

*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 mentally ill. As Jane has no siblings and her mother is divorced, the responsibility for her mother's care has fallen exclusively to Jane. Helen was living alone until Jane discovered how ill Helen had become; now Jane has moved her mother into her own home. When left alone, her mother neglects most of her basic care needs. As a function of her illness 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 to make sure she does not have to leave her mother alone for more than 5 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 again. 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 be possible for her during her mother's lifetime. Jane is also conscious that at any time her mother's mental health could worsen again, requiring workplace accommodation of her care responsibilities.*

## **CHAPTER 4 – Family Responsibilities Accommodation in the Workplace**

### **I. The Meaning of Workplace Flexibility**

In studies of the needs of working family caregivers, workplace flexibility consistently emerges as a measure caregivers believe would enhance their ability to balance employment and caregiving responsibilities. While the concept, being connected to flexibility, 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.

The term “flexibility” is the source of some controversy amongst critics of labour policy, associated as it is with recent revisions to employment legislation aimed at increasing the ability of employers to compete in a global economy.<sup>118</sup> In BC changes falling into this category include reductions in minimum shift lengths and changes to statutory holiday rules that reduced the entitlement of part-time employees to holiday pay – two of the recent revisions to the *Employment Standards Act* of BC that arguably removed legislated employee

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<sup>118</sup> Sylvia Fuller & Lindsay Stephens, *Women's Employment in BC: Effects of Government Downsizing and Employment Policy Changes 2001-2004* (Vancouver: Canadian Centre for Policy Alternatives, 2004) at 20.

rights. *Care/Work* does not advocate for employer flexibility in this manner. Workplace flexibility more narrowly conceived is about adjustments made at the initiative of the employee to enhance management of the dual worker-caregiver role. This is generally how the term “flexibility” is employed in family caregiving literature. However, this controversy over language points to a problem that must be kept in mind when considering legislation in relation to work flexibility: provisions must be crafted in such a manner as to prevent “flexibility” from being used in order to avoid other employee rights, such as the right to over-time pay and protections against excessive hours. That said, work flexibility may benefit employers as well – indirectly, through employee satisfaction, and directly, by meeting shared scheduling needs.

In BC and Canada, subject to limitations on hours of work imposed by provincial and federal employment standards legislation, flexibility remains at the discretion of employers. Therefore, in the absence of an understanding employer, the only forum for exercising a right to workplace flexibility is human rights. The significance of this is that where an employer rejects an employee request for workplace flexibility, the only legal recourse is a human rights argument characterizing the employer’s lack of flexibility as a form of discrimination. This is the only sense in which there can be said to be a right to workplace flexibility in BC.

For the non-unionized employee this means filing a human rights complaint. Unionized employees have recourse to labour arbitration or human rights adjudication to exercise rights enshrined in the *Human Rights Code*; however, the same human rights principles and law apply in either forum. The unionized worker has greater entitlement to workplace flexibility only if the collective agreement between the employee’s trade union and the employer contains specific language according employees a right to workplace flexibility. Based on our research, collective agreements that make explicit reference to accommodation of family caregiving obligations are rare. Similarly, a non-unionized employee may acquire a right to flexibility via contract. Remedies under the *Human Rights Code* are the primary source of entitlement to accommodation of family caregiver responsibilities under current BC law.

This chapter of *Care/Work* discusses family responsibilities discrimination and employer accommodation of family responsibilities. 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 employment 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. As is the case in many chapters of this paper, although the focus is BC, the problems we discuss present themselves in all Canadian jurisdictions, and the potential solutions we explore apply to all regions as well.

## II. Employee Access to Work Flexibility in BC

### A. BC Caregivers seek Additional Workplace Flexibility

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 is maintained, is available to over one third of Canadian employees.<sup>119</sup> This figure is consistent with our survey findings: close to 25% of BC caregivers believe they would benefit significantly from greater workplace flexibility, and detailed survey comments by a number of respondents betray anxiety around revealing the scope of their caregiving obligations in order to seek accommodation in the workplace. Many workers shift to self-employment and make other employment changes to manage the work/ care balance without confronting their employers.

Data also suggests that access to workplace flexibility may be in direct opposition to need. In spite of representing the majority of caregivers, women report lower participation rates in flextime arrangements, even at management levels and from within professional groups,<sup>120</sup> where occupational responsibilities would seem to permit greater potential for worker control over hours. Access also tends to increase with university education,<sup>121</sup> 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.<sup>122</sup>

### B. Flexibility, Part-time Options and the Results of our Survey of Employers

One recurring theme in terms of responses to our survey of employers was part-time options. A number of employers indicated that they have accommodated the family responsibilities of employees by allowing them to convert to part-time status by reducing their hours of work or participating in a job-sharing arrangement. In each workplace where this is permitted or documented in policy part-time options, the ability to convert to part-time is at the discretion of the employer and it requires employee initiative. In the case of job-sharing, two employees must generally present with an interest in sharing a position. Requests are dealt with on a case-by-case basis, taking into consideration the nature of the position and whether it requires a full-time work presence. Job-shares may require consideration of the fit between the two employees as well.

A major issue that arises in relation to part-time arrangements as a solution to managing family caregiving responsibilities is the impact on benefits, and what makes such an

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<sup>119</sup> 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].

<sup>120</sup> *Ibid* at 34 and 36.

<sup>121</sup> *Ibid.* at 34-35.

<sup>122</sup> Duxbury, Higgins & Shroeder, *supra* note 19 at 16.

arrangement viable is the employer's willingness to provide part-time employees with benefits equivalent to what full-time employees receive. In each case where employers indicated that their practice was to provide part-time employees working a requisite number of hours with comparable or identical benefits this practice was characterized as a financial investment in good employees. However, in many instances workplace flexibility may come at no economic cost to the employer. Providing part-time employees with full benefits is one area where employers effectively help to subsidize the cost of caregiving because it supports both employee and corporate wellness.

### III. The Human Rights Framework in British Columbia

#### Discrimination in Employment

13 (1) A person must not

- (a) refuse to employ or refuse to continue to employ a person, or
- (b) discriminate against a person regarding employment or any term or condition of employment

because of race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a summary conviction offence that is unrelated to the employment or to the intended employment of that person.<sup>123</sup>

The BC *Human Rights Code* prohibits an employer from discriminating against an employee regarding any term or condition of employment based on a protected ground, unless the term is a legitimate occupational requirement for the position in question. Family status is a protected ground in BC and so an employer may not discriminate against an employee on the basis of family status.

The meaning of “family status” is not fully defined by legislation. 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)*, the Supreme Court of Canada refers favourably to the following description of Justice Abella of employment discrimination on the basis of marital and family status contained in her decision of the lower court:<sup>124</sup>

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.<sup>125</sup>

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.

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<sup>123</sup> *Human Rights Code*, R.S.B.C 1996, c. 210, s.13.

<sup>124</sup> *B v. Ontario (Human Rights Commission)*, [2000] O.J. No. 4275 (O.C.A.) at para. 54.

<sup>125</sup> *B v. Ontario (Human Rights Commission)*, [2002] S.C.C. No. 66 [*B. v. Ontario*].

The strong wording of the first purpose of the BC *Human Rights Code* supports this approach:

**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.<sup>126</sup>

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 of 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.

#### **IV. Family Responsibilities Discrimination in BC – The Recent Legal Test**

The leading authority on discrimination in employment on the ground of family status in BC is the British Columbia Court of Appeal decision in *Campbell River*.<sup>127</sup> This case involved a mother of a school-aged child with severe behavioural problems. The mother, a unionized 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.

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<sup>126</sup> *Human Rights Code*, *supra* note 123 at s.3.

<sup>127</sup> *H.S.A.B.C. v. Campbell River & North Island Transition Society*, 127 L.A.C. (4th) 1 (B.C.C.A.) [*Campbell River*].

In Canada, including BC, prior case law had established that the discrimination argument is composed of two parts. First, the person alleging discrimination must make out what is called a *prima facie* case of discrimination based on a ground enumerated in the Code. Then the burden shifted to the respondent to establish a defense.<sup>128</sup>

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”<sup>129</sup>. The defense to a *prima facie* case is that the standard imposed by the employer is a *bona fide* occupational requirement. The test for establishing a *bona fide* occupational requirement has 3 parts. The employer must establish 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 accommodate the individual employees sharing the characteristic of the claimant without imposing undue hardship on the employer.<sup>130</sup>

In its decision in *Campbell River*, the British Columbia 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.”<sup>131</sup> 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.

## V. 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

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<sup>128</sup> *Health Employers Association of BC (Kootenay Boundary Regional Hospital) v. BC Nurses’ Union*, [2006] B.C.J. No. 262, 2006 BCCA 57 at para. 34-37; *Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115*, [2006] B.C.J. No. 263, 2006 BCCA 58 at para. 28.

<sup>129</sup> *Ontario (Human Rights Commission v. Simpson Sears Ltd.*, [1985] 2 S.C.R. 536 (O’Malley), at para. 28.

<sup>130</sup> *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees Union*, [1999] 3 S.C.R. 3 [“Meiorin”] at para. 54.

<sup>131</sup> *Campbell River*, *supra* note 127 at 39.

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 encapsulates the general tone of arbitrations 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.<sup>132</sup>

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* the judge stated with respect to 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.<sup>133</sup>

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.<sup>134</sup> In *British Columbia Public School Employers' Assn. v. B.C.T.F. (Sutherland Grievance)* (2006), 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*<sup>135</sup> the tribunal member stated that it was inappropriate to create a more restrictive definition for one prohibited ground of discrimination.<sup>136</sup> The Tribunal held that human rights legislation is “fundamental law”, and

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<sup>132</sup> *Canadian Staff Union v. Canadian Union of Public Employees (Reynolds Grievance)*, [2006] C.L.A.D. No. 452 (N.S. Arb. Bd.) at 143.

<sup>133</sup> *Evans v. University of British Columbia*, 2008 BCSC 1026 at para. 42, [2008] B.C.J. No. 1453.

<sup>134</sup> *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 at para. 39.

<sup>135</sup> *Hoyt v. CNR* [2006] C.H.R.D. No. 33 [*Hoyt*].

<sup>136</sup> *Ibid.* at para. 120.

as such to fulfil their objectives should be interpreted liberally.<sup>137</sup> 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*<sup>138</sup> 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*.<sup>139</sup> The Court stated that using "serious interference" as a standard was counter to binding jurisprudence. 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."<sup>140</sup> The Federal Court thus supported the *Hoyt* analysis of *Campbell River* up to the point of actually endorsing it, although its comments that requiring "serious interference" ran counter to jurisprudence indicates what line of cases the court prefers.

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,<sup>141</sup> leaving the state of the law somewhat unclear.

The *Campbell River* test has been followed in a couple instances in the federal jurisdiction. One case involved a conflict arising out of a change in work duties and so it does not illustrate some of the potential flaws of the narrowness of the *Campbell River* test.<sup>142</sup> A more recent federal arbitration that followed the *Campbell River* test is the December 2008 *Re Kanayochukwu*<sup>143</sup> arbitration. 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 a "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.

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<sup>137</sup> *Ibid.*

<sup>138</sup> *Johnstone v. Canada (Attorney General)*, 2007 F.C. 36 [*Johnstone*].

<sup>139</sup> *Ibid.* at para. 29.

<sup>140</sup> *Ibid.*

<sup>141</sup> *Johnstone v. Canada (Attorney General)* [2008] F.C.J. No. 427.

<sup>142</sup> *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.).

<sup>143</sup> *Trans4 Logistics and Teamsters Local 847 (Re Kanayochukwu)* (2008), 96 C.L.A.S. 73, 2008 CLB 10894.

*Campbell River* was also followed in a 2006 Nova Scotia decision.<sup>144</sup> 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 that he was afraid of opening the floodgates in terms of finding family status discrimination.<sup>145</sup> He followed *Campbell River*, and stated that in his opinion it was consistent with the Supreme Court of Canada's jurisprudence.<sup>146</sup> He did, however, agree with the contention that *Campbell River* conflates the first and second parts of *Meiorin* in the test.<sup>147</sup>

## VI. 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 up 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*

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<sup>144</sup> *Reynolds*, *supra* note 132.

<sup>145</sup> *Ibid.* at para. 134.

<sup>146</sup> *Ibid.* at para. 138.

<sup>147</sup> *Ibid.*

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 employee's 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.<sup>148</sup>

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.

## **VII. 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.

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<sup>148</sup> The relevance of group membership to the human rights analysis is discussed in greater detail in the discussion of the Supreme Court of Canada decision in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 contained in the following section.

## 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 Code* in 1984.<sup>149</sup> Only the *Human Rights Act* of New Brunswick does not include the ground of family status at the time of writing,<sup>150</sup> and a recent report of the New Brunswick Human Rights Commission recommends its addition.<sup>151</sup> Quebec does not use the term family status in its *Charter of Rights and Freedoms*; however, it includes “civil status”, which has been determined by the Supreme Court of Canada to include familial relationships.<sup>152</sup>

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.<sup>153</sup> 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”.<sup>154</sup> 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 North West Territories and the federal legislation<sup>155</sup> include family status as a protected ground without providing a definition.

## 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, there is 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.

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<sup>149</sup> *Human Rights Amendment Act*, R.S.B.C. 1992, c. 43, s.6 (Statutes of B.C.); Statutes of Canada, 1980-81-82-83, c. 143.

<sup>150</sup> *Human Rights Act*, R.S.N.B. 1973, c.H-11, c.30.

<sup>151</sup> New Brunswick Human Rights Commission, *Recommendations to Government*, 2008 at 4.

<sup>152</sup> *Brossard v. Quebec (Comm. des droits de la personne)*, [1988] 2 S.C.R. 279 [Brossard].

<sup>153</sup> *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.

<sup>154</sup> *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)

<sup>155</sup> *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.

The most recent Supreme Court of Canada decision that addresses the scope of family status discrimination is the 2002 decision in *B. v. Ontario*.<sup>156</sup> 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.<sup>157</sup>

In terms of thinking about family responsibilities discrimination this decision is significant in two respects. First, the Court clarified that 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.<sup>158</sup>

The Court held 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.<sup>159</sup> In its decision the Court affirmed 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.<sup>160</sup>

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.<sup>161</sup> The court stated 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.<sup>162</sup>

Quoting its decision in a previous case, the Court added 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

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<sup>156</sup> *B. v. Ontario*, *supra* note 125.

<sup>157</sup> *Ibid.* at para 54.

<sup>158</sup> *Ibid.* at para 53.

<sup>159</sup> *Ibid.* at para 36.

<sup>160</sup> *Ibid.* at para 44.

<sup>161</sup> *Ibid.* at para 53-55.

<sup>162</sup> *Ibid.* at para 55.

no one similar to the claimant who is experiencing the same unfair treatment.<sup>163</sup>

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 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.<sup>164</sup>

In an earlier Quebec decision the Supreme Court of Canada held that an anti-nepotism policy amounted to discrimination on the basis of family status.<sup>165</sup> 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. These two cases – *Brossard* and *R v. Ontario* – 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, given the restrictive approach taken in BC to date. In this respect "family status" remains an inadequate term for addressing family responsibilities discrimination.

### **C. Other Relevant Grounds: Marital Status and Sex**

"Family status" is not the only ground that may be invoked by caregivers experiencing workplace discrimination. In some regions "marital status" is a protected 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

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<sup>163</sup> *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para 66, qtd in *B. v. Ontario* at para 55.

<sup>164</sup> *Ibid.* at 56.

<sup>165</sup> *Brossard*, *supra* note 152.

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's 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."<sup>166</sup>

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.

## **VIII. Human Rights Approaches to Caregiver Discrimination outside Canada – Alternatives to the Family Status Ground**

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. Below we discuss human rights legislation in the US, New Zealand and Australia that utilizes alternative language that makes it clear family responsibilities discrimination is prohibited.

### **A. The United States**

In the United States family responsibilities discrimination is primarily litigated as a form of sex discrimination.<sup>167</sup> However, a number of jurisdictions are considering adding family or familial status as a ground,<sup>168</sup> 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

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<sup>166</sup> *B. v. Ontario*, *supra* note 156 at para. 46.

<sup>167</sup> 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>>.

<sup>168</sup> 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>>.

ground, and add “family responsibilities” as a ground under the *New York Executive Law* and the *Civil Rights Law*. In addition, the *Human Rights Act* of the District of Columbia currently prohibits discrimination on the basis of “family responsibilities”.<sup>169</sup>

## B. New Zealand

New Zealand reveals another approach to legislating in relation to family responsibilities discrimination. 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 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...<sup>170</sup>

The Act also defines marital status, disability and sexual orientation within the list of grounds.<sup>171</sup> 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. As the employment law section of this chapter 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.

## C. Australia

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. This section focuses on Australia because it appears to be the only English-language country to have followed this route to addressing the circumstances of family caregivers.

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.<sup>172</sup> The *Anti-discrimination Act* of the New South Wales contains a specific section addressing “Discrimination on the ground of a person’s responsibilities as a carer”.<sup>173</sup> This 2001 addition to their human rights act requires employers to permit flexible work

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<sup>169</sup> *DC Human Rights Act of 1977* § 2-1402.11(a).

<sup>170</sup> *Human Rights Act 1993* (N.Z.), s.21(1)(l).

<sup>171</sup> *Ibid.* s.21.

<sup>172</sup> Sara Charlesworth et al, *Balancing Work and Family Responsibilities: Policy Implementation Options* Melbourne: RMIT University Centre for Applied Social Research, 2002.

<sup>173</sup> *Anti-Discrimination Act 1977* (NSW), No. 48, PART 4B.

arrangements that do not impose unjustifiable hardship on the employer. The definition of discrimination includes discrimination resulting from 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.

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.<sup>174</sup>

Like the BC 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*. “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

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<sup>174</sup> *Ibid.* The *Equal Opportunity Act 1984* (WA) s. 35A contains similar language.

as the carer's spouses's immediate family members, and former spouse's immediate family members, and all family members include relationships by adoption, guardianship, fostering, and half siblings.<sup>175</sup> Caregivers who are not family members in some sense, such as close friends, community volunteers and neighbours, appear to be excluded from protection.

The *Equal Opportunities Act* 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.<sup>176</sup>

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."<sup>177</sup>

The states of Queensland and Tasmania 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.<sup>178</sup>

Other Australian jurisdictions address family responsibilities discrimination in the context of sex discrimination legislation. The *Sex Discrimination Act* of the Australian Capital Territory prohibits discrimination on the ground of family responsibilities, again capturing discrimination based on both similar and differential treatment:

#### **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

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<sup>175</sup> *Ibid.* s.49S.

<sup>176</sup> *Equal Opportunity Act 1995* (Vic).

<sup>177</sup> *Ibid.* s.4(1).

<sup>178</sup> *Anti-Discrimination Act 1991* (Qld) and *Anti-Discrimination Act 1998* (Tas).

(iii) a characteristic that is generally imputed to persons with family responsibilities.<sup>179</sup>

In the Australia Capital Territory family responsibilities are defined to include “care and support for” a dependent child, or “any other immediate family member who is in need of care and 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.<sup>180</sup>

The federal sex discrimination law prohibits direct discrimination on the ground of family responsibilities through dismissal or constructive dismissal, whereas other grounds are subject to broader human rights protection.<sup>181</sup> Its limited characterization of discrimination does not apply to neutral terms and conditions of employment that may have an adverse impact on caregivers, as compared with the more comprehensive language contained in the human rights legislation of the New South Wales, Victoria and the Australian Capital Territory, and thus provides little support for work flexibility claims.<sup>182</sup>

## D. Discussion

The comparison with the Australian framework is complicated by key differences between the Australian and Canadian human rights systems that are worth noting at the outset. First, as is the case in Canada, as a function of federalism each member state has passed unique discrimination legislation. While in Canada this has resulted in discrete terminology distinctions, such as the meaning of “family status” discussed in the previous section of this report, on the Australian front a number of quite different approaches have emerged that encompass more fundamental differences, such as varied definitions of discrimination.

Second, unlike the Canadian approach, according to which each province and territory has enacted a single unified Human Rights Code, in Australian jurisdictions human rights law is often fragmented into multiple laws, dealing with, for example, sex or disability discrimination under particularized statutes.<sup>183</sup>

Third, 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.<sup>184</sup>

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<sup>179</sup> *Sex Discrimination Act 1984* (ACT) s.7A.

<sup>180</sup> *Ibid.* s.4A.

<sup>181</sup> *Sex Discrimination Act 1984* (Cth)

<sup>182</sup> This inequity in the characterization of family responsibilities discrimination was highlighted in a recent report of the Human Rights and Equal Opportunity Commission of the Commonwealth of Australia into work-life balance as an aspect of the Commonwealth framework that ought to be revised. See Human Rights and Equal Opportunity Commission, *It's About Time: Women, men, work and family*, Final Paper, 2007 at 47 [*It's About Time*].

<sup>183</sup> The exception to this in Canada is the *Ontarians with Disabilities Act, 2001*, S.O. 2001, c.32, which exists in addition to the province’s more general *Human Rights Code*, R.S.O. 1990, c. H.19.

<sup>184</sup> Belinda Smith, “Models of Anti-Discrimination Laws – Does Canada offer any lessons for the reform of Australia’s laws?” at 1, 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 Aalt

The placement of family responsibilities within sex discrimination legislation identifies caregiver discrimination as a form of sex discrimination. This approach certainly reflects the Canadian jurisprudence on family responsibilities discrimination, which is composed largely of mothers seeking arrangements that allow them to schedule work around the demands of parenting infants and young children with disabilities. In practice, in many instances it may be difficult to separate sex and family responsibilities discrimination. However, this is not a unique feature of family responsibilities discrimination. Experience is particularized. A victim of discrimination experiences discrimination as the sum total of her personal characteristics, which may involve multiple grounds, such as race and disability. The intersectionality of protected grounds has been the subject of significant academic discussion.<sup>185</sup>

The sex discrimination approach followed in some Australian jurisdictions is at least in part a function of the fact that family responsibilities discrimination was added to existing legislation as a step toward implementing the International Labour Organization *Convention (156) Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Worker with Family Responsibilities*.<sup>186</sup> This Convention, adopted in 1981, states that:

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.<sup>187</sup>

Article 4 obliges signatories to enact measures that take account of the needs of workers with family responsibilities in terms and conditions of employment, social security and community planning.<sup>188</sup> Canada has not ratified the Convention.<sup>189</sup> However, Canada has ratified a number of the documents set out in the preamble of Convention 156 as precursors to this Convention<sup>190</sup> and Canada remains a member of the ILO.

The family responsibilities approach 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

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Willem Heringa, "Standards of Review for Discrimination: the Scope of Review by the Courts" in Titia Loenen & Peter R. Rodrigues, eds., *Non Discrimination Law: Comparative Perspectives* (Cambridge: Kluwer, 1999) at 25.

<sup>185</sup> See Nitya Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6 Canadian Journal of Women and the Law 25-51.

<sup>186</sup> *It's About Time*, *supra* note 182 at 47.

<sup>187</sup> International Labour Organization, *Convention (156) Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Worker with Family Responsibilities*, Article 3. ILOLEX Database of International Labour Standards, online: <<http://www.ilo.org/ilolex/english/convdisp1.htm>>.

<sup>188</sup> *Ibid.* articles 4 and 5.

<sup>189</sup> *Ibid.*

<sup>190</sup> For example, the Equal Remuneration Convention, 1951 (ILO C100) and the Discrimination (Employment and Occupation) Convention, 1958 (ILO C111); Human Rights and Equal Opportunity Commission, *supra* note 186 at 283 and 284.

to part-time status as discrimination.<sup>191</sup> This is in stark contrast with Canadian jurisprudence discussed earlier in this chapter. Refusal to accommodate a request for tele-working has also been found to be discrimination.<sup>192</sup> 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.<sup>193</sup> He states:

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 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.<sup>194</sup>

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

The report of the Human Rights and Equal Opportunity Commission of the Commonwealth of Australia into work-life balance reviewed community needs in relation to work and existing support in law and policy for Australian carers and their families. Its examination of human rights in the federal jurisdiction approved of the human rights approach but the final report recommends both greater protection for family caregivers facing discrimination in the workplace as well as a movement away from addressing carer’s rights as a form the sex discrimination. Neither issue appears to be a problem in Canada. The concern with respect to the scope of protection is not relevant to a review of Canadian law: the problems with the Australian federal code – a limitation of protection to dismissals and to instances of direct discrimination – do not apply to Canadian laws. The concern that their current approach of legislating family responsibilities discrimination may further entrench the notion that caring is women’s work again does not apply to the Canadian context.<sup>195</sup>

However, one recommendation in the area of human rights is worth mentioning. The Human Rights and Equal Opportunity Commission of the Commonwealth recommends the creation of a separate specialized law protecting for the right to flexible work arrangements: the *Family Responsibilities and Carers’ Rights Act*.<sup>196</sup>

This recommendation reflects the Australian approach of fragmenting human rights into multiple particularized statutes. (The federal jurisdiction has disability, sex and race anti-discrimination legislation already.) However, it does create a potential for greater clarity if there is a will in BC to support family responsibilities through human rights law. Unfortunately, aside from the emphasis on work flexibility accommodation for carers, the

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<sup>191</sup> 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 19.

<sup>192</sup> *Ibid.*

<sup>193</sup> Belinda Smith & Joellen Riley, “Family-friendly Work Practices and the Law” (2004) 26 Sydney Law Review 1 at 19.

<sup>194</sup> *Mayer v. Australian Nuclear Science and Technology Organisation*, [2003] FMCA 209, at para. 70, cited in Belinda Smith & Joellen Riley, *supra* note 193 at 19.

<sup>195</sup> *It’s About Time*, *supra* note 186 at 59.

<sup>196</sup> *Ibid.*

report does not map out the language of this proposed new law or set out its content in any detail.

The separation of the human rights of caregivers may not make sense in the Canadian context, where human rights laws are more general in scope. This approach could ghettoize caregiver discrimination, separating from a strong history of support for human rights, and further rationalize the *Campbell River* approach of subjecting family status discrimination in the employment context to a different, and more stringent, test. 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. There is a danger that situating the rights of family caregivers in a separate law would diffuse these benefits.

The Australian and New Zealand context reveals a number of potential questions with respect to legislating human rights protection of family responsibilities:

- Should family responsibilities discrimination be characterized as a form of sex discrimination?
- Is there any reason to limit family responsibilities discrimination to direct discrimination, thereby excluding workplace flexibility opportunities?
- Should family responsibilities discrimination be addressed by adding a new protected ground to the existing enumerated grounds?
- Does the challenge of addressing family responsibilities discrimination require a separate section that delineates the characteristics of family responsibilities discrimination?
- Is it useful to include examples of discrimination to clarify unequivocally that family responsibilities discrimination is invoked by a request for workplace flexibility?
- Is the broader language of carer or caregiver more appropriate than language that involves the word “family”?
- Is there any value in inserting into the *Human Rights Code* a definition of family status that defines it to include protection for caregiving relationships?

## **IX. 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*, which required employers to consider employee requests for contract variations where the employee had the responsibility for the care of a child.<sup>197</sup> 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.<sup>198</sup>

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<sup>197</sup> *Flexible Working (Eligibility, Complaints and Remedies) Regulation 2002*, S.I. 2002/3236.

<sup>198</sup> *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* 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.”<sup>199</sup> “Working arrangements” are defined to mean hours, days and place of work.<sup>200</sup> The law is notable in that it imposes no limitations on what kind of caregiving relationship are 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 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.<sup>201</sup>

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.<sup>202</sup> In the human rights context there exists a right to accommodation that can be exercised through a complaint and pursued via appeal. 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 employment law model is precisely the approach recommended in the recent 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 tenor of the chapter 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 *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

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<sup>199</sup> *Employment Relations (Flexible Working Arrangements) Amendment Act* 2007 (N.Z.), 2007/105, s.69AA/

<sup>200</sup> *Ibid.* s. 69AAA.

<sup>201</sup> *Ibid.* s.69AAF.

<sup>202</sup> 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.

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.<sup>203</sup>

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,<sup>204</sup> suggesting significant voluntary compliance on the part of employers. This group represents close to one quarter of the group of eligible employees,<sup>205</sup> but only three and a half percent of U.K. employees - arguably a manageable level of demand.<sup>206</sup> On this basis many sources consider this approach to have been successful.

## X. The European Union and Part-Time Employment Rights

A third approach to flexibility 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 this creates an entitlement to reduce hours without the limited benefits typically associated with part-time employment in BC.

In Germany, a law on part-time work came into force in 2001.<sup>207</sup> 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.<sup>208</sup> The law includes 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.

The European Union *Part-Time Work Directive* grants part-time workers the right to claim equal treatment with full-time workers. In addition to generally fostering a labour climate in which requests to convert to part-time status are received favourably, the Directive requires all member states of the European Union prohibits discrimination against part-time employees:

### 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.

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<sup>203</sup> Arthurs Report, *supra* note 29.

<sup>204</sup> 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) 103 at 104 & 109 [*Working Time*].

<sup>205</sup> *Ibid.* at 109.

<sup>206</sup> Ariane Hegewisch, "Employers and European Flexible Working Rights: When the Floodgates Were Opened", Issue Brief (San Francisco: WorkLife Law, 2005) at 1.

<sup>207</sup> The German Act on Part-time work and Fixed Term Contracts (*Teilzeit und Befristungssetz*): BGBl 2000 I, 1966, cited in Suzanne Burri, "Working Time Adjustment Policies in the Netherlands" in *Working Time*, *supra* note 204, 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.

<sup>208</sup> *Wet verbod van onderscheid naar arbeidsduur*, Stb. 1996, 391, cited in Burri, *ibid.* Also translated as the *Adjustment of Hours Law*.

2. Where appropriate, the principle of *pro rata temporis* shall apply.<sup>209</sup>

Effectively, the Directive prohibits direct discrimination and provides for a legal right to claim comparable benefits.<sup>210</sup> This agreement was concluded in 1997 and extended to the UK and Ireland the following year.<sup>211</sup>

These part-time laws are both broader and more narrow than the UK and New Zealand work flexibility approach discussed earlier in this chapter: 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 hours legislation provides a more limited solution to work and family balance in that it focuses strictly on the number of hours of work, whereas the UK and New Zealand approach encapsulates flexibility options more generally (location, start and finish times, teleworking).

## **XI. Conclusion: Employment Standards vs. Human Rights**

The above discussion 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.

There are significant drawbacks associated with using human rights to address the accommodation of family caregiving obligations. While one of the express legislative purposes of human rights legislation is to prevent discrimination, it is in actual application reactive as it operates on a complaint-driven system. The forum 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

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<sup>209</sup> 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>>.

<sup>210</sup> Alexandra Heron, “Promoting and Protecting Reduced-Hours Work: European Union Law and Part-Time Work” in *Working Time*, *supra* note 204, 35 at 37.

<sup>211</sup> 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://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998L0023:EN:NOT>.

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.<sup>212</sup> 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.

The Canadian system of human rights, which is governed by broad legislation that sets out protected grounds, may not lend itself to such a particularized response to family responsibilities discrimination. Aside from the *Ontarians with Disabilities Act*, broad human rights codes and judicial interpretation of these laws are the source of human rights in Canada.

There may be merit in pursuing 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

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<sup>212</sup> Ontario Human Rights Commission, *The Cost of Caring: Report on the Consultation on Discrimination on the Basis of Family Status* (2006) at 4.

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 contains a long list of excluded occupations and professions that includes architects, chartered accountants, lawyers, chiropractors, dentists, engineers, doctors, naturopaths, optometrists and veterinarians.<sup>213</sup> 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 framed as a human rights issue by decision-makers. Employment legislation may supplement, but cannot remove, human rights. In this respect it may be important to amend human rights legislation to clarify the family caregiving responsibilities that may trigger a human rights violation and the caregiving relationships that ought to be granted human rights protection in BC.

If the human rights approach is to be further explored in BC, this raises the question of whether it would be useful to either add a separate protected ground such as “family caregiver” or “caregiving responsibilities” to the list of enumerated grounds, or a definition of family status that includes a broad range caregiving relationships. The latter approach would reconcile human rights law with the more expansive approach to defining family relationships that has been followed in employment legislation in relation to Compassionate Care Leave.

The complete absence of clear legislative support for workplace accommodation of employee family responsibilities highlights the need for law reform in this area. The question of whether to take an employment law or human rights approach is a complex problem that raises the potential limitations of either approach. A comprehensive solution may require a twofold response.

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<sup>213</sup> *Employment Standards Regulation*, B.C. Reg. 423/2008, s.31.