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BC FAMILY STATUS LEGAL RESEARCH PROJECT

BACKGROUNDER

What is the Meaning of 'Family Status' under the BC *Human Rights Code*?

Under the BC *Human Rights Code*¹ (the BC Code”), as in most jurisdictions in Canada, “family status” is a protected ground of discrimination. In some jurisdictions, the term is defined by statute. However, the term is not defined in the BC Code. As compared with other enumerated grounds, such as sex or race, the meaning of the term “family status” is less self-evident. Added to the BC Code in 1992, the ground has been the subject of limited judicial interpretation and academic engagement as compared with other enumerated grounds. Today, the scope and meaning of “family status” appears to vary across the country and be the source of some confusion and differential treatment by courts and tribunals.

There exist two streams of statutory definitions of family status: “the status of being related to another person by blood, marriage or adoption”² and “the status of being in a parent-child relationship.”³ At the time of writing, the human rights legislation of BC, Manitoba, the Yukon, the Northwest Territories, and the federal legislation⁴ include family status as a protected ground but provide no definition.

To date, two key Supreme Court of Canada decisions have clarified the meaning and scope of family status discrimination. These decisions indicate that the term “family status” captures both the fact of being in a particular type of family relationship (for example, being in a single-parent family, being married or single) as well as an adverse distinction drawn on the basis of the particular identity of a family member (for example, anti-nepotism policies). The Supreme Court of Canada has characterized these categories of family status discrimination, respectively, as absolute status and relative status discrimination.⁵

A recent BC decision significantly raised the threshold for establishing family status discrimination in the employment context as compared with the general test developed by the Supreme Court of

¹ *Human Rights Code*, R.S.B.C. 1996, c. 210.

² *Human Rights Act*, R.S.A. 2000, c. A-25.5, s. 44(1); *Human Rights Act*, S. Nu. 2003, c. 12, s. 1.

³ *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).

⁴ *Human Rights Code*, R.S.B.C., *supra* note 1; *The Human Rights Code*, C.C.S.M. c. H175; *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.

⁵ *B v. Ontario (Human Rights Commission)*, [2002] S.C.C. No. 66 [*B. v. Ontario*] at para.53.

Canada and applied with respect to other protected grounds of discrimination.⁶ The BC Court of Appeal determined that a complainant must now establish that the respondent employer caused a serious interference with a substantial family obligation of the complainant. This stringent standard of “serious interference” requires complainants to meet a higher threshold of discrimination than complainants basing claims on other grounds (such as race, sex or disability), or raising instances of discrimination in non-employment contexts (such as housing or public service). This new standard, which has proven difficult to meet, has been applied in BC and other jurisdictions, but has been rejected by others (most notably by the Federal jurisdiction) as being inconsistent with upper-level jurisprudence.

Human rights law is generally complex and dynamic; however, this is particularly true of the concept of family status. Confusion about the application of this new standard has made it more difficult for applicants to advance allegations of discrimination on the basis of family status, and for all British Columbians to understand and anticipate their obligations and rights under the BC Code. This confusion reflects broader uncertainty about the purpose of the addition of the family status ground to contemporary human rights legislation. Two of the goals identified in the Preamble to the BC Code are “to foster a society ... in which there are no impediments to full and free participation in the economic, social, political and cultural life” and “to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code.”⁷ It is not clear what content ought to be attached to the ground of family status in order to give full regard to the above values, reflect the real challenges faced by people living in different family arrangements, and respect the diversity of BC families.

In 2006, the Ontario Human Rights Commission published *The Cost of Caring: Report on the Consultation on the Basis of Family Status*. The Executive Summary of the Report summarizes the Commission's findings by stating:

Family Status is one of the least understood grounds of the Ontario Human Rights Code (“the Code”). It is clear from the Commission's consultations that employers, landlords and service providers, as well as potential complainants and advocates, are largely unaware of the protections of the Code with respect to family status, or of issues and barriers related to this ground of discrimination.⁸

The BCLI Research Project

In the face of recent confusing jurisprudence and the changing landscape of the family in BC, the goal of the BC Family Status Legal Research Project is to research and analyze the family status ground, and prepare a Discussion Paper that:

- ✦ Provides a thorough review of legislation and jurisprudence in relation to the family status ground in Canada;
- ✦ Describes the issues and problems with the family status ground in BC;

⁶ *Health Sciences Assn of British Columbia v. Campbell River & North Island Transition Society*, 127 L.A.C. (4th) 1 (B.C.C.A.) [*Campbell River*].

⁷ *Human Rights Code*, s.3.

⁸ Ontario Human Rights Commission, *The Cost of Caring: Report on the Consultation on the Basis of Family Status* (2006) at 4.

- ⬆ Develops scholarly research and analysis of issues relating to the family status ground;
- ⬆ Identifies further issues for exploration in relation to the family status ground; and
- ⬆ If appropriate, identifies a further legal research, law reform or legal education project in this area.

Although the scope of this small research project will be clarified in consultation with external project advisors, key questions the Discussion Paper could address include:

- ⬆ What does the family status ground mean in British Columbia law?
- ⬆ How does this definition compare to the rest of Canada?
- ⬆ Does the jurisprudence reflect inconsistency across the country?
- ⬆ Should there be uniformity?
- ⬆ What is the relationship between family status and other enumerated grounds?
- ⬆ Does the jurisprudence reflect contemporary expansive notions of family and respect for diversity?

The BC Family Status Legal Research Project is intended to foster rigorous discussion regarding the purpose and function of the family status ground in contemporary society. Human Rights Codes are dynamic statutes that evolve in response to social change. Over the years, the grounds have been revised and expanded in each jurisdiction of Canada to render human rights law more responsive to sites of disadvantage and discrimination. Family status, as we have discussed, is one of the most recently added grounds in BC. Recent controversy regarding the meaning of family status discrimination emphasizes the need for an inquiry to identify the kinds of discrimination that have, and have failed to be, captured by this ground. It is important to consider whether this pattern of interpretation reflects contemporary notions of family and is responsive to systemic disadvantages linked to the concept of family status. This reflection on treatment of the family status ground is especially vital given the lack of a self-evident meaning to the term. In this respect, the BCLI hopes that this Discussion Paper will be a resource for academics, advocates, decision-makers and policy analysts working in the area of human rights.

Clarification of the family status ground will also serve individuals and organizations that provide advice or information in relation to human rights, including human rights advocates, lawyers, trade unions, human resources personnel, and government agencies – as well as any organization that provides information and support to vulnerable persons. Limited BCLI research and consultation in this area to date suggests there is public interest in clarifying the scope and meaning of the ground. As part of the BC Family Caregiving Legal Research Project, funded by the Law Foundation of BC, the BCLI conducted a survey of caregivers in the province. Family responsibilities accommodation in the workplace emerged as a key practice identified by survey respondents as potentially improving their circumstances as caregivers. Currently, the only legal route for arguing for workplace accommodation is human rights, generally through the family status ground. The full family caregiving study paper, *Care/Work: Law Reform to Support Family Caregivers to Balance Paid Work and Unpaid Caregiving* is available online on the BCLI website. Chapter 4 of the paper, “Family Responsibilities Accommodation in the Workplace”, summarizes BCLI research to date on family status discrimination: <http://www.bcli.org/ccel/projects/family-caregiving/chapter4>.

The work of the BC Family Caregiving Legal Research Project is supported by a group of project advisors that bring a wealth of knowledge and expertise to this project. The members of the BC Family Caregiving Legal Research Project are:

Frances Kelly, Barrister and Solicitor
Community Legal Assistance Society - Disability
Law Program

Nitya Iyer,
Partner, Heenan Blaikie
Pay Equity Commissioner, Northwest Territories

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Lauren Bates, Staff Lawyer
Law Commission of Ontario

Susan O'Donnell, Executive Director
BC Human Rights Coalition

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We anticipate publishing our research findings throughout the lifetime of this short project. Updates will be posted to the family status project page of the BCLI website. We also welcome your thoughts on this exciting area of research. Please direct all comments to Krista James, project manager, at kjames@bcli.org.