination, hate speech and harassment and persons whose right to equality has been infringed;
 - (g) to set out measures to advance persons disadvantaged by unfair discrimination;
 - (b) to facilitate further compliance with international law obligations including treaty obligations in terms of, amongst others, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.

⁴¹⁰ *Ibid*, s 1, Chapter 1.

⁴¹¹ *Ibid*.

⁴¹² *Ibid*, s 13, Chapter 3.

⁴¹³ *Ibid*, s 34, Chapter 7.

Employment discrimination is specifically excluded from the application of the *Equality Act*.⁴¹⁴ Equality in the workplace is addressed under the *Employment Equity Act 1998*.⁴¹⁵ Section 6 of the *Employment Equity Act* provides the following “prohibition of unfair discrimination”:

- (1) No person may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice, on one or more grounds including race, gender, pregnancy, marital status, *family responsibility*, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, and birth.
- (2) It is not unfair discrimination to—
 - (a) take affirmative action measures consistent with the purpose of this Act; or
 - (b) distinguish, exclude or prefer any person on the basis of an inherent job requirement.
- (3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).⁴¹⁶

“Family responsibility” is defined in the *Employment Equity Act* as meaning “the responsibility of employees in relation to their spouse or partner, their dependent children or other members of their immediate family who need their care or support.”

2. Employment Legislation

(a) Work Flexibility Legislation

The United Kingdom and New Zealand protect the right to accommodation of family responsibilities under employment standards legislation.⁴¹⁷ In 2003 the U.K. parliament passed the *Flexible Working (Eligibility, Complaints and Remedies) Regulation 2002*, which required employers to consider employee requests for contract variations where the employee had the responsibility for the care of a child.⁴¹⁸ In 2007 an amendment to the regulation took effect which broadened the scope of family responsibilities protected under employment legislation to include adult care as well where the adult was a relative, a spouse or living at the employee’s residence.⁴¹⁹

Similarly, the objectives of the 2007 New Zealand *Employment Relations (Flexible Working Arrangements) Amendment Act* include “to provide certain employees with a statutory right to request a variation of their working arrangements if they have the care of any person.”⁴²⁰ “Working arrangements” are defined to mean hours, days and place of work.⁴²¹ The law imposes no limitations on what kind of

⁴¹⁴ *Ibid*, s 5(3).

⁴¹⁵ *Employment Equity Act 1998* (Act No. 55 of 1998).

⁴¹⁶ *Ibid*, s 1 (emphasis ours).

⁴¹⁷ U.K. human rights law is not discussed in this chapter as none of their equality rights legislation contains a reference to a family status ground or family responsibilities (or other ground related to caregiving).

⁴¹⁸ *Flexible Working (Eligibility, Complaints and Remedies) Regulation 2002*, S.I. 2002/3236.

⁴¹⁹ *Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulation 2006*, S.I. 2006/3314.

⁴²⁰ *Employment Relations (Flexible Working Arrangements) Amendment Act 2007* (N.Z.), 2007/105, s 69AA/

⁴²¹ *Ibid*, s 69AAA.

caregiving relationships are covered by the *Act*. Both the U.K. and the New Zealand work flexibility laws address the care of both family and friends.

Both statutes set out the potential grounds for refusal based on the impact of accommodation on the employer's business, effectively limiting and defining what amounts to undue or unjustifiable hardship. This aspect of the employer's decision is not reviewable, provided timelines for response are met. The grounds for rejection under the New Zealand law are very broadly defined to include:

- (a) inability to reorganize work among existing staff:
- (b) inability to recruit additional staff:
- (c) detrimental impact on quality:
- (d) detrimental impact on performance:
- (e) insufficiency of work during the periods the employee proposes to work:
- (f) planned structural changes:
- (g) burden of additional costs:
- (h) detrimental effect on ability to meet customer demand.⁴²²

Work flexibility legislation has been characterized as providing slightly weaker rights than those attached to human rights protection in the sense that the former provides a "right to request" rather than a "right to" flexible work arrangements.⁴²³ In the employment context, if the employer considers the request, then there is no forum to challenge the adequacy of consideration or the balancing of the employer and employee's needs. Employer discretion is built into the legislation. In contrast, in the human rights context, there exists a right to accommodation that can be exercised through a complaint and pursued via appeal.

This employment law model is precisely the approach recommended for Canada in the final report of the Commission on Federal Labour Standards. By far the largest chapter of the report deals with control over time for working families. The chapter strives to strike a balance between the competing needs of employees and employers for both predictability and flexibility in a manner that respects both the current *Canadian Labour Code* framework and changing social and labour demographics. Recommendation 7.44 of the Report states:

Employees should be provided a right to request, in writing, that their employer decrease or increase their hours of work, give them a more flexible schedule or alter the location of their work. The employer would be required to give the employee an opportunity to discuss the issue and provide reasons in writing if the request is refused in whole or in part. There would be no appeal of an employer's decision on the merits, although an employee could file a complaint if the employer has failed to adhere to the procedure.⁴²⁴

In spite of wide discretion accorded to the employer, the work flexibility amendments appear to have had some positive impact on family responsibilities accommodation. In the first year after the first U.K. amendment becoming law, out of 900,000 requests, close to 800,000 parents of preschool

⁴²² *Ibid*, s 69AAF.

⁴²³ Ariane Hegewisch & Janet C. Gornick, *Statutory Routes to Workplace Flexibility in Cross-National Perspective* (Washington D.C.: Institute for Women's Policy Research, 2008) at 21.

⁴²⁴ Federal Labour Standards Review Commission, *Fairness at Work: Federal Labour Standards for the 21st Century*, by Harry Arthurs (Ottawa: Human Resources and Skills Development Canada, 2006) [Arthurs Report].

children successfully requested schedule modifications,⁴²⁵ suggesting significant voluntary compliance on the part of employers. This group represented close to one quarter of the group of eligible employees,⁴²⁶ but only three and a half percent of U.K. employees—arguably a manageable level of demand.⁴²⁷ On this basis many sources consider the work flexibility approach to have been successful.

(b) The European Union and Part-Time Employment Rights

A different approach has been followed in Germany and the Netherlands. In these countries legislation has been passed granting workers the right to request to convert to part-time status. Coupled with the European Union Directive on discrimination against part-time employees, these regimes create an entitlement to reduce hours without losing the benefits typically associated with full-time employment in B.C.

In Germany, a law on part-time work came into force in 2001.⁴²⁸ Similarly, in the Netherlands the *Working Time Adjustment Act* came into Force in 2000, granting employees a right to request a decrease in the number of hours they were working.⁴²⁹ The laws include a right to convert to part-time status, regardless of the rationale for the request, unless there are significant business grounds to refuse the request.

As discussed in Chapter A, the European Union *Part-Time Work Directive* grants part-time workers the right to claim equal treatment with full-time workers, including benefits established based on the principle of *pro rata temporis*.⁴³⁰ Effectively, the Directive prohibits direct discrimination and provides for a legal right to claim comparable benefits.⁴³¹ This agreement was concluded in 1997 and extended to the U.K and Ireland the following year.⁴³²

These laws focused on a right to convert to part-time employment are both broader and more narrow than the U.K and New Zealand work flexibility approach discussed above: in Germany and the Netherlands the right to modify work hours is more widely available in that it is not limited to workers who request the change of hours in order to address family responsibilities; however, work

⁴²⁵ Ariane Hegewisch, “Individual Working Time Rights in Germany and the U.K: How a Little Law Can Go a Long Way” in *Working Time for Working Families: Europe and the United States* (Washington D.C: Friedrich Ebert Stiftung, 2005) 103 at 104 & 109 [*Working Time*].

⁴²⁶ *Ibid* at 109.

⁴²⁷ Ariane Hegewisch, “Employers and European Flexible Working Rights: When the Floodgates Were Opened”, Issue Brief (San Francisco: WorkLife Law, 2005) at 1.

⁴²⁸ The German Act on Part-time work and Fixed Term Contracts (*Teilzeit und Befristungsgesetz*): BGBl 2000 I, 1966, cited in Suzanne Burri, “Working Time Adjustment Policies in the Netherlands” in *Working Time*, *supra* note 425, 55 at 56. See also Doris Barnett, “Legislative Innovation and the Family Responsive Workplace in Germany: What is Being Done and Why”, in *Working Time*, 11 at 13.

⁴²⁹ *Wet verbod van onderscheid naar arbeidsduur*, Stb. 1996, 391, cited in Burri, *ibid*. Also translated as the *Adjustment of Hours Law*.

⁴³⁰ Framework Agreement on Part-Time Work, *supra* note 302 at clause 4.

⁴³¹ Alexandra Heron, “Promoting and Protecting Reduced-Hours Work: European Union Law and Part-Time Work” in *Working Time*, *supra* note 425, 35 at 37.

⁴³² European Council Directive 98/23/EC of 7 April 1998 on the extension of Directive 97/81/EC on the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC to the United Kingdom of Great Britain and Northern Ireland, online <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998L0023:EN:NOT>.

hours legislation provides a more limited solution to work and family balance in that it focuses strictly on the number of hours of work. In contrast, the U.K and New Zealand approach encapsulates flexibility options more generally (location, start and finish times, tele-working).

C. Summary of Comparative Analysis

This comparative overview does not provide a decisive answer to the question of what is family status or family status discrimination; however, this summary hopefully provides a broader political and social context within which to understand an equality rights approach to family status, as well as offer other statutory approaches worth consideration.

A review of international covenants and conventions reveals no reference to family status discrimination. However, a number of instruments espouse protection for the rights of workers with family responsibilities as critical to gender equality. In particular, the CEDAW requires state party governments “to encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life,” to the end of eliminating discrimination against women.⁴³³ The ILO Workers with Family Responsibilities Convention covers not only parent-child relationships, but also extends to family relationships characterized by a need for care and support, where such family responsibilities impact on economic activity. The Convention states that members shall aim, as a matter of national policy, “to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination...” At the very least, these international instruments endorse an approach that considers barriers to full participation in the economic realm that arise as a result of a conflict between work and family responsibilities as giving rise to a human rights violation. In other words, these laws are consistent with an expansive view of family status discrimination that includes challenges connected to family responsibilities.

In comparing a number of jurisdictions with English language equality rights legislation, we see a few trends.

1. Family Status Defined to Include Family Responsibilities

The term family status is found in equality rights legislation in Hong Kong, New Zealand and South Africa. In New Zealand and Hong Kong the human rights statute defines family status broadly to include family caregiving responsibilities. South Africa defines the concept to include both membership in a family, as well as the “social, cultural and legal rights and expectations associated with such status” —very different phraseology from what we see in other jurisdictions but thematically consistent with an approach that defines family status to include family responsibilities: caregiving responsibilities arguably flow from social or cultural expectations, if not also legal obligations in many instances.

2. Favouring a Family Responsibilities Ground as an Alternative to Family Status

The family status ground is not common in Australian anti-discrimination legislation. The only statute to prohibit family status discrimination defines discrimination on the ground of family responsibilities or family status as a collective concept (Western Australia). Other states and territories use the grounds of: responsibilities as carer (New South Wales); parental status or status as a carer (Victoria); caring responsibilities (South Australia); parental status and family responsibilities (Queensland and Tasmania); status as a parent or carer (Australian Capital Territory); and

⁴³³ CEDAW, *supra* note 286.

parenthood (Northern Territory). Although, as the above list illustrates, every Australian jurisdiction takes a unique approach, the broad carer ground of discrimination is uniquely Australian, and this approach has resulted in a statutory approach that generally expands protection beyond the realm of a parent-child relationship, the exception being the Northern Territory. In a number of jurisdictions protection is extended to include relationships involving immediate family members (Queensland, South Australia) grandparents, grandchildren and siblings (Commonwealth, New South Wales), or more loosely to include caring relationships (Western Australia) or relationships of substantial dependency (Victoria). Although the federal jurisdiction echoes this expansive approach, the law uniquely addresses family responsibilities discrimination in the sex discrimination legislation. The statute prohibits family responsibilities discrimination strictly in the employment context, as a function of fulfilling obligations under the CEDAW.

3. Limiting Protection to Parent-Child Relationships and Pregnancy Discrimination

In the United States a number of jurisdictions prohibit discrimination on the ground of familial status. This concept is largely defined to capture discrimination based on a parent-child, guardianship or custodial relationships, including designates with written permission, as well as pregnancy discrimination. The language of family responsibilities does not figure in definitions of familial status.

4. Employment Legislation: Work Flexibility and Part-time Work

Finally, in a number of jurisdictions employment legislation provides additional protection. New Zealand and the U.K have passed Flexible Working amendments that create a right to request accommodation of family responsibilities—changes to hours, days and place of work—without proving discrimination, taking the issue outside of the human rights paradigm. Further, in Germany and the Netherlands there is a right to covert to part-time employment, regardless of any rationale connected to family responsibilities.

V. Conclusion

A. Family Status in 2012: Change over Time; Uncertainty amidst Change

1. Sources of Uncertainty

Although the family status ground has been included in the B.C. *Human Rights Code* for twenty years, and part of the *Canadian Human Rights Act* for just over thirty years, the ground remains one of the newest additions to the vocabulary of human rights, and one of the least understood of the prohibited grounds. Today a number of factors contribute to the current uncertainty regarding the scope and meaning of family status discrimination.

First, as we point out in the outset of this Study Paper, widespread silence surrounded the addition of family status to Canadian human rights law. Across the country, over a period of time stretching from 1981 to 2006, the various legislatures added family status discrimination to their legal frameworks with little discussion to clarify the intended scope of the ground.⁴³⁴ At most, comments surrounding the introduction of the ground identify a concern with providing protection to parents, and, in particular, to women who are single parents.

Second, as is discussed in Section II of this paper, there is a lack of uniformity to statutory definitions of the ground. In roughly half the provinces the meaning of family status is circumscribed by a statutory definition: in Prince Edward Island, Newfoundland and Labrador, Nova Scotia, Ontario and Saskatchewan, family status is limited to parent-child relationships; and in Alberta and Nunavut, family status is the status of “being related by blood, marriage or adoption.” In contrast, in B.C., Manitoba, the Northwest Territories, Yukon and the federal jurisdiction, the term family status is not defined.⁴³⁵ In Canada there is no shared legal definition from which a single and uniform understanding of the term family status may emerge.

Third, upper level court decisions emanating from B.C. and the federal jurisdiction—two jurisdictions governed by the same statutory approach to family status (i.e., no definition)—have released conflicting judgments regarding the scope of family status discrimination, at least in the employment context. This dynamic suggests that statutory uniformity has not been, in and of itself, a sufficient foundation to ground a consistent approach to family status. In Canada, there is lack of agreement amongst decisions-makers regarding a coherent approach to the ground.

Fourth, in spite of this interpretative controversy, there remains very little academic commentary on family status that delineates a solid conceptual and critical path forward—a problem this Study Paper seeks in part to remedy.

Finally, the family status ground was born out of a different socio-historical reality than that which saw the birth of the founding or original grounds of human rights legislation in this country, namely, race, colour, country, national or ethnic origin and religion or creed. As is discussed in Section II of this paper, in Canada anti-discrimination legislation was largely a post-war phenomenon, a response to the atrocities of the Second World War. The original grounds reflect this preoccupation with

⁴³⁴ See Figure 2 for a chronology of the introduction of the ground across Canada.

⁴³⁵ See Figures 2 and 3 for an overview of the various approaches.

religious and ethnic persecution. Family status emerged forty years later, and although there was little discussion surrounding its introduction, times had certainly changed. New and different pressing issues are suggested, but unarticulated, in this move to expand the protected grounds.

2. Focus on Family

Like the family status ground itself, this Study Paper is a product of the times. The rationale for this paper reflects a convergence of various current socio-historical realities. First, over the years there has been an evolution in Canadian families, including labour force participation by family members. There is a growing recognition of diversity in both family structures and in the kinds of relationships of support, care and affection people include in their own personal definitions of family. Although there remains uncertainty about the meaning of family status, as the Ontario Human Rights Commission points out in its 2006 Report of the Consultation on Discrimination on the Basis of Family Status, caregiving and relationships of care “lie at [the] heart” of family status.⁴³⁶

Second, a relatively recent decision of the B.C. Court of Appeal on discrimination based on the family status ground encouraged an interpretative approach to family status employment discrimination that limits the scope of protection provided under the ground, triggering a series of decisions in B.C. and the rest of Canada debating the meaning of the family status ground, particularly in relation to circumstances where female complainants maintaining paid employment allege that workplace standards discriminate against parents with family caregiving responsibilities. As we discuss in Section IV of this paper, these decisions on family status employment discrimination reflect a socio-historical reality that developed subsequent to the creation of human rights legislation in Canada. The cases highlight the growing presence of women and mothers in the workforce and the disintegrating separation between the world of work and the realm of the family.

Third, recent legislative reform in B.C. suggests a more expansive approach to the notion of family. The new B.C. *Family Law Act*⁴³⁷ contains an expanded definition of parenthood, recognizing that children come into people’s lives through different means, including assisted technologies. The statute offers choice in determining who will be the parents of the child, regardless of each person’s role in conception.

Fourth, and most recently, in the last year the rhetoric of “families first” has become a centrepiece of the governing party of this province. Although the meaning and significance of this agenda may have appeared initially as murky as the family status ground itself, the concept of family has become a dominant aspect of government ideology. This focus on families has recently manifested in a number of concrete policy steps, including the creation of a new statutory holiday entitled Family Day.⁴³⁸ In addition, as part of its recent seniors’ strategy, the provincial government announced a \$15 million dollar grant to the United Way of Lower Mainland’s non-medical home support program.⁴³⁹ This program provides assistance to isolated older people with activities that would

⁴³⁶ *The Cost of Caring*, *supra* note 14 at 4.

⁴³⁷ *Family Law Act* SBC 2011, c. 25. The Act has been proclaimed but many provisions will not take effect for 16 to 18 months.

⁴³⁸ BC is not the first province to proclaim Family Day. Family Day is a statutory holiday in Alberta, Saskatchewan and Ontario. See Inside Greater Toronto, Family Day in Canada, online: <<http://www.insidegta.com/family-day-in-canada/>>.

⁴³⁹ “Improving Care for B.C. Seniors: An Action Plan” (2012), at 7, online: Government of BC, Ministry of Health <<http://www.seniorsbc.ca/>>. See “Seniors to shape advocate’s role as part of action plan” (February 14, 2012)

otherwise be performed by families, in a sense making up for a loss of family support that is arguably a form of disadvantage based on family status. While it remains to be seen what further policy directions will flow from the family first agenda, this focus on families in this province makes 2012 an ideal moment in history to explore the concept of family status discrimination and evaluate the impact this ground has had in protecting the rights of diverse families.

All four of the above trends and events problematize the notion of family, rendering more pressing and timely the need to generate, after twenty to thirty years of uncertainty, greater clarity regarding the meaning of family status.

This Study Paper summarizes the findings of the B.C. Family Status Legal Research Project. The project included a comparative review of human rights statutes across Canada and an analysis of reported family status decisions, including court cases, tribunal decisions and labour grievance arbitrations. The case review is largely concentrated on decisions subsequent to *Campbell River*,⁴⁴⁰ the controversial B.C. decision that produced the new standard for assessing *prima facie* discrimination on the ground of family status in an employment context. Although the emphasis of this paper is on B.C., the review included decisions from other jurisdictions, most notably Ontario, which has seen a high volume of family status decisions compared to other provinces and territories. By way of exploring options for research and reform, and gathering greater insight into the concept of family status, this project also involved research into approaches taken in other jurisdictions, including international human rights law. This conclusion summarizes our findings, culminating in questions for discussion to help guide further research, law reform and policy development to support the overarching goal of an inclusive approach to addressing disadvantage based on family relationships.

B. The Jurisprudence: From *Mossop* to Today

1. The Supreme Court of Canada Decision in *Mossop*

One of the first and few opportunities the Supreme Court of Canada has had to consider the meaning of family status was the decision in *Mossop*.⁴⁴¹ *Mossop* concerned a gay man who sought bereavement leave to attend the funeral of his partner's father, asserting this right under the language of the collective agreement, which provided such an entitlement to common-law spouses. Although the two men had been a couple for more than ten years, and lived together in a shared home, leave was denied because the term spouse was confined to opposite sex partners. Brian Mossop claimed the denial of leave was discriminatory on the basis of family status, as his employer refused to acknowledge his family structure as being legitimate. At the time, the case raised the issue of whether same-sex couples should be recognized as legitimate family configurations worthy of statutory protection from discrimination.

The Supreme Court of Canada denied the appeal, grounding its reasoning in parliamentary intent. The Court stated the refusal to grant bereavement leave was not discriminatory under the applicable human right law, because sexual orientation was not a protected ground under the *Canadian Human*

online: Government of BC, Ministry of Health <<http://www.seniorsbc.ca/documents/pdf/2012HLTH0011-000154.pdf>>

⁴⁴⁰ *Campbell River*, *supra* note 3.

⁴⁴¹ *Mossop*, *supra* note 16 at 46.

Rights Act in 1985, when Mossop filed his complaint. The decision of the majority of the Court characterized the treatment of the complainant as discrimination based on sexual orientation, and not family status. The Court held that the claim of discrimination based on family status was effectively being used to bypass parliament's specific decision to omit sexual orientation as a ground. Using similar reasoning, Justice LaForest noted in his concurring judgment that the dominant understanding of the concept of family at the time of the Supreme Court of Canada judgment was the "traditional family"; even in 1993, when Brian Mossop brought forward his appeal, the "ordinary" usage of the term family did not include "same-sex living arrangements" in Canada.⁴⁴²

In her dissenting reasons in *Mossop*, Justice L'Heureux-Dubé took a different approach from the majority, rejecting a notion that meaning is determined by parliamentary intent. She offered the following reflections on the absence of a definition of family status:

Though the members of Parliament may perhaps not at that precise moment have envisaged that "family status" would be interpreted by the Tribunal so as to extend to same-sex couples, the decision to leave the term undefined is evidence of clear legislative intent that the meaning of "family status", like the meaning of other undefined concepts in the Act, be left for the Commission and its tribunals to define. In my view, if the legislative record helps here in the search for legislative intent, it rather supports the Tribunal's wide and broad discretion in the interpretation of the provisions of its own Act.⁴⁴³

These words encourage an expansive approach to the interpretation of family status, at least within those jurisdictions where family status is not defined in the human rights statute. L'Heureux-Dubé J. went on to add the following comments, encouraging a dynamic approach to interpreting human rights concepts according to which meaning is never "frozen in time":

Even if Parliament had in mind a specific idea of the scope of "family status", in the absence of a definition in the *Act* which embodies this scope, concepts of equality and liberty which appear in human rights documents are not bounded by the precise understanding of those who drafted them. Human rights codes are documents that embody fundamental principles, but which permit the understanding and application of these principles to change over time. These codes leave ample scope for interpretation by those charged with that task. The "living-tree" doctrine, well understood and accepted as a principle of constitutional interpretation, is particularly well suited to human rights legislation. The enumerated grounds of discrimination must be examined in the context of contemporary values, and not in a vacuum. As with other such types of legislation, the meaning of the enumerated grounds in s. 3 of the *Act* is not "frozen in time" and the scope of each ground may evolve.⁴⁴⁴

The approach encouraged by L'Heureux-Dubé J. has played itself out in human rights jurisprudence over the years. The meaning of grounds would appear not to be static. We have, for example, seen sex discrimination evolve over the years to include sexual harassment,⁴⁴⁵ pregnancy discrimination,⁴⁴⁶ and transsexualism and other gender-identity based claims.⁴⁴⁷ L'Heureux-Dubé J. advocates an

⁴⁴² *Ibid* at 46.

⁴⁴³ *Mossop*, *supra* note 16 at 107.

⁴⁴⁴ *Ibid* at 109.

⁴⁴⁵ *Janzen v Platy Enterprises Inc.*, [1989] 1 SCR 1252.

⁴⁴⁶ *Brooks v. Canada Safeway, Ltd.*, [1989] 1 SCR 1219.

⁴⁴⁷ *Vancouver Rape Relief Society v. Human Rights Commission*, 2000 BCSC 889.

approach that anticipates the dynamism of a concept such as family, and in a sense this Study Paper heeds this advice. The question thus becomes, to what extent has the meaning of family status evolved since *Mossop*? What kinds of experiences and family relationships are currently captured by the concept of family status?

The decision in *Mossop* is very much located in a particular era, and years later, now that sexual orientation has been added to every Canadian human rights statute, the review of cases contained in this Study Paper demonstrates greater inclusivity.

2. Summary of the Case Review

(a) What is Family Status?

(i) Family Relationships included in the Meaning of Family Status

This review of cases considers whether the concept of family status is being interpreted in a manner broad enough to include many kinds of family configurations. At the outset of this paper we posed a number of questions:

- Is the concept of family status being interpreted in a manner sufficiently broad enough to include many kinds of families, or do patterns of interpretation privilege certain types of families? For example, is the concept of family being interpreted in a manner that recognizes and respects cultural differences?
- Are individuals in family relationships characterized by vulnerability or disadvantage bringing forward complaints of discrimination?
- Do the cases reveal complainants whose identity implicates other sites of oppression or disadvantage, such as disability, race, immigration status or sexual orientation, and what kinds of patterns are emerging in terms of the relationship between family status and other enumerated grounds?
- Are the cases limited to barriers associated with childcare, or do the cases address other family obligations, such as assistance for aging parents, support for adult children with developmental disabilities, and care for family members who are ill or dying?

One of the findings of this research initiative is that, at least since *Campbell River*, the family status jurisprudence does not represent a broad spectrum of family configurations and caregiving relationships. Across Canada, most of the reported decisions where family status is raised as a ground of discrimination deal with circumstances involving a parent-child relationship. In this sense the B.C. cases are not aggressively testing the openness of the B.C. statutory approach of having no definition. Certainly, in some cases the Human Rights Tribunal references the absence of a statutory definition in B.C. as a rationale for including relationships outside the concept of parent-child relationships within the meaning of family status; however, most cases fall squarely within the confines of the most restrictive definitions of family status.

There are a few exceptions to this pattern. The Tribunal has found the concept of family to include marriage-like relationships (including those involving youth) that do not involve children, and possibly other cohabiting, dating relationships that might somehow fall short of the concept of

“marriage-like.” For example, in *L. v. B.C. (Ministry of Children and Family Development)*, the Tribunal found that circumstances involving a 16-year old girl living with her 20-year old boyfriend could give rise to a finding of discrimination under marital status and family status.⁴⁴⁸ Also, in *Berezan* the Tribunal member suggested that a cohabiting same-sex relationship that does not include children could be captured by the concept of family status.⁴⁴⁹ Both of these decisions captured facts that would have fallen outside of the definition of family status found in the Ontario *Human Rights Code*, which limits the concept to parent-child relationships. Interestingly, both decisions comment on family status and marital status collectively.

In B.C., family status also includes relationships between adult children and their parents. *Baines*⁴⁵⁰ involved a complainant who took time off to care for her father, who had been hospitalized and required surgery. In refusing to dismiss the complaint, Member Marion indicated that a relationship between a woman and her father fell within the ambit of family status, citing *B v. Ontario. Hutchinson*⁴⁵¹ concerned a parent caring for his adult child. Mr. Hutchinson was an older man who had been the lifelong caregiver for his daughter, a woman with cerebral palsy who had been a quadriplegic since adulthood. Poverty, dependence on income assistance, and disability compound the experience of this family, contributing to an experience of systemic disadvantage.

In B.C., the concept of family status has also been characterized to include circumstances involving the death of a child, including a child that lived less than 24 hours, after being born at 21 weeks gestation.⁴⁵² Further, the *McGrath* Tribunal decision characterized a relationship between a custodial parent (other than the mother or father) and a child as falling within the meaning of family status.⁴⁵³ The *McGrath* case involved grandparents who claimed the Ministry of Child, Family and Community Development discriminated against them in refusing to provide their families with foster parent support once they obtained legal custody of their grandchildren.

In Alberta, family status may also include characteristics of a spousal relationship, beyond the fact of being married and aspects of childcare. In the decision in *Rennie*, the Tribunal found that a case of *prima facie* discrimination had been made out, for, considering all the circumstances, including marital relationship issues and the husband’s unwillingness to take care of the children in the evening, it was highly possible that the complainant was unable to make childcare arrangements that would allow her to work the required evening shifts. The Chair stated, “if the concept [of family status] is definable, and I understand it correctly, then the state of her relationship with her husband—beyond the simple fact that they are married—is an aspect of Ms. Rennie’s family status.”⁴⁵⁴

In Ontario the Tribunal found that family status discrimination included a distinction that precluded a youth from receiving income assistance benefits while living with her parents, again including as

⁴⁴⁸ *L. v. BC (Ministry of Children and Family Development)*, *supra* note 190.

⁴⁴⁹ *Berezan*, *supra* note 188. The allegation of discrimination based on sexual orientation was not dismissed.

⁴⁵⁰ *Baines*, *supra* note 193.

⁴⁵¹ *Hutchinson*, *supra* note 157.

⁴⁵² *Mahdi*, *supra* note 187.

⁴⁵³ *McGrath* Tribunal decision, *supra* note 163, at 32. The Tribunal decision is discussed in Section III, Chapter D, at 2(b)(iv) of this Study Paper.

⁴⁵⁴ *Rennie*, *supra* note 204 at 53. While this case has been mentioned in Ontario and the federal jurisdiction, the *Rennie* decision does not appear to have been followed in BC.

part of family status characteristics of a family relationship that were connected, but not reducible, to parenting obligations, i.e. residency.⁴⁵⁵

(ii) Cases involving Vulnerable Families

This case review generally does not reveal a family status discrimination arguments being used as a tool to advance the rights of vulnerable families. However, in Ontario we do see a number of Tribunal decisions involving single Aboriginal mothers arguing family status discrimination. In at least one case the Tribunal appears to ground its finding of discrimination in an intersectionality of multiple grounds, including race, sex, ethnicity and family status. Vice-chair Leslie Reaume concluded that, “the harassment of the complainant was based on the unique intersection of the grounds with which the complainant self-identifies. As the Commission argued, the complainant was harassed on the basis of her status as an Aboriginal single mother and that identity is an important part of the context of her complaint.”⁴⁵⁶ Although single parents figure prominently in the Ontario cases, largely in a tenancy or services context, this is not so true of B.C., at least in terms of the family status jurisprudence.⁴⁵⁷

Immigrant families are also not reflected in the family status cases. One exception is the Ontario Superior Court decision in *A.T. & V.T.*,⁴⁵⁸ which involved two young children who had recently immigrated to Canada. It was alleged on behalf of the complainants that their ineligibility for publically funded health care until they completed a three-month waiting period amounted to discrimination on the basis of family status and place of origin.

Overall, the cases do not reflect a diversity of family relationships that one might expect. In B.C. family caregiving responsibilities is a major theme of the jurisprudence, and almost all the complaints and grievances framed as family status discrimination relate to parenting relationships or childcare responsibilities. Few cases address challenges linked to providing care to aging parents or other adult family members, including adult children with disabilities. Scenarios involving cohabitation of extended family are conspicuously absent. While a small number of cases concerned with discrimination in the employment context in relation to childcare challenges involve families fragmented by separation,⁴⁵⁹ most cases do not reveal facts that depart from the nuclear family norm.

Based on this case review, the meaning of family status does not appear to be a source of controversy. As is discussed above, this may largely be because the facts underlying the cases generally fall within the scope of both strains of statutory definition, dealing with parent-child relationships where the family members are connected by blood, marriage or adoption. In the end, while the cases do tell a story of how family status is being interpreted by decision-makers, and we have come a long way since *Mossop*, the cases provide a skewed portrait of families in B.C. Many families are missing. Although the absence of these families raises questions of access beyond the scope of this Study Paper, the experiences of these missing families must be considered in any plan to move forward in developing law and policy initiatives to address barriers to family inclusivity and systemic disadvantage based on family status. A rigorous course of action must reflect the

⁴⁵⁵ *Hendersbott*, *supra* note 5.

⁴⁵⁶ *Hope*, *supra* note 225 at 65.

⁴⁵⁷ The exception is *Falardeau*, *supra* note 182, which considered the circumstances of a single father.

⁴⁵⁸ *A.T. & V.T.*, *supra* note 228.

⁴⁵⁹ Consider, for example, *Power Stream*, *supra* note 236, and *Canadian Staff Union*, *supra* note 257.

challenges facing diverse families. We return to this problem in the Questions for Discussion posed at the end of this paper.

(b) What is Family Status Discrimination?

As discussed in Section III (Chapter D), legislating a meaning of family status does not appear to cure the confusion regarding the meaning of family status discrimination. “Family status” and “family status discrimination” refer to different but related concepts: whereas the term family status addresses the web of family relationships and other personal connections of care, support and affection caught by the term family, family status discrimination refers to the actions and barriers that may offend the *Code*. The restrictive *Campbell River* test has emerged out of a jurisdiction where meaning is not constrained by a statutory definition.

Although there is a degree of homogeneity to the family relationships underlying family status discrimination complaints, a broad set of experiences appears to be captured by the family status discrimination cases. As discussed in Section III (Chapter C) of this Study Paper, the reported decisions of courts, human rights tribunals and labour grievance arbitrators on family status discrimination fit roughly into the following categories:

- i. Requests for equality of benefits, often between biological and adoptive parents, or birth fathers and mothers, in particular, in relation to parental or bereavement leave;
- ii. Arbitrations considering the impact of absence from the workplace due to maternity, parental or other leave related to family obligations on entitlement to other negotiated benefits (pay increases, retirement benefits);
- iii. Arguments that facially neutral employment standards discriminate against parents with particular family responsibilities (such as denials of requests to convert to part-time, requirements to work evening or overnight shifts, elimination of part-time shifts, requests for changes to shifts times and responsibilities during pregnancy);
- iv. Discriminatory termination, where there is disagreement amongst the parties as to whether discrimination is linked to family obligations, or performance issues or other legitimate business rationale;
- v. Discriminatory policy in relation to administration of public benefits (entitlement to income assistance by under-age parents, adult children living with their parents, or parents with shared custody; foster parent support payments to grandparents);
- vi. Tenancy discrimination (denial of opportunity to rental accommodation due to family status, often because of young children or single parent status); and
- vii. Nepotism and anti-nepotism cases.

In Section III (Chapter A) we characterized cases included under categories ii., iii and iv. as falling within the slightly broader concept of family responsibilities discrimination. The case tables at Appendices 1 and 2 include decisions captured by all of the above categories, but the analysis of the jurisprudence and consideration of themes has been limited to categories ii. to vi., where the law is

still arguably in a developmental phase. Figure 5 provides a visual breakdown of the jurisprudence according to type.

(c) What is Family Responsibilities Discrimination?

A central theme of this paper is the impact of *Campbell River*, the controversial B.C. Court of Appeal decision that gave birth to the “significant interference with a substantial parenting obligation” test for determining whether an employee had experienced discrimination in terms and conditions of employment. In fashioning the new test the Court sought to constrain the scope of family status discrimination, such that not every instance of a conflict between a work and family obligation would amount to *prima facie* discrimination and trigger an examination of the duty to accommodate. *Campbell River* effectively established a more stringent standard than the *prima facie* discrimination standard to which other grounds are held. In this paper we have characterized the line of cases considering the relationship between family and work responsibilities as the family responsibilities jurisprudence, a sub-category of family status decisions more broadly.⁴⁶⁰

Based on our case review, *Campbell River* continues to be cited in B.C. in employment circumstances, but it is often distinguished, especially by the Human Rights Tribunal. As is discussed in Section III (Chapter C), although the decision is often relied on in cases involving a request for an employer to accommodate parenting responsibilities, facts bearing a strong similarity to those underlying *Campbell River*, the B.C. Tribunal has found the *Campbell River* test to be inappropriate for a non-employment context, and has distinguished the test in some employment cases. Figure 4, which lists the majority of the family responsibilities discrimination cases since *Campbell River* and a number of cases from outside B.C., shows that *Campbell River* is not consistently applied in all family status cases, even where parental duties are at issue. However, this review of cases also suggests that *Campbell River* may be gaining support in the arbitral context, particularly in Ontario.

Section III (Chapter E) identifies a number of problematic themes emerging from the cases that follow *Campbell River*. First, a distinction between extraordinary versus ordinary family obligations is often used to rationalize whether family responsibilities meet the “serious interference with substantial family obligations test”—a distinction that raises the question, “what is normal?” Second, the language of choice is sometimes invoked to characterize particular family responsibilities as inadequate to ground a claim of family status discrimination. Third, evidence of disability of a family member appears to be the most common factor that transforms a normal caregiving duty into an extraordinary obligation, even in instances where disability is never articulated as a ground of discrimination. Although these themes illustrate some conceptually untenable binaries (normal versus extraordinary, choice versus obligation), these trends also raise some interesting questions about the role of human rights institutions and the relationship between prohibited grounds. Although the decisions do not overtly articulate a need to establish discrimination based on disability, there remains a sense that, at least in the family responsibilities context, family status is a kind of secondary ground that requires evidence of another ground to make out a case of discrimination. In Chapter E we thus speak of a medicalization of family status in the family responsibilities context, medical evidence being a strong factor in making out a successful case.

These three themes identify different language that is used to control the floodgates and limit the potential scope of family responsibilities discrimination. Although never articulated as such, in a

⁴⁶⁰ See Section III, Chapter B.

sense the language of the extraordinary versus ordinary poses the question of whether the barriers to participating in the workforce at issue in the family responsibilities cases are worthy of human rights protection. This is perhaps a concern that links to the lineage of anti-discrimination legislation, which is steeped in a preoccupation with preventing racial and religious persecution.

These cases demonstrate how challenging it has been to flesh out the meaning of family status discrimination. There appears to be a discomfort amongst decision-makers with attaching human rights significance to something so common as the family unit, and to a challenge so ubiquitous as the struggle to balance work and family obligations. Everyone has a status in relation to family, even if that status is a lack of family. However, it remains problematic on its face to assert that one's experience must be somehow unique, unusual or extraordinary to ground a human rights claim. The commonness of one's experience is not a legal defense. Rather, commonness may speak to the urgency of an equality issue. Moreover, access to employment remains fundamentally important to individuals who must care for and support other family members, and participation in the workforce has been noted by the Supreme Court of Canada to be fundamental to one's identity.⁴⁶¹

C. Comparative Findings

1. Human Rights Law

This Study Paper includes a comparative review of employment and human rights law.⁴⁶² The review identifies family responsibilities discrimination as an issue of international concern and offers alternative law and policy approaches for giving effect to equality rights linked to family responsibilities.

The term family status does not appear in any international convention or charter that lists prohibited grounds. Most jurisdictions that include family status as a prohibited ground define family status to include family responsibilities. One such example is New Zealand.⁴⁶³

The New Zealand *Human Rights Act* includes family status as a ground and defines it as follows:

Family status, which means—

- (i) Having the responsibility for part-time care or full-time care of children or other dependents; or
- (ii) Having no responsibility for the care of children or other dependents; or
- (iii) Being married to, or being in a civil union or de facto relationship with, a particular person; or
- (iv) Being a relative of a particular person...⁴⁶⁴

Family status is thus defined to include family responsibilities. The Hong Kong *Family Status Discrimination Ordinance* does not use the term family responsibilities but the inclusive definition

⁴⁶¹ See, for example, *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 at 91.

⁴⁶² Jurisdictions considered include the United States, New Zealand, Australia, Hong Kong and South Africa. See Section V (Chapter B).

⁴⁶³ A similar approach is taken in Hong Kong.

⁴⁶⁴ *Human Rights Act 1993* (N.Z.), *supra* note 380.

captures circumstances of family responsibilities discrimination.⁴⁶⁵ The *Equal Opportunity Act* of Western Australia prohibits discrimination on the grounds of family responsibilities or family status, which are broadly and collectively defined.⁴⁶⁶

South Africa defines the concept to include both membership in a family, as well as the “social, cultural and legal rights and expectations associated with such status”—very different phraseology from what we see in other jurisdictions, but thematically consistent with an approach that defines family status to include family responsibilities: caregiving responsibilities arguably flow from social or cultural expectations, if not also legal obligations in many instances.

American jurisdictions use the term “familial status”, generally in the context of federal, state and county fair housing legislation. In most jurisdictions the definition is confined to parent-child relationships, including pregnancy discrimination and covering the experience of any person having legal custody of the child.⁴⁶⁷

Family status does not appear in any Australian anti-discrimination statute other than Western Australia. However, other states and territories prohibit family responsibilities discrimination using more specific language than family status, including: responsibilities as carer (New South Wales); parental status or status as a carer (Victoria); caring responsibilities (Southern Australia); parental status and family responsibilities (Queensland and Tasmania); status as a parent or carer (Australian Capital Territory); and parenthood (Northern Territory). The relationships captured under the ground varies from jurisdiction to jurisdiction. Western Australia broadly includes caring relationships regardless of dependency, and Victoria includes relationships of substantial dependency. Other states and territories list the family members included, which is generally beyond a parent-child relationship. The Australian strategy provides an alternative and possibly clearer statutory approach for B.C. if there is a will to ensure family responsibilities discrimination is covered by the B.C. *Human Rights Code*.

A review of international instruments indicates that family responsibilities accommodation is an important issue in relation to women’s equality rights. As discussed in Section V (Chapter A), the CEDAW, a binding treaty that has been ratified by Canada, stresses the importance of ensuring the “effective right to work”, including a requirement that state parties “shall take appropriate measures to... encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities.”⁴⁶⁸

Further, article 3 of the ILO Workers with Family Responsibilities Convention states:

⁴⁶⁵ See *supra* note 406.

⁴⁶⁶ *Equal Opportunity Act 1984* (WA), *supra* note 387 at s 35A(2).

⁴⁶⁷ The exceptions are State College, Pennsylvania and Monroe County, Florida, which include more expansive definitions of familial status. The State College definition includes “the state of being married, single, divorced, separated, widowed,” of being pregnant or “a parent...stepparent, foster parent, or grandparent of a minor child,” or of being “a provider of care to a person or persons in a dependent relationship...whether in the past, present, potentially in the future, or pursuant to employer perception.” The Monroe County definition also includes “any familial relationship whatsoever,” including living with a same sex partner or a dependent parent. See State College, Pennsylvania Ordinance 1887; Monroe County, Fla. Code §§ 13-102, cited in Bornstein & Rathmell, *supra* note 333 at 14.

⁴⁶⁸ CEDAW, Article 11(2)(c), *supra* note 286.

1. With a view to creating effective equality of opportunity and treatment for men and women workers, each Member shall make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities.⁴⁶⁹

2. Employment law

As discussed in Section VI (Chapter B), the ability to participate in the workforce in spite of pressures imposed by family responsibilities has also been addressed in a number of jurisdictions through employment law, rather than human rights legislation. Both the United Kingdom (2003) and New Zealand (2007) have passed work flexibility legislation, which provide employees with a statutory right to request a variation of their working arrangements, including hours, days and place of work, in order to care for another person. The U.K law includes co-resident family members and the New Zealand law includes friends and family. The laws create a “right to request” rather than a “right to” flexible work arrangements, and allow an employee to pursue an accommodation without proving discrimination. There is discretion built into the laws, and there is no right to challenge a refusal provided procedural matters such as timelines for response are met. This approach is recommended in the final report of the Commission on Federal Labour Standards.⁴⁷⁰

As an alternative, Germany (2001) and the Netherlands (2000) have passed laws that create a right to convert to part-time status. Coupled with the European Union Directive on discrimination against part-time employees this approach creates an entitlement to reduce hours without a total loss of benefits. Benefits must be calculated based on the principle of *pro rata temporis*.⁴⁷¹

D. Family Status Discrimination in B.C.

1. Challenges to using a Human Rights Framework to Address Family Responsibilities Discrimination

One of the primary findings of this research initiative is that the issues of systemic disadvantage revealed in the jurisprudence on family status discrimination present social issues the B.C. human rights system does not have the capacity to address on its own. Reported decisions provide examples of working parents who are finding it difficult to secure appropriate and affordable childcare compatible with long hours, overnight shifts and unpredictable schedules. Labour arbitrations illustrate barriers to supporting the desire of new mothers to work part-time after maternity leave, and reveal the negative impact multiple parental leaves can have on long-term entitlement to employment benefits. Non-employment cases reveal the financial strain imposed on different kinds of caregivers: parents who provide long-term assistance to adult family members with disabilities; grandparents who assume primary care of their grandchildren when the biological parents are unable to take on that role; and low income families struggling to support three generations in one home when a youth becomes a parent herself. These stories underscore some of the challenges contemporary families face in sustaining caregiving.

⁴⁶⁹ Workers with Family Responsibilities Convention, Article 3, *supra* note 290.

⁴⁷⁰ *Arthurs Report*, *supra* note 424.

⁴⁷¹ Framework Agreement on Part-Time Work, Clause 4(2), *supra* note 302.

The majority of the reported decisions on family status discrimination arise out of an employment context. Many of these cases deal with the interplay between family responsibilities and work obligations, and demonstrate that workers with family responsibilities face barriers to participating in the workforce. In particular, parents with young children are struggling to balance the competing, but equally socially important, demands of care and work. The cases illustrate forms of discrimination that are invisible to many people, because the discriminatory standards are built into the very structure of the workplace—norms like the assumption of full-time work, the 9-5 work day, and the notion of a rotating and shared responsibility for overnight shifts.

Few of these cases involving employment discrimination illustrate examples of direct, overt or intentional discrimination based on family status, or suggest that employers are consciously erecting barriers that limit the full participation of women in the workforce. Rather, the cases highlight how facially neutral workplace rules may have a negative impact on people with caregiving responsibilities. Of course, this is not to say that people with family responsibilities, including pregnant women, do not continue to experience direct employment discrimination. Indeed other sources, including the jurisprudence on discrimination on other grounds, such as sex, suggest that direct and intentional discrimination remains a problem.⁴⁷² However, the experiences discussed in the family status cases often raise issues of adverse effects discrimination.

Although a human rights argument remains the only available legal approach for a worker to assert a rights-based entitlement to accommodation of family responsibilities under B.C. law, the family status cases indicate that the B.C. human rights system may not provide the ideal framework for addressing all instances of family responsibilities discrimination.

This paper suggests a number of problems with the human rights litigation approach. First, the volume of potential complaints, given the ubiquity of family caregiving obligations, speaks of a need for a more accessible, and less costly, forum for addressing family responsibilities discrimination. In *Campbell River* the Court expressed a need to limit the scope of family status discrimination in order to protect against a flood of cases, and indeed a floodgates rationalization has become a theme of the family responsibilities jurisprudence. However, in the absence of law and policy reform elsewhere, family responsibilities discrimination complaints will only increase in number as our population ages and families experience heightened caregiving demands—at significant cost to employers, complainants, trade unions, and the human rights infrastructure.

Second, the human rights approach is individualistic, carving out individual remedies for particular complaints and grievances; however, the underlying questions of access touched upon in the family status cases relate not only to the larger workplace, but also to all workplaces more generally. The individualized approach places the burden on employers, unions and employees to address the question of social and community responsibility for the care of dependents and other family members requiring support, care or assistance. Such an approach puts pressure on small employers who lack comparable resources to innovate and follow through on issues of inclusive workplace design. This rights-based approach also requires an individual to assert a violation in order to get a

⁴⁷² For example, pregnancy discrimination remains common in BC. See *Su v. Coniston Products (No. 2)*, 2011 BCHRT 223; *de Lisser v. Traveland Leisure Vehicles and others*, 2009 BCHRT 36; *Johnston v. Poloskey and Poloskey*, 2008 BCHRT 55; *Stackhouse v. Stack Trucking and Craft (No. 2)*, 2007 BCHRT 161; *Ballendine v. Willoughby and others (No. 5)*, 2009 BCHRT 33.

remedy: problems of access to justice thus present barriers to developing inclusive workplaces. The reliance on human rights litigation also results in a dynamic whereby social standards are effectively being created in a piecemeal fashion, within the private sector, without government input.

In a Canadian jurisdiction with a Human Rights Commission in place to bring forward systemic and group claims this pressure on the human rights system might be more appropriate. However, in B.C., where there is little infrastructure in place to support group claims, family responsibilities discrimination, which is often systemic in nature, cannot be adequately addressed through human rights litigation.

Third, at least in B.C., the reasoning coming out of the jurisprudence on family responsibilities discrimination sets a high bar for workers wanting to establish family status discrimination in order to request an accommodation. It is clear from the jurisprudence that family status includes caregiving responsibilities. However, there remains significant disagreement about what kinds of responsibilities are included or protected under human rights law. The restrictive standard arising out of *Campbell River*, and the language appearing in the cases that follow *Campbell River*, betray considerable discomfort with using a human rights analysis to address the barriers faced by people with caregiving responsibilities. Patterns of interpretation require a complainant to establish that the disadvantage he or she experiences is unique and not a function of personal life choices. Medical evidence of a disability or special needs in relation to the family member requiring care appears to be one of the strongest arguments for establishing family responsibilities discrimination. This reluctance to characterize circumstances that are not extraordinary as instances of discrimination reveals the challenge with using a human rights approach to address a pervasive absence of inclusive workplace standards: systemic barriers are often by their very nature commonplace. Although human rights is the only legal route available to workers who require accommodation to maintain employment as well as their family obligations, human rights litigation may not to be an ideal fit.

This Study Paper began with a review of a line of human rights cases, but ends with questions for discussion that include anti-discrimination law, but extend beyond the confines of human rights legislation. On the one hand, it may be possible to enhance the capacity of the B.C. human rights regime to address family responsibilities discrimination. On the other hand, changes outside the realm of human rights law may be required to properly address family responsibilities in B.C.

2. Questions for Further Consideration

(a) A Family Status Discrimination Policy for B.C.

As part of this Study Paper we compared recent family status decisions from B.C., Alberta and Ontario. Both the Ontario and Alberta Human Rights Commission have taken some leadership in clarifying the meaning of family status discrimination. The Alberta Human Rights Commission published an updated two-page information sheet on marital and family status in February 2012.⁴⁷³ The Ontario Human Rights Commission published a comprehensive 58-page *Policy and Guidelines on Discrimination Because of Family Status* in 2007.⁴⁷⁴ Although these two publications illustrate divergent approaches to clarifying the meaning of family status, both policy documents have been cited in

⁴⁷³ *Supra* note 211.

⁴⁷⁴ *Supra* note 222.

human rights decisions and serve as a resource for the larger community in understanding rights and obligations in relation to the family status ground. Both policies also state explicitly that family status discrimination includes family responsibilities.

The publication of a family status discrimination policy for B.C. might result in greater clarification regarding the scope and meaning of family status discrimination. The process of developing such a policy might generate greater consensus in this area amongst key stakeholders. A family status policy for B.C. could do the following:

- Clarify that family status discrimination has been interpreted to include some instances where family and employment responsibilities conflict
- Highlight that the B.C. approach has been to characterize the concept of family broadly and inclusively beyond parent-child relationships and in a manner not limited to caregiving relationships
- Define and illustrate absolute versus relative status discrimination
- Emphasize that it is not acceptable to refuse to hire or promote an employee based on negative assumptions about the work ethic or commitment of people with family responsibilities, or due to a reluctance to accommodate the caregiving obligations of employees
- Explain that many instances of family status discrimination will be unintentional and linked to systemic barriers and disadvantage
- Discuss systemic discrimination and illustrate how facially neutral rules can disadvantage people with caregiving responsibilities
- Define the concept of inclusive workplace design
- Identify how inclusive workplace design requires an understanding of the particular challenges faced by an employee
- Illustrate a diversity of barriers to workplace participation linked to family status and family responsibilities
- Explain that an analysis of whether a person has experienced family status discrimination should consider the disadvantage imposed by the norms of social institutions, such as the workplace, as well as the availability of social supports, including childcare and eldercare
- Clarify that family status discrimination is not reducible to disability and illness
- Illustrate that family status discrimination linked to family responsibilities is often experienced by women, due to the historical social role of women as family caregivers
- Explain how creating workplaces that are accessible to women can require accommodation of family responsibilities and support for women who are caregivers and parents
- Discuss how notions of “personal choice” may ground an overly simplistic understanding of how people assume family responsibilities
- Encourage employers to appreciate that an individual employee who raises an issue of family status discrimination may be identifying a barrier experienced by a number of employees in similar circumstances
- Encourage employers to explore solutions to claims of family status discrimination that focus on removing barriers to inclusivity rather than identifying solutions that will benefit only the single worker

In the absence of a Human Rights Commission in B.C. it is not clear who should take leadership in crafting a provincial family status policy. However, the need for policy guidance may be even more

pressing given the absence of a Commission to act as a resource in this area. This Study Paper provides a research foundation that can serve as a background for policy development.

Questions for Discussion

1. Should a Family Status Discrimination Policy be developed for B.C.?
2. What organization should take leadership in developing the Policy?
3. What information should be contained in the Policy?
4. What stakeholder organizations should be involved in the development of the Policy?

(b) Reform of the B.C. *Human Rights Code*: Defining Family Status Discrimination

The comparative research included in this Study Paper identified alternative statutory approaches to clarifying the meaning and scope of family status discrimination within human rights legislation. No alternative approach surfaces as providing an obvious resolution to the state of uncertainty that emerges from the Canadian jurisprudence. As compared with B.C., other provinces and territories that have defined family status in human rights legislation have taken a narrow approach at odds with patterns of statutory interpretation in B.C. In any event, current Canadian approaches to a definition identify the relationships included in the concept of family status, but not the types of behaviour or circumstances caught by the concept, and it is the clarification of the latter which has become the major source of controversy in Canada.

Some non-Canadian jurisdictions define family status to include family responsibilities within the human rights statute. Such an approach might provide greater assurance of ongoing protection for family responsibilities. Again, this matter appears resolved by the jurisprudence; the question is rather, “which responsibilities are included?” Some jurisdictions include family responsibilities as a separate protected ground. But a statutory definition that does not address the question of whether ordinary family responsibilities, such as day-to-day childcare, are captured by the concept of family status discrimination, will fail to address the ongoing controversy.

Questions for Discussion

1. Should the B.C. *Human Rights Code* be amended to include a definition of family status discrimination that:
 - a) Clarifies the types of behaviour or circumstances included in the term?
 - b) Affirms more generally that family status discrimination includes some circumstances where terms and conditions of employment conflict with family responsibilities or caregiving obligations?
 - c) Includes barriers associated with routine childcare?
2. Should the B.C. *Human Rights Code* be amended to include a separate ground of discrimination based on family responsibilities or caregiver status?

(c) Work Flexibility Legislation for B.C.

Due to aging demographics, a shrinking workforce, and the ongoing prevalence of childcare responsibilities and participation of parents in the paid workforce, tensions between workplace and family responsibilities are likely to increase. In the absence of alternative legal avenues for asserting a right to a change in terms and conditions of employment that will help a worker better manage family caregiving, it is likely that people will continue to file human rights complaints and labour grievances in order to pursue accommodation of family responsibilities. The human rights framework requires workers to prove discrimination in order to ground an entitlement to accommodation of family responsibilities. This reality means that many workers will find themselves unable to achieve accommodation because their circumstances do not fit the restrictive legal test set out in *Campbell River*.

Issues of employee satisfaction, health and retention point to a need for a simpler process for addressing accommodation of family responsibilities in the workplace. There is a strong economic rationale for finding ways to support people to maintain paid employment and removing barriers associated with seeking accommodation.

With the above dynamics in mind, the time may be right for developing work flexibility legislation for B.C. However, moving forward in this direction requires further research into the experience of the U.K. and New Zealand in addressing family responsibilities through work flexibility legislation. A number of questions need to be clarified before legislation is drafted.

Questions for Discussion

1. Is work flexibility appropriate for B.C.?
2. What has been the experience in the U.K and New Zealand in addressing family responsibilities through work flexibility legislation?
3. Under what certain circumstances should a worker be entitled to request accommodation of family responsibilities under work flexibility legislation?
4. What family relationships should be covered under the law?
5. What family responsibilities should be covered under the law?
6. What forms of accommodation should be possible under the law?
7. What should be the grounds for refusing accommodation?
8. Under what circumstances should there be an entitlement to request a review of an employer's refusal?
9. What should be the relationship between the human rights law and work flexibility law?

10. Should the development process include public consultation?
11. What stakeholders should be included in the consultation process?
12. Given that the work flexibility model generally provides for a right to request accommodation, with very limited grounds for review, what process should be followed to ensure stakeholders understand rights and responsibilities under the law?

(d) Social Policy Regarding Support for B.C. Families

One of the problems with addressing family responsibilities discrimination through a human rights lens is that the approach is individualistic, looking for individual solutions to what is arguably a systemic issue, namely that many workplace standards were created based on a model that assumed that breadwinners were not also responsible for the day-to-day care of children and other family members who require temporary or ongoing support, care or assistance. This individualistic approach leaves employers, unions and employees to come up with piecemeal solutions and attempt to negotiate compromises. Where that process fails, individuals file grievances or human rights complaints. There are strengths to the individualized approach, which allows the parties to craft creative solutions to address the unique challenges that some families face. However, this approach leaves the government out of the equation, resulting in a scenario where the private sector is creating the new standards for the workplace, with insufficient input from government.

This dynamic of creating standards without state input will continue under work flexibility legislation, which again follows an individualistic model of problem-solving. This review of jurisprudence undertaken as part of this study reveals a lack of social consensus on the question of “to what extent families are entitled to social supports in order to raise children and care for other family members?” The language of choice that emerges from the *Campbell River* jurisprudence assumes that people choose their family obligations. These cases characterize family responsibilities as inherently private and personal matters not within the domain of human rights. In contrast, the line of cases following *Johnstone* and *Brown* emphasizes a social and community responsibility to support families. Under these circumstances it appears that a lack of social consensus underlies an absence of judicial consensus.

The question of, “to what extent families are entitled to social supports in order to raise children and care for other family members” is a complex issue that implicates various social institutions beyond the workplace, such as the health care system, child and elder care policy, and community living networks. The family status cases present an opportunity for the provincial government to come forward and work with stakeholders to generate a clearer position on these issues and develop a responsive policy strategy around family caregiving responsibilities in B.C. Such a discussion is well beyond the scope of this research initiative; however, the jurisprudence suggests that the time has come to seize this opportunity. The reality of an aging population threatens to put additional pressures on a sandwich generation caring simultaneously for young children and older adults.

The B.C. Family Status Legal Research Project involved a review of the family status cases. As discussed earlier, the cases do not adequately represent a broad spectrum of families and caregiving circumstances. One of the key findings of this paper is a lack of diversity with respect to the types of families and caregiving responsibilities represented by the cases. Access to justice and cultural values represent only two of the reasons why human rights litigation may not be the appropriate

route for someone to express concerns about disadvantage rooted in the interface between family relationships and work rules or government policy.

A thorough policy response to the issue of family status discrimination must reflect greater diversity than is represented by the family status cases. A full discussion must consider the experience of immigrants, Aboriginal people, people from diverse cultural backgrounds, people with disabilities, and people who have chosen their families through bonds formed other than through biology. A thorough investigation of the issues should build on knowledge of the barriers faced by people caring for loved ones across the lifecourse, and include the care of adults, such as adult children with developmental disabilities, people struggling with addictions, and palliative and end of life care.

Questions for Discussion

1. What are the family responsibilities that currently strain B.C. families?
2. What value as a society do we place on supporting families to raise children? Is raising children a community or private responsibility? What is the role of the state in supporting families?
3. What social value is, or ought to be, placed on care, assistance and support for older people and people with disabilities? Is this a private responsibility of families and individuals, or does the broader community, including the state, also bear some responsibility?
4. What kinds of resources could the B.C. government provide to support families to balance work and family responsibilities?
5. What are some innovative practices currently explored by employers who demonstrate leadership in supporting their workers to balance work and family responsibilities?
6. What is inclusive workplace design?
7. What alternative policy approaches to childcare and eldercare emerge from a literature review? What can we learn from the approaches taken in other countries?

(e) The Test for *Prima Facie* Discrimination on the Ground of Family Status

Although *Campbell River* remains the leading B.C. authority on family responsibilities discrimination, there remain significant problems with the way the case is being utilized to reject claims of family status discrimination. *Campbell River* creates a unique standard for family status employment discrimination. Given the prevalence of family responsibilities, and a pervasive absence of inclusive workplace design and other social supports for caregivers in B.C., a broad approach to family status discrimination may put significant strain on employers and the human rights system. However, this concern is not in and of itself an adequate rationalization for limiting access to human rights. The legislature has included family status within the B.C. *Human Rights Code* alongside other grounds of discrimination. Challenges to inclusion should not warrant limiting the scope of the ground at the outset of the analysis, in the form of a different and narrow *prima facie* discrimination test for one ground. The undue hardship analysis provides ample opportunity for addressing the possibility and feasibility of various forms of accommodation.

The language reflected in the cases that follow *Campbell River* ground findings in notions of extraordinariness and choice that are not consistent with human rights analysis more broadly. Although there has been a movement away from this requirement in B.C., the Court of Appeal decision suggests that discrimination can only arise from a change initiated by the employer. There is also a trend in medicalizing family responsibilities issues, such that it has become challenging to establish family status employment discrimination in the absence of medical evidence of a disability, special needs or serious illness of a family member requiring care.

In contrast, the broad approach espoused in *Johnstone* provides inadequate guidance for employers and other organizations on the scope of family status discrimination. *Johnstone* leaves obligations unclear, and imposes a heavy burden on employers that is especially challenging for small businesses to meet. There is a need for greater guidance.

Most of the family status discrimination cases rightly explore the particular challenges faced by an individual grievor or complainant in considering questions of accommodation, assuming family status discrimination is established. However, one of the shortcomings of a conceptual approach focused on the individual is that systemic barriers are not adequately discussed, and larger questions of inclusive workplace design are seldom explored. Such an analytical framework will often obscure systemic discrimination from view.

Even if workplace flexibility legislation is developed, human rights litigation can remain an important avenue for addressing employment discrimination based on the ground of family status. At this time, arguing family responsibilities discrimination is one of the only options for a worker seeking accommodation of family responsibilities, and human rights litigation remains a major forum for exploring notions of inclusive workplace design. With this in mind, we encourage open discussion of some of the patterns of decision-making identified and explored in this Study Paper.

Questions for Discussion

1. Is it appropriate to have a separate and more stringent test for the family status ground, or for some types of family status discrimination?
2. What is the conceptual relationship between disability and family status? Should someone be required establish disability or illness, or provide medical evidence, in order to make out family status discrimination?
3. What are the hallmarks of a robust analysis of family status employment discrimination where structural or systemic barriers are at issue?
4. Is the extraordinariness of a person's experience a conceptually appropriate means for determining whether a human rights violation has occurred? Should human rights protection be limited to novel circumstances?

E. Final Words

In 1989, Dickson C.J. stated the following in commenting on pregnancy discrimination:

Combining paid work with motherhood and accommodating the childbearing needs of working women are ever-increasing imperatives. That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious.⁴⁷⁵

The words of the former Chief Justice remind us that we are all invested in the act of raising children, whether we become parents or not. This is especially true today, at a time when our workforce is shrinking and our population is aging. Other forms of family caregiving also benefit society economically, as family based care of adults affects a cost savings for our other publically funded institutions. The above quotation, which is excerpted from a landmark decision that broadened the meaning of sex discrimination to include pregnancy discrimination, also reflects the manner in which human rights institutions are at the forefront in shaping values in relation to equality rights.

The family status jurisprudence provides a portrait of some of the family caregiving challenges British Columbians face and raises some difficult questions about how the province approaches the challenge of supporting British Columbians to manage family responsibilities. In some areas social policy may have to move forward in order to decrease the burden currently placed on our human rights system to tackle problems of inclusive workplace design and respond to the needs of families struggling with various caregiving challenges. Reform of employment law through work flexibility legislation may reduce the strain currently placed on human rights law to address matters of inclusive workplace design. However, human rights will remain a key forum for addressing barriers to participation in the workforce linked to family responsibilities, as well as other forms of family status discrimination.

The challenge presented by the cases does not lend itself to an adequate remedy solely through reform of human rights legislation, or through law reform more generally. Rather, in the absence of reforms outside the human rights regime, the pressures imposed on human rights law to address complex issues of systemic disadvantage based on family relationships are only likely to increase. This dynamic is unlikely to generate greater conceptual clarity in the absence of direction from our highest court, and adjudicative forums are likely to remain limited in their ability to provide adequate remedies to family responsibilities accommodation under current social policy.

One of the reasons why we are seeing human rights cases focused on family responsibilities is the lack of a robust infrastructure to support B.C. families. Many changes have occurred in society over the last few decades, resulting in a greater presence of unpaid family caregivers in the paid workforce. However, social policy has failed to move in step with these changes in society. In the near future, more and more working parents will find themselves part of the sandwich generation, caring for parents and children in the same time frame. If social policy moves forward to provide greater support for families to manage commonplace family responsibilities, the emphasis on extraordinary instances in human rights jurisprudence could become less problematic. With a social safety net in place, families will not as often be compelled to turn to human rights litigation for a remedy.

⁴⁷⁵ *Brooks v. Canada Safeway, Ltd.*, [1989] 1 SCR 1219 at 1243-44.

The family status jurisprudence raises challenging questions that interrogate the fundamental values upon which our society is built. Is the care of family members exclusively the private responsibility of individuals? Or is there an entitlement to support, not strictly from an employer, but from society more broadly? What family responsibilities attract larger societal support? This Study Paper cannot answer these questions, and indeed there may be no social consensus on these issues at this time. However, current social dynamics highlight the need to explore these questions.

Protection and support for maternity leave has become a staple of the Canadian legal landscape, reflecting a paradigm shift in how we think about the social responsibility for infant care. The family status discrimination jurisprudence tells us that many families continue to struggle to balance the competing demands of paid work and family responsibilities, well beyond the years of maternity and parental leave, suggesting a need to reconsider how we approach the challenge of supporting families with caregiving responsibilities. Hopefully this Study Paper offers a summary and critique of the jurisprudence that will lay a foundation for clarifying the scope and meaning of family status in the human rights context. Human rights law remains a powerful tool in some instances for addressing disadvantage based on family relationships and relationships of care, support and affection at the foundation of this complex ground of discrimination. However, a more comprehensive response to the systemic issues underlying family status discrimination may require alternative strategies. This Study Paper highlights questions for discussion that will help clarify a critical path forward.

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