FAMILY RESPONSIBILITIES DISCRIMINATION

An International Review of Approaches to Accommodating Family Caregiving Obligations[1]

Jane has been an associate lawyer with a large firm for the last 5 years. Her elderly mother, Helen, who has always struggled with mental health issues, has recently become seriously ill. As Jane has no siblings and her mother is divorced, the responsibility for her mother's care has fallen exclusively to Jane. When left alone, her mother neglects most of her basic care needs, and so Jane has recently moved her mother into her own home. As a function of her illnesss, she does not trust anyone other than Jane, and will not tolerate the presence of anyone else. Thus it is not an option for Jane to hire a caregiver, in spite of her above average income. In the short term Jane would like to reduce her hours of work and adapt her work schedule so she does not have to leave her mother alone for more than five hours at a stretch. She would like to return to her demanding practice schedule once her mother is somewhat better, but cannot anticipate how long it will take for her mother's condition to stabilize. If she were permitted to work some of the time from her home, she would be capable of working more hours, but in her area of work, where full-time often means 60 hours a week, full-time may no longer possible during her mother's lifetime. Jane is also conscious that while it is likely her mother's health will improve, at any time her mental health could worsen again, necessitating further adjustments.

Sunita is a unionized employee working in health care. She works a shift schedule set out in her collective agreement: a rotation that includes twelve hour shifts and frequent overnights. Recently her father-in-law suffered a stroke resulting in partial paralysis, and requiring administration of medication at home as well as ongoing accompaniment to medical and rehabilitation appointments. The family decided he should live with Sunita, who has health care skills, can administer his medication, and can deal best with his other health care providers. Sunita requested a one month paid leave to get father-in-law settled into her home, adjust to the new routine, and stabilized on medication. Her employer denied her request for a paid compassionate leave and is considering an unpaid leave. In terms of longer term adjustments, Sunita's employer has denied her request for a schedule of shorter shifts excluding evenings. Sunita thinks this modification in her hours of work is necessary because her father-in-law is at greatest risk of respiration problems when he is sleeping. However, there are very few positions in her bargaining unit that are not associated with rotations that include nights.

Joseph and his partner have three adopted children. Their eldest son has been subject to many different diagnoses over the years as health professionals attempted to characterize the source of his behavioural problems and developmental delays. He is unable to read and write, and he has been expelled from many schools over the years. At the age of 20 their son has finally been diagnosed with schizophrenia, and he appears to be unable to take care of himself. Joseph's partner has steady employment that involves a great deal of overnight travel, and so Joseph is the primary caregiver for the boys. However, Joseph must work outside the home as well in order to meet the family's financial needs. The couple is concerned about leaving their son either home alone, or with the younger children. Joseph would like to take four to six months off work to try to work more closely with his son to develop a routine to manage his illness and following that may require other work schedule modifications. He is a non-unionized employee. He does not appear to be eligible for compassionate care leave or benefits. His employer has denied his request for an unpaid leave, and Joseph is afraid of losing his job.

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[1] By Krista James, Staff Lawyer, British Columbia Law Institute and Emma Butt, Articled Student, British Columbia Law Institute. This paper presents for discussion research of the British Columbia Law Institute and the Canadian Centre for Elder Law in the area of human rights, employment law and family responsibilities accommodation. This paper was presented at the Continuing Legal Education Society of British Columbia Human Rights Conference 2009. For more details on the Family Caregiving Legal Research Project see the project webpage at http://www.bcli.org/ccel/projects/family-caregiving#tabs-projects-3.

I. Introduction – What is Family Caregiving?

Taking care of dependent or vulnerable adult family members, rather than contracting the work out to third parties outside the family, is the norm in many cultures. This practice is known as family or informal caregiving. Family caregivers look after aging parents, children with disabilities, and people coping with mental health issues, addictions and chronic illnesses. Caregivers manage medical care, assist with intensely intimate elements of personal care, and provide a range of services including emotional support, meals, housework and mobility assistance – all tailored to the particular needs of a loved one and organised around the other demands work, family and community impose on a caregiver's time and energy.

As illustrated by the portraits that introduced this paper, family caregiving encompasses diverse relationships. Some caregiving relationships are lifelong, as may be the case with children with disabilities. Other recipients of care have fluctuating needs, with care increasing during periods of poorer health and becoming minimal when an illness is in remission. Post-surgical care may be intense but temporary. In contrast, some degenerative conditions are characterized by increasing needs such that a caregiver may be providing care on a full-time basis for many years. However, while there is great diversity in the amount of time caregivers spend in caregiving, caregivers face substantial demands on their time. Duxbury, Higgins and Shroeder's recent study of employed caregivers who maintain full-time positions found that "the majority of caregivers 'work' the equivalent of two full time jobs: they spend and average of 36.5 hours per week in paid employment and 34.4 hours per week in caregiving".[2]

Balancing paid work and unpaid caregiving in a healthy manner thus presents an enormous personal challenge. The potential work-related consequences of caregiving are significant, including a reduction in employment income, pensionable earnings and opportunities for career development, as well as terminations and resignations. However, the challenge of balancing work and care is arguably not only the worker's problem. Unpaid family caregiving forms a key component of Canada's publicly-funded health care system. Community care has become an increasingly large component of the Canadian long-term care strategy as a function of de-institutionalization of aspects of health care service delivery and a rapidly aging population. The question of how the costs of caregiving ought to be distributed between individuals, family, employers and the state also raises issues of gender equality, for in spite of women's comparable rates of participation in the labour force, care remains overwhelmingly the work of women.[3] High rates of divorce mean women are providing care with less support from the family infrastructure and lower rates of fertility concentrate the care of an increasing community of care recipients on the resources of fewer caregivers. Delayed parenting means women are increasingly balancing caring for children and parents during the same phase of their lives. The issue also raises a problem of labour force participation. As Terrence Hensley explains:

> There was a time when a matter, such as work-life balance, would have been considered a private concern for families to work out. But when the economy, as well as families' ability to live at prevailing community standards, depends on the supply of two workers per family, and when the fertility rate continues to drop, private risks tend to be defined as public crisis.[4]

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[2] Linda Duxbury, Christopher Higgins & Bonnie Shroeder, *Balancing Paid Work and Care Responsibilities: A Closer Look at Family Caregivers in Canada*, (2009) at 9.

[3] Pyper, Wendy, "Balancing Career and Care", *Perspectives on Labour and Income,* Statistics Canada Catalogue no. 74-001-XIE), (November, 2006), online: <http://www.statcan.ca/english/freepub/74-001=XIE/0020474-001-XIE.pdf>.

[4] Terrance Hunsley, "Informal Caregivers: Balancing Work and Life Responsibilities", (2006) 8(3) Horizons at 9.

II. The Family Caregiving Legal Research Project

It is in response to these concerns that the British Columbia Law Institute and the Canadian Centre for Elder Law embarked on the Family Caregiving Legal Research Project. This project examines how the laws of British Columbia currently respond to the needs of working caregivers and explores how legislation could be revised to be more supportive of family caregiving.

There is no single law in BC or Canada that addresses the circumstances of working caregivers. Rather, this area is impacted by legal provisions found in employment and labour law, human rights, pensions, tax policy and health law. Existing legal recognition of the circumstances of family caregivers fall into roughly three categories: (a) employment leave provisions; (b) measures that offset income loss; and (c) family responsibilities accommodation.

Under the *Employment Standards Act*, R.S.B.C. 1996, c.113, eligible employees are entitled to five days unpaid family responsibility leave to address the care needs of children and other immediate family members (s.52), and eight weeks unpaid compassionate care leave to provide end-of-life care to family members (s.52.1), the latter of which also may also trigger entitlement to six weeks of employment insurance benefits. Our review of this area of this law identifies BC and Canada as leaders in providing workers with income replacement for end-of-life caregiving as well as maternity and parental leave benefits, but providing little recognition of other forms of family caregiving.

Measures to offset income loss include tax incentives, as well as pensions and direct stipends or wages paid to the caregiver in recognition of caregiving labour. This is an area Canada has not explored significantly. The last ten years has witnessed a proliferation in studies on the needs of caregivers, all of which highlight the financial strain associated with caregiving and indicate a need for reform to address the short and long term income security of caregivers. Existing tax measures are accessible only to higher income earners, pension measures exclusively address the care of young children, and direct payments to caregivers are only possible by way of exceptions to health policy.

The third approach of family responsibilities accommodation and work flexibility is the focus of this paper.

III. Workplace Flexibility and Family Responsibilities Accommodation

While the concept of "work-flexibility", being connected to the notion of adaptability, requires a certain amount of conceptual or definitional openness to retain its meaning, workplace flexibility tends to denote measures, such as opportunities to change work hours or location, telecommuting and part-time options. Such arrangements are lauded for allowing workers and employers to craft creative solutions to balancing workplace and family caregiving responsibilities which are tailored to the family and work demands of a particular employee.

Many workers already benefit from a degree of workplace flexibility. The Statistics Canada Workplace and Employee Survey indicates that "flextime", defined to include control over time when work starts and stops so long as the full complement of hours in maintained, is available to over one third of Canadian employees.[5] This figure is consistent with the results of the British Columbia Law Institute's Family Caregiver Survey, which indicate that close to 25% of BC caregivers believe they would benefit significantly from greater workplace flexibility. Data also suggests that access to workplace flexibility may be in direct opposition to need. In spite of representing the majority of

[5] Derrick Comfort, Karen Johnson & David Wallace, "Part-time Work and Family-friendly Practices in Canadian Workplaces" (Ottawa: Human Resources Development Canada, 2003) Catalogue no. 71-584-MIE, at 32 and 33 [Comfort, Johnson & Wallace].

caregivers, women report lower participation rates in flextime arrangements, even at management levels and from within professional groups,[6] where occupational responsibilities would seem to permit greater potential for worker control over hours. Access also tends to increase with university education,[7] suggesting that access may be more limited for lower income workers. The availability of flexibility may also depend on the nature of family responsibilities: the need for government intervention in the area of workplace flexibility appears to be particularly urgent for the family caregivers of older adults, who experience more work-life balance problems and benefit from less employer support than employed parents of young children.[8]

In BC and Canada, subject to limitations on hours of work imposed by provincial and federal employment standards legislation, modifications to address family caregiving responsibilities remain at the discretion of employers. Therefore, in the absence of an understanding employer, the only forum for exercising a right to workplace flexibility at this time is human rights. The significance of this is that where an employer rejects an employee's request for flexibility, the only legal recourse is to file a human rights complaint arguing that the employer's inflexibility amounts to discrimination. This is the only sense in which there can be said to be a right to workplace flexibility in BC.

This paper discusses family responsibilities discrimination. It examines how Canadian human rights decision-makers have framed the work-family balance issue as a human rights problem and responded to the claims of employed caregivers seeking accommodation of caregiving responsibilities by employers. It considers the challenges of using the existing human rights framework, including the family status ground, as a route for pursuing accommodation, and includes a review of both recent family responsibilities cases as well as decisions that have clarified the meaning of the family status ground. Finally, it explores options for reform by considering two directions other countries have followed in terms of legislation of a right to accommodation of family responsibilities – work-flexibility amendments to employments standards law (the U.K. approach) versus codification of a caregiver specific ground in human rights legislation (the Australian approach) – and analyzing the various strengths of these divergent approaches.

IV. The Human Rights Approach to Family Responsibilities Accommodation

The Supreme Court of Canada has characterised discrimination in employment on the ground of family status rather broadly. In *B v. Ontario (Human Rights Commission),* [2002] S.C.C. No. 66 [*B. v. Ontario*], the Supreme Court of Canada refers favourably to Justice Abella's description of employment discrimination on the basis of marital and family status 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 family", in her decision on behalf of the Ontario Court of Appeal in *B v. Ontario (Human Rights Commission),* [2000] O.J. No. 4275 (O.C.A.) (at para. 54). This characterization suggests a potential application to the family caregiving context. A review of reported human rights decisions indicates that courts and tribunals have found that employment arrangements that prevent an employee from performing family caregiving responsibilities may be a form of discrimination on the ground of family status.

The strong wording of the first purpose of the BC *Human Rights Code,* R.S.B.C. 1996, c. 210, at s.3 supports this approach:

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[6] Comfort, Johnson & Wallace, *ibid* at 34 and 36.
[7] Comfort, Johnson & Wallace, *ibid* at 34-35.
[8] Duxbury, Higgins & Shroeder, *supra* note 2 at 16.

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.

However, there are at least two barriers to using the family status ground to pursue accommodation of family responsibilities.

First, the leading BC authority on family status discrimination of caregiving responsibilities significantly raised the threshold of proof for establishing family status discrimination as compared with the general discrimination test developed and refined over the years by the Supreme Court of Canada and applied with respect to discrimination based on other protected grounds. Jurisprudence in other Canadian jurisdictions is more promising but still in its infancy. The tenor of existing case law indicates a pattern of limiting protection for caregivers seeking accommodation under the family status ground, an approach that appears to result in a concern regarding the potential universality of caregiving obligations giving rise to excessive pressure on employers to make workplace changes.

Second, the meaning of "family status" has been the subject of limited judicial interpretation as compared with other enumerated grounds, and existing legislation and case law does not make it clear that the ground includes anything other than a parent-child relationship. The meaning and scope of "family status" appears to be the source of some confusion and is subject to differential treatment across the country. Although theoretically human rights would seem to be the only available legal forum for protecting family responsibilities in the workplace, there are simply very few court or tribunal decisions that involve the accommodation of workers caring for adult family members. The following sections of this paper discuss these two problems by way of background to our analysis of options for law reform.

V. Family Responsibilities Discrimination in BC – The "New" Legal Test

The leading authority on discrimination in employment on the ground of family status in BC is the British Columba Court of Appeal decision in *H.S.A.B.C. v. Campbell River & North Island Transition Society*, 2004 BCCA 260, 127 L.A.C. (4th) 1 [*Campbell River*]. This case involved a mother of a school-aged child with severe behavioural problems. The employee worked a shift that ended in the early afternoon so she could care for her son after school. Due to a reorganization of the workplace, the employer changed the employee's shift hours to end at 6:00 p.m. instead of 3:00 p.m., thereby conflicting with her care for her son. The employee claimed that this change in shift discriminated against her on the ground of family status as it effectively prevented her from either continuing in the position or maintaining both employment and the care of her child.

In Canada, including BC, prior case law has established that the discrimination argument is composed of two parts. First, the person alleging discrimination must make out a *prima facie* case of discrimination based on a ground enumerated in the Code. The burden then shifts to the respondent to establish a defense.

Based on *Ontario (Human Rights Commission v. Simpson Sears Ltd.,* [1985] 2 S.C.R. 536 (O'Malley), (at para. 28), a *prima facie* case of discrimination is "one which covers the allegation made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer". The defense to a *prima facie* case is that the standard imposed by the employer is a *bona fide* occupational requirement, subject to the three-part test fashioned by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission)* v. *British Columbia Government and Service Employees Union,* [1999] 3 S.C.R. 3 ["*Meiorin*"].

In its decision in *Campbell River* the British Columba Court of Appeal established a new test for adjudicating discrimination on the basis of family status in the employment context – ostensibly amending the first part of the duty to accommodate test for instances where the family status ground and employment intersect. The test to determine if there is *prima facie* discrimination is whether "a change in a term, or condition of employment, imposed by the employer results in serious interference with a substantial parental or other family duty" (at para 39). The Court then referred the union grievance back to the original arbitrator to deal with the accommodation of this employee. There are no further reported decisions on this case. In its decision the judge noted that the threshold set by this test would be quite difficult to meet and that has proven to be the case in BC.

VI. Recent Family Responsibilities Discrimination Cases in BC and Canada

There exist very few tribunal or court decisions dealing with family responsibilities accommodation in Canada, and virtually all of them deal with the care of young children. Moreover, reported decisions contain very little law on ongoing caregiving requirements; rather, most cases on record involve immediate and fleeting caregiving. Decision-makers have not interpreted entitlements liberally and none appear to recognize the implications of our aging population on human rights in this area. If anything, recognition of the potential scope of caregiving has precipitated a normalization of caregiving - essentially, these responsibilities are considered not sufficiently unique or extraordinary to warrant a human rights response - as well as a desire to protect against a floodgates reaction in the form of a massive number of caregiver claims. There are no cases that deal with the issue of how businesses and employees can manage the requirements for long-term, routine caregiving while addressing workplace demands. The following quotation of the decision of Arbitrator Christie in *Canadian Staff Union v. Canadian Union of Public Employees [Reynolds Grievance],* [2006] C.L.A.D. No. 452 (N.S. Arb. Bd.) (at para 143) encapsulates the general tone of decisions in this area:

> As wrenching as the choices faced by Mr. Reynolds and his family are, they are choices; and they are not new or rare choices for family people, particularly where both spouses work. Aged parents have always been, and will continue to be, a responsibility and concern for everybody, including people in the workforce.

Most of the BC cases subsequent to *Campbell River* that raise family responsibilities discrimination involve new mothers seeking accommodation in the form of part-time work. In each case, the perception that the challenge of juggling care and work is so common appears to be a bar to a successful human rights claim. In *Evans v. University of British Columbia,* 2008 BCSC 1026 [2008] B.C.J. No. 1453, the judge states (at para. 42), with reference to the tribunal decision regarding a woman who had not been able to find suitable childcare at the time of her return to work:

> The tribunal concluded that an employee on maternity or parental leave knows of the responsibility to make suitable childcare arrangements by the date of return to work and that, as a result, there was nothing extraordinary about the petitioner's situation.

In another case the arbitrator expressed concern that finding discrimination on the facts of the case would create an entitlement for part-time work for every full-time employee ending maternity leave, barring undue hardship, implying that this would be a problematic outcome. In *British Columbia Public School Employers' Assn. v. B.C.T.F. (Sutherland Grievance)* (2006), 155 L.A.C. (4th) 411, [2007] B.C.W.L.D. 3277, Arbitrator Monroe writes (at para 39):

> No doubt, there are many new mothers who, like Ms. Sutherland, and for the same reasons given by her, would prefer to work part-time for some months after the conclusion of maternity leave, rather than returning right way to their full-time jobs. However, circumstances at hand fall well outside the holding in *Campbell River*.

Two federal jurisdiction decisions reject the *Campbell River* approach. In the 2006 Canadian Human Rights Tribunal decision of *Hoyt v. CNR,* [2006] C.H.R.D. No. 33 [*Hoyt*], the Tribunal member stated (at para. 120) that it was inappropriate to create a more restrictive definition for one prohibited ground of discrimination. The Tribunal held that human rights legislation is "fundamental law", and in order to fulfil their objectives, should be interpreted liberally. Although the employee's discrimination argument was successful, the facts of the case, involving the accommodation of a pregnant woman's physical limitations, do not otherwise shed light on the accommodation of caregivers of adult family members.

The 2007 decision in *Johnstone v. Canada (Attorney General)*, 2007 F.C. 36 [*Johnstone*] 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. Johnstone requested accommodation in the form of three fixed 12-hour shifts per week so that she could arrange for childcare while she was at work. The employer's accommodation policy required Johnstone to accept part-time employment in exchange for fixed shifts. Johnstone 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.

In its findings the Federal Court remitted the decision back to the Canadian Human Rights Commission in part because they used "serious interference" language that appeared to be taken from *Campbell River* (at para 29). The Court stated that using "serious interference" as a standard was counter to binding jurisprudence. The Federal Court of Canada criticized *Campbell River*, stating that there was no reason that a higher standard of proof must be demonstrated in the context of complaints on the basis of family status discrimination than for other grounds of discrimination The judge found *Hoyt*'s critique of *Campbell River* valid, and noted that *Campbell River* was unduly restrictive due to the fact that "the operative change typically arises within the family and not in the workplace." The Federal Court thus supported the *Hoyt* analysis of *Campbell River* up to the point of actually endorsing it, and its comments that requiring "serious interference" ran counter to jurisprudence indicates what line of cases the court preferred.

The employer in *Johnstone* appealed the Federal Court decision. In its dismissal the Federal Court of Appeal did not provide an opinion on whether the *Hoyt* or *Campbell River* standard is correct, leaving the state of the law somewhat unclear. See *Johnstone v. Canada (Attorney General)* [2008] F.C.J. No. 427.

The *Campbell River* test has been followed in a couple of instances in the federal jurisdiction. The case of *Canada Post Corp. v. Canadian Union of Postal Workers (Sommerville Grievance)* [2006] C.L.A.D. No. 371 (QL), 156 L.A.C. (4th) 109, (Can. Lab. Arb.) does not illustrate some of the potential flaws of the narrowness of the *Campbell River* test as the facts involved a conflict arising out of a change in work duties.

A more recent federal arbitration that followed the *Campbell River* test is the December 2008 decision in *Trans4 Logistics and Teamsters Local 847 (Re Kanayochukwu)* (2008), 96 C.L.A.S. 73, 2008 CLB 10894. In this grievance the employee was an owner / operator of a truck that delivered goods for Staples stores. He had to go overseas to Nigeria on short notice due to a serious medical problem of his son. He failed to find someone to perform his deliveries for him and so was fired under "deemed termination" clause in his contract. The arbitrator followed *Campbell River* and held that *prima facie* discrimination could not be found due to the fact that there was no "action" on the part of the employer or change in the terms of the employee's contractual relationship that negatively impacted the employee's familial obligations.

Campbell River was also followed in the 2006 decision of Nova Scotia Arbitrator Christie in the *Reynolds Grievance* cited above. In that case the employee applied for job within his organization, and had the highest seniority out of the qualified candidates. The job the employee was applying for was located in Halifax, but the employee requested that he perform the job out of St John's and travel to Halifax occasionally as required. He did so due to the fact that he wanted to remain close to his elderly mother, and his children who resided with his ex-wife. Furthermore, his current partner had custody of her children from a previous relationship, and was concerned that a move to Halifax might create a custody dispute.

In his decision the Nova Scotia arbitrator noted (at para. 134) that he was afraid of opening the floodgates in terms of finding family status discrimination. He followed *Campbell River*, and stated (at para. 138) that in his opinion it was consistent with the Supreme Court of Canada's jurisprudence. He did, however, agree with the contention that *Campbell River* conflates the first and second parts of *Meiorin* in the test.

VII. An Overview of Criticisms of the *Campbell River* Test

The *Campbell River* test revises the law in two significant respects relevant to our study. First, the language of the test indicates that discrimination will only occur where the conflict between work and family responsibilities is a function of a change in the terms or conditions of employment. Strictly interpreted, this wording excludes circumstances where the conflict arises out of a change in the circumstances of the employee's family. Therefore, if the difficulty in balancing work and family responsibility develops because of changes in the health of a family member requiring an employee to assume caregiving responsibilities, then there is no discrimination.

Second, the test requires the interference with family responsibilities to be "serious". In the past the presence of *prima facie* discrimination has been easier to establish. There is no weighing of the significance of the trespass on human rights. Rather, the assessment of the degree of interference was built into the undue hardship prong of the three-part *bona fide* occupational requirement test, which has indeed been the subject of significant upper level court jurisprudence. As a result of this language, the BC Court of Appeal has been accused of conflating the two parts of the test in the *Campbell River* case and criticized for contradicting Supreme Court of Canada jurisprudence. For now, however, *Campbell River* is the correct test in British Columbia, and arbitrators in other jurisdictions have found it persuasive in their determinations. Although critiqued by the Canadian Human Rights Tribunal, *Campbell River* has yet to be confirmed or overturned by the Supreme Court of Canada.

The case's underlying assumption appears to be that people's personal lives are static, and that if they do not require accommodation, they will never require it. The *Campbell River* decision seems designed to prevent employers from changing employment terms that might affect a person's familial obligations. An increased or new need to provide care, or alternately, job requirements that are discriminatory from the outset, do not appear to create a case of *prima facie* discrimination. This case thus takes a "slippery slope" view of accommodation for employees with familial obligations, and seeks to limit a requirement to accommodate to a very narrow set of circumstances.

A less explicit but equally problematic aspect of the test as it has played out in subsequent jurisprudence is a sense that family responsibilities must be extraordinary in order to place an employee at risk of discrimination. Commonplace family caregiving is excluded – a policy rationale to limit the potential cast of the net of discrimination. This trend raises the interesting question of, why must the circumstances be unique to give rise to discrimination? Discrimination is wrong regardless of its rarity or commonness. From a public policy perspective it is rather the increasing prevalence of family caregiving, as opposed to its uniqueness, that renders this a problem calling for comprehensive

solutions. From an individual perspective, the perspective from which one usually conducts the human rights analysis, the conflict between employment and caregiving responsibilities is problematic no matter how many other caregivers share the employee's struggle. The approach of the BC Court of Appeal runs counter to an earlier line of equality jurisprudence stressing the analytical value of identifying membership in a disadvantaged group to establish discrimination, for here the size of the shared group is a bar to a claim of discrimination.

Eldercare responsibilities might find greater support under the *Campbell River* analysis, assuming caring for our parents may be considered a less traditional family obligation than caring for biological children. It is difficult to say, as eldercare has not been the subject of reported decision-making on family responsibilities discrimination.

VIII. The Bigger Picture – The Meaning of "Family Status"

A major source of confusion in the area of family responsibilities discrimination is the meaning of the family status ground. Neither legislation nor jurisprudence provides a comprehensive statement regarding its meaning or scope.

A. Human Rights Legislation in Canada

Although a fairly recent addition to most human rights laws in Canada, as compared with, for example, race and religion, discrimination on the basis of family status is now prohibited in most Canadian jurisdictions. Although human rights protection has existed in BC since the creation of the *Fair Employment Practices Act* of 1956, family status was added to the BC *Human Rights Code* in 1992, and the Canadian *Human Rights Act* in 1984. Only the New Brunswick *Human Rights Act*, R.S.N.B. 1973, c.H-11, c.30, does not include the ground of family status at the time of writing, and a recent report of the New Brunswick Human Rights Commission recommends its addition.[9] Quebec does not use the term family status in its *Charter of Rights and Freedoms*; however, it includes "civil status", which was been determined by the Supreme Court of Canada decision in *Brossard v. Quebec (Comm. des droits de la personne),* [1988] 2 S.C.R. 279 [*Brossard*] to include familial relationships.

The meaning of "family status" is not self-evident. A number of human rights laws contain definitions of "family status". There are two strains of definitions in Canadian legislation.[10] The laws of Saskatchewan, Ontario, Nova Scotia, Newfoundland and Labrador, and Prince Edward Island define family status as "the status of being in a parent and child relationship".[11] Alberta and Nunavut define family status more broadly as "the status of being related to another person by blood, marriage or adoption". The common reference to a parent/child relationship may exclude caregiving arrangements other than childcare, and may or may not include the converse, in the form of eldercare. At the time of writing, BC, Manitoba, Yukon, the Northwest Territories and the federal legislation[12] include family status as a protected ground without providing a definition.

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[9] New Brunswick Human Rights Commission, *Recommendations to Government*, 2008 at 4.

[10] *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14, s.44(1); *Human Rights Act* S.Nu. 2003, c. 12, s.1.

[11] *Human Rights Code*, R.S.S. 1979, c. S-24.1, s.2(1); *Human Rights Code*, R.S.O. 1990, c. H.19, s. 10(1); *Human Rights Act*, R.S.N.S. 1989, c.214, s.3(h); *Human Rights Act*,. C.H-12, R.S.P.E.I 1988, c.H-12, s. 1(1)(h.11); *Human Rights Code*, R.S.N.L. 1990, c.H-14, s.2(e.1)

[12] *Human Rights Code,* R.S.B.C. 1996, c.210; *Human Rights Code*, C.C.S.M. cH175; *Human Rights Act*, R.S.W.T. 2002, c.18; *Human Rights Act*, R.S.Y. 2002, c. 116; *Canadian Human Rights Act*, R.S.C. 1985, c.H-6.

B. Supreme Court of Canada Guidance on the Meaning of Family Status

Although the meaning of the term family status has evolved over the years through judicial treatment and legislation, it remains in development. One of the challenges to thinking about family status is that it has not been the source of significant litigation. The Supreme Court of Canada has to date provided only limited guidance with respect to the scope and meaning of the term. While several cases have dealt with the concept of family status discrimination, at this time there has yet to be a case where a court has provided a detailed analysis of the definition and scope of family status. In particular, the Supreme Court of Canada has not yet addressed the question of whether family status discrimination in employment includes discrimination based on an individual's family obligations and responsibilities, such as caring for an elderly, ailing parent.

The most recent Supreme Court of Canada decision that addresses the scope of family status discrimination is *B. v. Ontario*. In that case the complainant was fired because of the actions of his daughter: the girl was a sexual abuse survivor, and, after being in therapy for a period of time, she identified one of her father's employers (her uncle) as her abuser. Her father was subsequently terminated from his position after working for the employer for 26 years. Both the appellants and the lower court argued that particular identity complaints did not amount to human rights violations on the ground of family status and that group membership was required to establish discrimination.

In terms of thinking about family responsibilities discrimination this decision is significant in two respects. First, the Court clarified (at para. 53) that the concept of family status captures both the fact of being in a particular type of family relationship (for example, being a single parent family, the status of being married or single) as well as an adverse distinction drawn based on the particular identity of a family member. The Court characterized these forms of family status discrimination as, respectively, absolute status and relative status discrimination, the most common of the latter type in the employment context being anti-nepotism policies.

The Court held (at para. 36) that both the wording of the Ontario statute and the principles of interpretation for human rights statutes favoured a finding that "family status" applied to relative status discrimination. In its decision the Court affirmed (at para. 44) the often-cited principle that human rights legislation is quasi-constitutional and as such ought to be given a fairly liberal and purposive interpretation in order to advance the objectives of underlying law and policy.

Second, the court determined that while relative status discrimination may be established where a general rule results in differential treatment of a particular subgroup of people, it is not necessary to situate a person within a larger group to make out discrimination (at para. 53-55). The court stated (para. 55) that:

> While the search for a group is a convenient means of understanding and describing a discriminatory action, it does not rise to the level of a legal requirement. In the context of equality guarantees in the Canadian Charter, this Court has stated clearly that group membership is not a necessary precondition to a finding of discrimination.

Quoting its decision in *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497, at para. 66, the Court added (para. 55) that:

> It will always be helpful to the claimant to be able to identify a pattern of discrimination against a class of persons with traits similar to the claimant, i.e., a group, of which the claimant may consider herself or himself a member. Nonetheless, an infringement of s. 15(1) [of the *Charter of Rights and Freedoms*] may be established by other means, and may exist even if there is no one similar to the claimant who is experiencing the same unfair treatment.

This language is significant given the trend in recent family responsibilities discrimination to find that there is no requirement to accommodate overly commonplace family responsibilities. In *B v. Ontario*, the Court (at para. 56) refers favourably to Justice Abella's discussion of "grounds" versus "groups" in the Court of Appeal decision:

> Discrimination is not only about groups. It is also about individuals who are arbitrarily disadvantaged for reasons having largely to do with attributed stereotypes, regardless of their actual merit…Whether or not a disadvantaged group can be fashioned out of the facts of any particular case is largely irrelevant. The *Code* stipulates grounds in s. 5(1), not groups. The question is whether an individual has been discriminated against on the basis of a prohibited ground, not whether he or she necessarily fits into a group requiring redress.

In the earlier Quebec decision in *Brossard* the Supreme Court of Canada held that an anti-nepotism policy amounted to discrimination on the basis of family status. In that case the court held that the town discriminated against a young person applying for a lifeguard position when, as a result of the application of an anti-nepotism policy prohibiting the employment of any member of an existing employee's immediate family, she was excluded from consideration because her mother was employed as a secretary in the police station. The cases of *B. v. Ontario* and *Brossard* largely encapsulate the Supreme Court of Canada's guidance to date on the scope and meaning of the family status ground.

Campbell River does not exhaustively define the concept of family status. Rather, in identifying the test for *prima facie* discrimination, the Court characterized the definition as lying somewhere between the meanings proposed by the opposing parties, and the test it fashioned is intended to balance the excessive workplace disruption the Court associated with a broad interpretation against providing no protection for parents with family responsibilities. From the perspective of caregiving policy, the strength of *Campbell River* is that it clarifies that the inclusion of the ground of "family status" protects individuals against discrimination on the basis of family responsibilities, where the terms of the stringent test are meant. The language "parental or other family duty" suggests that the meaning encompasses more than the parent-child relationship. However, no case has come forward to push this interpretation. Still, it is highly unlikely that "family" status would be interpreted to include caregiving of friends and neighbours, which is a significant portion of family caregiving in Canada. In this respect "family status" remains an inadequate term for addressing family responsibilities discrimination.

C. Other Relevant Grounds

"Family status" is not the only ground that may be invoked by caregivers experiencing workplace discrimination. In some regions "marital status" is protected as a ground as well, and that ground is referenced in some of the above-discussed family responsibilities cases. Although marital status has not been expressly defined in every Canadian jurisdiction, there seems to be general agreement that the definition of marital status includes being married, single, divorced, separated, widowed, and living in a common law relationship. It also appears to include both absolute and relative status discrimination, that is to say, both instances of discrimination based on an individual's membership to a particular group or class of persons (such as married persons) and circumstances of discrimination based on the particular identity of an individual spouse. In *B. v. Ontario* the Supreme Court of Canada favoured "an approach that focuses on the harm suffered by the individual, regardless of whether that individual fits neatly into an identifiable category of persons similarly affected" (at para. 46).

In practice, issues of family status and marital status regularly overlap and are often cited together in cases of discrimination in employment. Both are subject to a broad human rights approach to their interpretation; however, family status appears to be a more all-encompassing ground. In most Canadian jurisdictions family status typically refers the relationship between parent and child

(including adoptive children), and in some jurisdictions also extends to other family relationships such as those between siblings, in-laws, uncles or aunts, nephews or nieces, and cousins, whereas marital status is more limited to relationships connected to spousal status.

"Sex", which benefits from greater conceptual clarity, may be an appropriate source of entitlement to protection, as family caregiving remains such a gendered form of labour; but this approach, like marital status, falls short of being able to address family responsibilities discrimination broadly.

IX. Human Rights Approaches to Family Responsibilities Discrimination outside Canada

Although on the international front there is increasingly recognition that the employee's struggle to balance work and caregiving responsibilities may give rise to discrimination, the "family status" ground is somewhat unique to Canadian human rights legislation. In the United States family responsibilities discrimination is primarily litigated as a form of sex discrimination.[13] However, a number of jurisdictions are considering adding family or familial status as a ground,[14] or building in greater human rights protection in relation to family caregiving responsibilities using other language. For example, bills have been put forward to amend the *Maine Human Rights Act* to add "family caregiver status" as a specific ground, and add "family responsibilities" as a ground under the *New York Executive Law* and the *Civil Rights Law*.

The New Zealand *Human Rights Act 1993* (N.Z.), s.21(1)(l), includes "family status", under a lengthy list of prohibited grounds of discrimination, and codifies the following definition of the ground right in 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…

The New Zealand definition of family status makes it clear that both relative and absolute status discrimination as well as instances of family responsibilities discrimination are prohibited. As the employment law section of this paper illustrates, New Zealand has taken a dual approach to responding to family responsibilities discrimination, for it has also addressed the issue under its employment legislation.

Most Australian jurisdictions take an explicitly human rights approach to family responsibilities accommodation; however, the term "family status" is not used. Various more direct expressions like "carer" and "family responsibilities" appear in their human rights laws as equivalent to the Canadian version of enumerated grounds. Although all Australian jurisdictions address family responsibilities more directly than in Canada or the United States, there is variation across the Commonwealth.

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[13] 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>.

[14] Sloan Work and Family Research Network and the Centre for WorkLife Law, "Addressing Family Responsibilities Discrimination", Issue Brief, 2008, online: <http://www.worklifelaw.org/IssueBriefs.html>.

The *Anti-Discrimination Act 1977* (NSW), No. 48, PART 4B, of New South Wales contains a specific section addressing "Discrimination on the ground of a person's responsibilities as a carer", which was added to the Act in 2001. It states:

> **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.

The Act further defines discrimination against employee caregivers 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
>
> (c) by dismissing the employee, or
>
> (d) by subjecting the employee to any other detriment.

"Responsibilities as carer" is defined to include a lengthy list of family members but is limited to familial relations, excluding from protection caregivers who are close friends, community volunteers and neighbours.

The *Equal Opportunities Act 1995* (Vic.) of Victoria 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, thereby setting out unequivocally that work flexibility requests raise human rights issues. The Act states:

> **14A 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 an employee's responsibilities as a parent or carer by allowing the employee to work from home on a Wednesday morning or have a later start time on a Wednesday or, if the employee works on a part-time basis, by rescheduling a regular staff meeting so that the employee can attend.

There is also no limitation of caring to 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".

The *Anti-Discrimination Act 1991* (Qld) and *Anti-Discrimination Act* 1998 (Tas) prohibit family responsibilities discrimination by including it in a list of grounds without delineating the nature of this form of discrimination in a separate section of the Act.

Other Australian jurisdictions address family responsibilities discrimination in the context of sex discrimination legislation. The Australian Capital Territory's *Sex Discrimination Act 1984* (ACT) s.7A states:

> **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 then 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
>
> (iii) a characteristic that is generally imputed to persons with family responsibilities.

The Australian approach to family responsibilities discrimination does appear to have achieved some success in shaping a more progressive understanding of the impact of caregiving responsibilities on labour force participation. Although, similar to the Canadian context, the complainants tend to be mothers seeking a reduction in hours, even where the complainants' children did not possess special needs, decision-makers have recognized a refusal to accommodate a request to shift to part-time status as discrimination.[15] This is in stark contrast with Canadian jurisprudence discussed earlier in this paper. Refusal to accommodate a request for tele-working has also been found to be discrimination.[16] In an Australian case that framed the accommodation of a new mother as a form of sex discrimination, the magistrate concluded that by refusing the request for part-time work after the conclusion of her maternity leave the employer "made it impossible for [her] to return to work at all," resulting in discrimination by constructive dismissal.[17] In *Mayer v. Australian Nuclear Science and Technology Organisation,* [2003] FMCA 209, the magistrate states (para. 70):

> I need no evidence to establish that women per se are disadvantaged by the requirement that they work full time. As I observed in *Escobar v. Rainbow Printing* [(no 2) [2002] FMCA 122] and as Commissioner Evatt found in *Hickie v Hunt & Hunt* [[1998] HREOCA 8], women are more

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[15] See the discussion in Juliet Bourke, "Using the Law to Support Work/Life Issues: The Australian Experience, (2004) 12(1) American University Journal of Gender, Law and Social Policy.

[16] *Ibid.*

[17] Belinda Smith & Joellen Riley, "Family-friendly Work Practices and the Law" (2004) 26 Sydney Law Review at 19.

> likely than men to require at least some period of part time work during their careers, and in particular after maternity leave, in order to meet family responsibilities.

Unlike the Canadian context, the normality of family caregiving responsibilities does not appear to be a bar to a discrimination claim.

The comparison with the Australian framework is complicated by key differences between the Australian and Canadian human rights systems, the most significant in terms of the theme of this paper being that the Australian approach is heavily codified, leaving less to the interpretation of the courts. So whereas Canadian human rights law has evolved significantly through judicial interpretation, many concepts like the meaning of discrimination and unjustifiable or undue hardship are defined by statute in Australia, granting less discretion to the courts in shaping discrimination law. This difference in approach has been characterized as evidence of closed (Australia) versus open (Canada) models of discrimination.[18] The greater legislative clarity as to the scope and meaning of "family status" is in part a function of this approach.

In any event, the Australian approach raises the question of whether family responsibilities discrimination should be addressed by adding a new protected ground to the existing enumerated grounds. It also highlights the possibility that in the event of adding a ground specific to family responsibilities discrimination, the broader language of "carer" or "caregiver" may be more appropriate than more narrow language that involves the word "family".

X. Employment Standards and the Duty to Accommodate

The United Kingdom and New Zealand protect the right to accommodation of family responsibilities under employment standards legislation. In 2003 the U.K. parliament passed the *Flexible Working (Eligibility, Complaints and Remedies) Regulation 2002,* S.I. 2002/3236, which required employers to consider employee requests for contract variations where the employee had the responsibility for the care of a child. 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 (*Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulation 2006*, S.I. 2006/3314).

Similarly, the objectives of the 2007 New Zealand *Employment Relations (Flexible Working Arrangements) Amendment Act* 2007 (N.Z.), 2007/105, s.69AA include the object "to provide certain employees with a statutory right to request a variation of their working arrangements if they have the care of any person." "Working arrangements" are defined to mean hours, days and place of work. The law imposes no limitations on what kind of caregiving relationship is covered by the law. In this sense both the U.K. and the New Zealand work flexibility laws address the care of both family and friends.

Both laws also 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 providing timelines for response are met. However, the grounds for rejection under the New Zealand law are very broadly defined (at s.69AAF) to include:

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[18] Belinda Smith, "Models of Anti-Discrimination Laws – Does Canada offer any lessons for the reform of Australia's laws?", Paper presented at the Law and Society Association Australia and New Zealand Conference, 2008, 'W(h)ither Human Rights', December 10-12, 2008, University of Sydney, relying on the work of A.W. Heringa, "Standards of Review for Discrimination: the scope of review by courts" in Loenen T. & Rodrigues P., *Non Discrimination Law: Comparative Perspectives*, Kluwer, at 25-37.

(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.

Employment legislation of flexibility has been characterized as providing slightly weaker rights than those attached to human rights protection in the sense that they provide a *right to request* rather than a *right to* flexible work arrangements.[19] 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. In a sense employer discretion is built into the legislation.

This is precisely the approach the recent final report of the Commission on Federal Labour Standards recommends Canada take in order to address family responsibilities accommodation. By far the largest chapter of the report deals with control over time for working families. The tenor of the chapter is on striking a balance between the competing needs of employees and employers for both predictability and flexibility in a manner that respects both the current framework of the *Canada Labour Code, R.S.C. 1985, c. L-2* 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.[20]

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 children successfully requested schedule modifications,[21] suggesting significant voluntary compliance on the part of employers. This group represents close to one quarter of the group of eligible employees,[22] but only three and a half percent of U.K. employees - arguably a manageable level of demand.[23] On this basis many sources consider this approach to have been successful.

XI. Employment Standards vs. Human Rights

The above comparison raises the question of, assuming an impetus toward law reform to increase employer accommodation of family caregiving responsibilities, whether the appropriate forum for reform is employment law or human rights.

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[19] 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.
[20] Federal Labour Standards Review Commission, *Fairness at Work: Federal Labour Standards for the 21st Century* (Ottawa: Human Resources and Skills Development Canada, 2006) [Arthurs Report].
[21] Ariane Hegewisch, "Individual Working Time Rights in Germany and the UK: 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) at 104 and 109.
[22] *Ibid.* at 109.
[23] Ariane Hegewisch, "Employers and European Flexible Working Rights: When the Floodgates Were Opened", Issue Brief (San Francisco: WorkLife Law, 2005) at 1.

There are significant drawbacks associated with using human rights to address accommodation of family caregiving obligations. This fault-based, complaint-driven model of accommodation is somewhat akin to a private civil remedy, and thus poses significant barriers to access: the process can be time-consuming and costly; it may require a lawyer; delays and appeals can mean years before the employee has a resolution to address her circumstances, whereas family caregiving demands tend to be urgent. Human rights may be financially inaccessible to employees who do not have the support of a trade union behind them. In practice, an employee must become the "difficult employee" who complains about her treatment in order to seek accommodation.

Another problem is that the human rights approach requires a certain amount of sophistication and rights awareness not likely found in the general population. To claim discrimination an employee must identify her treatment as not only unfair but also as a form of discrimination. The presence of direct discrimination, where a person is denied a benefit or treated differently based on a characteristic, (for example, the women denied a position because she is female) may be commonly understood as discrimination; requests for work flexibility, hinged as they are on a request for variation of a facially neutral rule that produces a disadvantage, are less easily identified by non-experts as raising human rights issues.

This last problem points to one of the strengths of the employment law approach: the notion of flexibility is built right into the purpose of the provision. BC human rights law, which is framed by broad goals, does not spell out employer or other obligations explicitly. One of the strengths of the employment standards approach, which slots family responsibilities accommodation clearly within the employment environment, is that it makes it very clear that it is an employer's responsibility to consider employee requests to adapt their work patterns. It removes the hurdle of proving discrimination in order to get a remedy. There also may be a normalizing effect of legislating work-flexibility accommodation into employment law. Accommodation becomes less a matter of creating an exception for a disadvantaged employee and more a matter of considering all requests.

As was discussed earlier in this paper, in Canada one of the problems with the human rights approach lies in the language of "family status" which, due to its definitional ambiguity, has evolved to capture very different types of problematic treatment. In its consultation on family status discrimination the Ontario Human Rights Commission confirmed that "family status" appears to be one of the least understood grounds of the Code.[24] The current jurisprudence tells us in that, in its present incarnation, the term "family status" may not be able to respond to the work-life balance problems facing increasing numbers of employees.

The Australian approach suggests that greater clarity in legislative drafting may enhance the capacity of human rights law to respond to family responsibilities claims. The idea of adding a ground to enhance the responsiveness of human rights legislation is not novel. This approach is consistent with Canadian law reform in the area of equality rights protection. The language of Canadian human rights legislation has not remained static over the years. It has evolved to respond to the discrimination of groups of people not initially protected under enumerated grounds. In BC, the original human rights law, the *Fair Employment Practices Act, 1956*, included race, creed (religious belief) and colour as protected grounds. The *Human Rights Code* of 1973 added the grounds of marital status, sex, ancestry, place of origin, political belief, criminal conviction and age. Disability was added in 1984 and sexual orientation and family status were added in 1992. In 2008 age discrimination protection was extended to include adults over age 65. Adding a "family responsibilities" ground is consistent with the expansive Canadian approach to enumerated grounds and human rights law reform.

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[24] Ontario Human Rights Commission, *The Cost of Caring: Report on the Consultation on Discrimination on the Basis of Family Status* (2006) at 4.

There may be merit in pursing the human rights route further. One of the strengths of the human rights approach is the elevation of the issue of accommodating family caregivers to quasi-constitutional status. Human rights principles may also have a normative effect given their association with moral values. The *Human Rights Code* approach would also make the right to flexibility more universally available. Whereas the Code applies to all employment relationships in BC, a significant number of workers are not covered by the *Employment Standards Act*. The *Employment Standards Regulation,* B.C. Reg. 423/2008, s.31 contains a long list of excluded occupations and professions that includes architects, chartered accountants, lawyers, chiropractors, dentists, engineers, doctors, naturopaths, optometrists and veterinarians. In BC the employment standards framework will provide protection to only a sub-class of workers. The other issue is that family responsibilities accommodation has already been to some extent been framed as a human rights issue by decision-makers. Employment legislation may supplement, but cannot remove, human rights.

XII. Conclusion

This paper works forward from the proposition that, given recent social and demographic changes, it is timely to consider law reform measures that will support family caregivers to balance work and caregiving responsibilities and provide greater recognition of the social value of unpaid family caregiving labour. This review suggests that while the challenge of accommodating family caregiving responsibilities has been framed by the courts as giving rise to discrimination on the ground of family status, to date caregivers have had limited success using the human rights forum to argue for work adjustments that would better accommodate their family responsibilities, in a large part because the current test for *prima facie* discrimination set out by the BC Court of Appeal severely limits the scope of family responsibilities discrimination. For the purposes of the investigation of the BC Law Institute into law reform in the area of caregiver support, this raises the question of whether employment law or human rights present a more appropriate avenue for exploring this problem further. The Family Caregiving Legal Research Project remains a work-in-progress and thus this paper presents no conclusions at this time with respect to the appropriate direction for law reform.

Although human rights and employment standards present various weaknesses, they suffer the same inadequacy in that they provide individual redress for what is arguably a systemic problem – rigid workplaces designed around a presumed absence of caregiving work. Case by case resolution may support creativity but do little to shift institutional standards. If structural change is required, a piecemeal and individualized approach will achieve change very slowly.

Accommodation must also be understood as only a facet of a larger strategy of supporting caregivers, a challenge that will require a more comprehensive review encompassing tax law, pensions, health policy and employment law in addition to human rights. The question of how the costs of our aging population should be distributed between and amongst family, community, employers and the state raises complex public policy issues based in notions of paid and unpaid work. Historically family responsibilities accommodation has been constructed as a private issue to be addressed by individuals within the family sphere. This approach may no longer be tenable.