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Human Rights and Accommodation of Family Responsibilities in the Workplace: Obligation, Choice, and Invisible Caregivers

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HUMAN RIGHTS AND ACCOMMODATION OF FAMILY RESPONSIBILITIES IN THE WORKPLACE: OBLIGATION, CHOICE, AND INVISIBLE CAREGIVERS

I. Introduction

There is increasing discussion in public policy and jurisprudence of workplace flexibility, work/life balance, and support for employees' caregiving responsibilities. These discussions encompass not only parenting, but also other forms of family caregiving, such as eldercare—partly motivated by a recognition that in Canada, like many countries, our population is aging, and our labour force is shrinking. Some workers with caregiving responsibilities are fortunate enough to have an

understanding employer who appreciates their value, and supports caregiving responsibilities where possible; some employees perform work that lends itself fairly easily to adaptation. However, workplace environments can be complex, and within a collective bargaining environment it can be especially challenging to support one worker's caregiving needs and responsibilities without negatively impacting someone else's hard earned or negotiated benefits. Support and recognition of employee caregiving responsibilities can require adaptations in policy and practice, changes in work hours and location, and creative problem-solving.

In November 2017 the Government of Canada introduced a bill which adds work flexibility provisons to the Canada Labour Code, RSC 1985, c L-2.[1] The amendments grant employees with a minimum of six months of service the right to request changes in the terms and conditions of employment, incuding the number of hours, schedule, and the location of work. The employer may refuse the request for business reasons that are fairly consistent with the meaning of undue hardship. In 2006 Report of the Federal Labour Standards Review Commission, Fairness at Work: Federal Labour Standards for the 21st Century had recommended such changes to the Canada Labour Code, modelled on flexible working legislation that had been was enacted in the United Kingdom in 2002 and New Zealand in 2007.[2]

In the absence of work flexibility legislation, or an employment contract or policy creating a right to workplace flexibility, the only legal foundation for asserting a right to workplace flexibility in Canada is a human rights argument that the employer's lack of flexibility or willingness to make changes is as a form of discrimination based on family status (and/or another enumerated ground). This is the only sense in which there can be said to be a legal right to accommodation of caregiving responsibilities in British Columbia and Canada at this time. However, interpretation of the family status discrimination has proven controversial.

Over the last thirteen years, we have seen in the family status jurisprudence a conceptual tug of war over the scope and meaning of family status discrimination in circumstances where workplace and family responsibilities conflict, and a worker alleges discrimination based on family status. There was, on the one hand, the Federal Court of Appeal decision in *Johnstone v Canada (Attorney General)*, 2007 FC 36, (*Johnstone* 2007), espousing a broad approach grounded in *Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd.*, [1985] 2 SCR 536, *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3 (*Meiorin*), and *Brown v. Canada Department of National Revenue (Customs and Excise)*, (1993) CHRT TD 7/93 (*Brown*), and, on the other hand, a narrower test established by the BC Court of Appeal in its decision in *Health Sciences Association of BC v Campbell River and North Island Transition Society*, 2004 BCCA 260 (*Campbell River*). The narrower approach was ideologically rooted in concerns over holding back a flood of claims that would result, at least supposedly, if family status discrimination were broadly defined, for few experiences are as ubiquitous as caregiving and family.

In the years following *Campbell River* and *Johnstone 2007,* decision-makers across the country were fairly evenly split over which decision set out the proper approach. However, by 2016, the Federal Court of Appeal decision in *Attorney General of Canada v Johnstone,* 2014 FCA 110

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1 Bill-C-63, A second act to implement certain provisons of the budget tabled in Parliament on March 22, 2017 and other measures, 1st Sess, 42nd Parl, 2017, cl 177.1.

2 For more discussion of the report and the UK and New Zealand approach see Care/Work: Law Reform to Support Family Caregivers to Balance Paid Work and Unpaid Caregiving (2010), online: Canadian Centre for Elder Law <https://www.bcli.org/publication/study-paper-family-caregiving>. See Chapter 4.

(*Johnstone* 2014), which developed a new four-part test for family status discrimination, appeared to have largely resolved the legal test for every jurisdiction other than BC. This new test limits the scope of family status discrimination to caregiving responsibilities grounded in legal obligation. Application of the *Johnstone 2014* is resulting in many relationships and responsibilities of fundamental importance to family caregivers bring downgraded beyond the realm of human rights protection to a lesser status called "personal choice." It is a turn of events that seems to ironically position BC as now uploading the broadest of the two approaches. However, in 2017, comments in decisions within BC and other jurisdictions foretell another conceptual sea change.

This paper looks at the history of family responsibilities discrimination in Canada, describes the evolution of the legal test, and canvases the range of responsibilities, relationships, and caregivers which have found support, been denied protection, or remained utterly invisible within the jurisprudence. Reported decisions tell many stories of caregivers struggling for support and recognition. Some recent decisions applying the *Johnstone 2014* test suggest weaknesses with this new(ish) approach from a public policy perspective. Socially important caregiving for children and aging parents is falling outside the conceptual framework of this new test. Further, the absence of vulnerable caregivers from many communities from the jurisprudence highlights the limited capacity of human rights law to address the needs of the most vulnerable caregivers in BC and Canada, and hints at the work to be done to reach some of these caregivers.

II. Family Status Discrimination in Canada: The Statutory Backdrop

Human rights statutes have existed in Canada for approximately sixty years, and early anti-discrimination laws can be traced back to the 1940s. Most Canadian anti-discrimination laws were enacted amidst the post-WWII political climate. As a result, the grounds captured in early human rights statutes reflected concerns regarding persecution based on religious or cultural identity, and a number of the early more comprehensive Canadian human rights statutes reference the Universal Declaration of Human Rights,[3] adopted by the United Nations following the resolution of WWII.[4] In 1947 Saskatchewan passed the first comprehensive Canadian human rights statute,[5] including the

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

4 United Nations, "The Universal Declaration of Human Rights - History of the Document," online: United Nations <http://www.un.org/en/sections/universal-declaration/history-document/>.

5 Although this was the first Canadian statutes to apply to various sites of discrimination (including employment, engagement in occupations, ownership and occupation of property, access to public places, membership in professional and trade associations, education, and publications) as well as reference a number of enumerated grounds, it was not the first statute in Canada to provide protection against discrimination. Precursors included: BC's *An Act Respecting Unemployment Relief*, SBC 1931, c 65, schedule A, which stated that that "in no case shall discrimination be made or permitted in the employment of any persons by reason of their political affiliation, race or religious views" (s 8); Ontario *Insurance Act,* SO 1932, c 24, which prohibited discrimination in the insurance assessment on the basis of the race or religion of the insured (s 4); Ontario's *Racial Discrimination Act*, 1944 SO 1944, c 51, which prohibited the publication or displaying of signs, symbols, or other representation expressing racial or religious discrimination (s 1); and BC's *Social Assistance Act*, SBC 1945, c 62, which provided

grounds of race, creed, religion, colour, and ethnic or national origin.[6] Other grounds did not start appearing in human rights laws until the late 60s.

The concept of a family status ground is relatively new in relation to the history of human rights law in Canada. The family status ground first appeared in a Canadian human rights statute in 1981, when family status was added to the Ontario Human Rights Code, and in 2017 it is now included in most Canadian human rights statutes.[7] The most recent jurisdiction to add family status to its human rights law was New Brunswick, which added family status in 2017.[8] Although Quebec has not created a family status ground, the slightly more narrow ground of "État civil" or "Civil status" has been in the Charte des Droits et Libertés de la Personne since 1983.[9]

Of course, in 2017 family status is no longer the most recently added ground. Gender identity was added to the Human Rights Act, SNWT 2002, c 18 in 2002,[10] and since that time, most jurisdictions have added gender identity,[11] or both gender identity and gender expression.[12] Human rights law

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that "in the administration of social assistance there shall be no discrimination based on race, colour, creed or political affiliations" (s 8). The 50s-60s also saw the emergence "fair practices" legislation, which generally addressed discrimination in the context of either employment or accommodation. Fair employment legislation was passed in Ontario, Manitoba, Nova Scotia, New Brunswick, and British Columbia between 1951 and 1956 (*An Act to promote Fair Employment Practices in Ontario,* SO 1951, c 24, ss. 3-5; *Fair Employment Practices Act*, SM 1953 (2nd session), c 18, s 4; *Fair Employment Practices Act*, SNS 1955, c 5, s 3; *Fair Employment Practices Act*, SNB 1956, c 9, s 3; *Fair Employment Practices Act*, SBC 1956, c 16, ss 3-5) and fair accommodation legislation was passed in Ontario, Saskatchewan, New Brunswick, Nova Scotia, Manitoba and BC (*Fair Accommodation Practices Act,* SO 1954, c 28, s 2; *Fair Accommodation Practices Act, 1956*, SS 1956, c 68, ss 3-4; *Fair Accommodation Practices Act*, SNB 1959, c 6, s 3; *Fair Accommodation Practices Act*, SNS 1959, c 4, ss 3-5; *Fair Accommodation Practices Act*, SM 1960, c 14, ss 3-4; *Public Accommodation Practices Act*, SBC, c 50, ss 3-4).

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

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

8 Bill 51, *An Act to Amend the Human Rights Act*, 3rd Sess, 58th Leg, New Brunswick, 2017, s 2.1 (assented to 5 May 2017).

9 As compared with the family status discrimination cases I discuss in this paper, civil status has been interpreted as covering only direct discrimination and not capturing accommodation of family caregiving responsibilities. See B*eauchesne c Syndicat des cols bleus regroupés de Montréal (SCFP-301),* 2013 QCCA 2069, [2013] JQ no 16787.

10 *Human Rights Act,* SNWT 2002, c 18. Gender identity was included in the original version of the Act in 2002.

11 Manitoba added gender identity in 2012: *The Human Rights Code*, CCSM 1987, c H175. Added in Bill 36, *The Human Rights Code Amendment Act*, 1st Sess, 40th Leg, 2012 (assented to 14 June, 2012), SM 2012, c 38. Saskatchewan added gender identity in *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1. Added in Bill 171, *An Act to amend The Saskatchewan Human Rights Code,* 4th Sess, 27th Leg, 2014 (assented to 8 December, 2014), SS 2014, c 33.

12 Ontario added both in 2012: *Human Rights Code*, RSO 1990, c H.19. Added in Bill 33, *Toby's Act (Right to be Free from Discrimination and Harassment Because of Gender Identity or Gender Expression),* 1nd Sess, 40th Leg, 2013 (assented to 19 June, 2012), S0 2012, c 7. Nova Scotia, Newfoundland and Labrador and Prince Edward Island added both in 2013: *Human Rights Act*, RSNS 1989, c 214, added in Bill 140, *Transgendered Persons Protection Act,* 2nd Sess, 47th Leg, 2013 (assented to 6 December, 2013), SNS 2013, c 51; *Human Rights Act*, SNL 2010, c H-13.1, added in Bill 25, *The An Act to Amend the Human Rights Act, 2010,* 2nd Sess, 47th Leg, 2013 (assented to 10 December, 2013), SNL 2013, c 23; and *Human Rights Act,* RSPEI 1988, c H-12, added in Bill 11, *An Act to Amend the Human Rights Act,* 4th Sess, 64th Parl, 2013 (assented to 6 December, 2013), SPEI 2013, c 15. Alberta added both in 2015: *Alberta Human Rights Act,* RSA 2000, c A-25.5. Added in Bill 7, *Alberta Human*

has seen grounds emerge over time, with BC adding sex and age in 1969,[13] New Brunswick adding physical disability in 1976,[14] and Quebec adding sexual orientation to its Charter in 1978.[15] It has taken decades to develop fairly robust lists of enumerated grounds across the country. Figure 1, which appears at the end of this section, provides a chronology of when various grounds appeared for the first time in Canadian human rights statutes.

In contrast to the addition of gender identity or expression, and likely many of the other enumerated grounds, family status was not added in the context of an equality rights or social movement that provided meaning to the ground. Consequently, human rights litigation on family status discrimination tells a story of confusion about who the ground is designed to protect and why. Based on statutory language alone, family status does not have a consistent meaning across the country. In the majority of Canadian jurisdictions the term family status is defined in the human rights statute; however, there exist two categories of definitions: "the status of being related to another person by blood, marriage or adoption"[16] and the slightly more narrow "status of being in a parent-child relationship."[17] The two jurisdictions where courts have taken leadership in interpreting the meaning of family status discrimination do not define the ground within their human rights statutes. Figure 2 illustrates the three statutory approaches to defining family status found within Canadian human rights laws.

Statutory definitions of family status characterize what kinds of family relationships are included in the concept of "family status." As will be discussed later in this paper, decision-makers have generally treated the absence of a statutory definition as a rationale for interpreting family status broadly to capture many different family relationships. The differences found in the interpretation of the scope of the family status ground across the country do not arise only, or even largely, from differences in the statutory definitions discussed above. The thorny question appears to be: What circumstances, treatment or behaviour is captured by the concept of family status discrimination? More specifically, what accommodation of family caregiving responsibilities ought to flow from the inclusion of the family status ground in human rights law, particularly in circumstances where employment and family responsibilities create a conflict for a worker? The challenge of addressing these questions has resulted in a series of interesting decisions on the extent to which an employer must alter a neutral workplace policy where an employee finds the rule or standard creates a barrier to fulfilling caregiving responsibilities. Largely the cases have considered the experiences of mothers with young children; however, as discussed below, we are now seeing other types of workers and family caregiving issues reflected in more recent decisions.

Rights Amendment Act, 1st Sess, 29th Leg, 2015 (assented to 11 December, 2015), SA 2015, c 18. BC and Quebec added both in 2016: *Human Rights Code,* RSBC 1996, c 210, in Bill 27, *Human Rights Code Amendment Act,* 5th Sess, 40th Leg, 2016 (assented to 28 July, 2016), SBC 2016, c 27; *Charter of Human Rights and Freedoms*, CQLR c C-12. Added in Bill 103, *An Act to strengthen the fight against transphobia and improve the situation of transgender minors in particular,* 1st Sess, 41st Leg, 2016 (assented to 10 June, 2016), SQ 2016, c 19.

13 *An Act for the Promotion and Protection of the Fundamental Rights of the People of British Columbia,* SBC 1969, c 10.

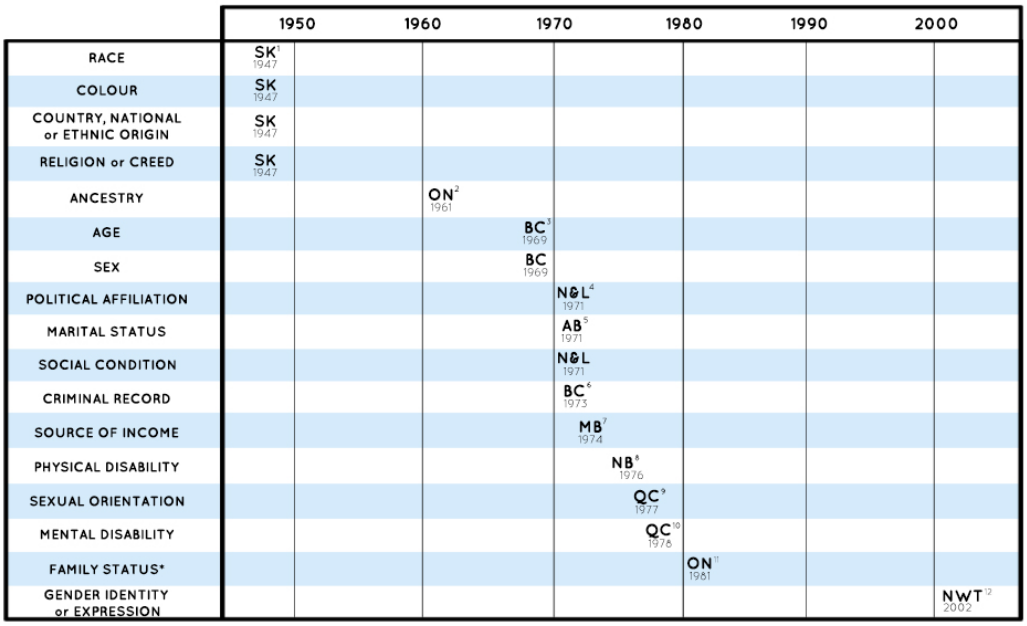
14 *An Act to Amend the Human Rights Act*, SNB 1976, c.31.

15 *Charter of Rights and Freedoms*, SQ 1977, c 6.

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

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

Figure 1: Timeline of Addition of Prohibited Grounds across Canada



[1] *The Saskatchewan Bill of Rights Act, 1947*, SS 1947, c 35. It was the first statute, analogous to modern human rights acts, aimed to protect against discrimination in employment (as "Fair Practices Acts" did before it), service provision, and accommodation.
[2] *The Ontario Human Rights Code*, 1961-62, SO 1961-62, c 93
[3] *Human Rights Act*, SBC 1969, c 10 (British Columbia)
[4] *The Newfoundland Human Rights Code*, SNfld 1969, No 75 (Newfoundland and Labrador)
[5] *The Human Rights Act*, SA 1971, c 48 (Alberta)
[6] *Human Rights Act*, SBC 1973 (2nd Sess.), c 119 (British Columbia)
[7] *Human Rights Act*, SM 1974, c 65 (Manitoba)
[8] *An Act to Amend the Human Rights Act*, SNB 1976, c 31, (New Brunswick)
[9] *Charter of Rights and Freedoms*, SQ 1977, c 6 (Quebec)
[10] The Quebec *Charter of Rights and Freedoms* only includes "disability", but defines it as including mental disability
[11] *An Act to Revise and Extend Protection of Human Rights in Ontario*, SO 1981, c 53
[12] *Human Rights Act, SNWT 2002, c 18 (Northwest Territories)*
* In 2002, the Northwest Territories were the first to adopt the undefined ground of "family affiliation" alongside "family status". To date, there have been no decisions by the NWT Human Rights Commission on this ground which would serve to define it.

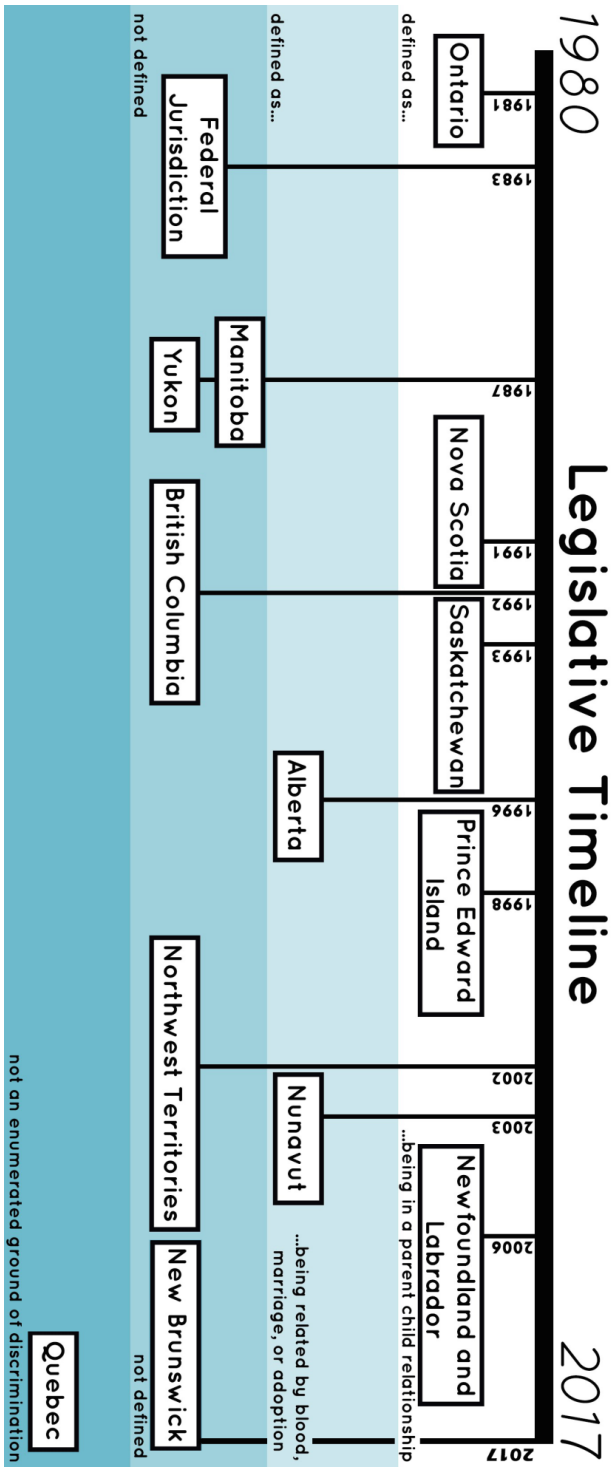

1980
Legislative Timeline
2017
Ontario
1981
1983
Federal Jurisdiction
Yukon
Manitoba
1987
Nova Scotia
1991
British Columbia
1992
Saskatchewan
1993
Alberta
1996
Prince Edward Island
1998
Northwest Territories
2002
Nunavut
2003
Newfoundland and Labrador
2006
New Brunswick
2017
Quebec
defined as...
defined as...
not defined
...being in a parent child relationship
...being related by blood, marriage, or adoption
not defined
not an enumerated ground of discrimination

Figure 2

III. An Overview of Family Status Discrimination Cases Since 2004

Based on our review of the factual circumstances underlying human rights complaints, court decisions, and labour arbitrations interpreting the meaning of this ground from 2004-2016, family status discrimination includes an array of circumstances. The majority of cases address disadvantage linked to the following categories:

(i) *Facially neutral employment standards that may discriminate against parents with particular family responsibilities*, such as denials of requests to convert to part-time, requirements to work evening or overnight shifts, elimination of part-time shifts, requests for changes to shifts times and responsibilities during pregnancy;

(ii) *Discriminatory termination linked to family status*, often where there is disagreement amongst the parties as to whether termination was linked to family obligations, rather than performance issues or a legitimate business rationale;

(iii) *Discrimination in hiring or promotion*, often due to assumptions about availability to work due to caregiving obligations;

(iv) *The impact of absence from the workplace due to maternity, parental or other leave* related to family obligations on entitlement to other negotiated benefits, such as pay increases and retirement benefits;

(v) *Requests for equality of benefits*, often between biological and adoptive parents, or birth fathers and mothers, particularly in relation to parental leave benefits;

(vi) *Workplace harassment*;

(vii) *Tenancy discrimination linked to caring for young children*, such as denial of rental accommodation due to family status, often because of children or single parent status;

(viii) *Discriminatory policy in relation to administration of public benefits*, eg. entitlement to income assistance of minor parents, adult children living with parents, or parents with shared custody;

(ix) *Nepotism* and anti-nepotism cases; and

(x) *Other*.

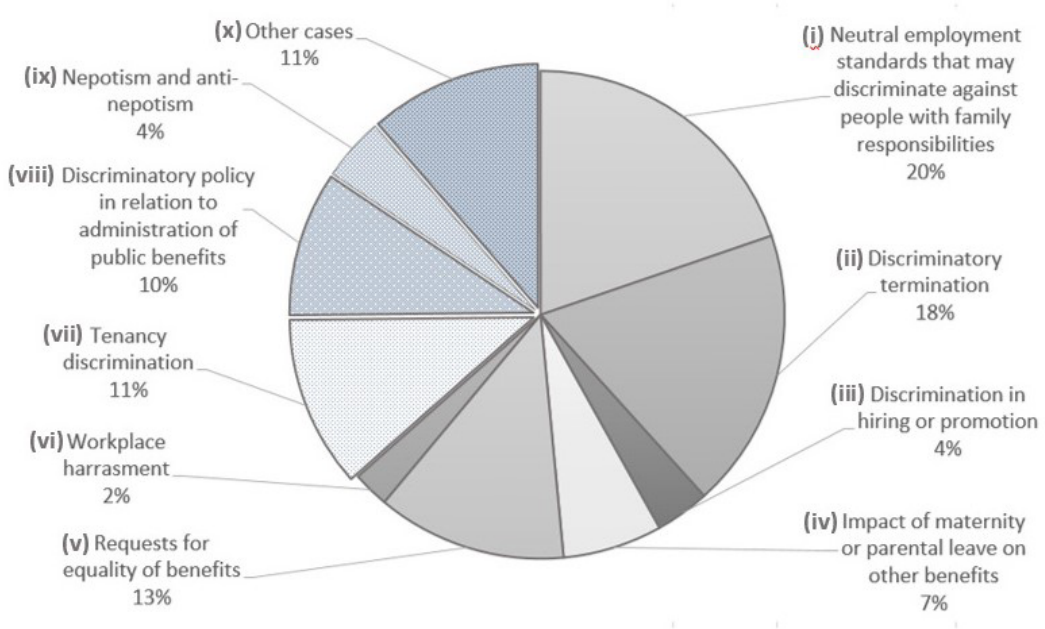
Figure 3, developed based on a review of the family status cases from 2004 to 2016, illustrates the spread of cases across these ten categories. While these categories reflect a diverse range of issues, the vast majority of family status cases portray families struggling with caregiving responsibilities. Almost two thirds of the cases relate to employment discrimination. The first five categories set out above are linked to family responsibilities and leaves associated with providing care, mostly to young children and infants. The tenancy cases generally deal with discrimination linked to the absolute status of being a parent of young children or a single parent. The public benefit cases include a number of cases linked to family caregiving as well. Parental obligations dominate, but there are a few cases pertaining to caregiving in relation to other family members.

Reported decisions provide examples of working parents who face difficulty in securing appropriate and affordable childcare compatible with long hours, overnight shifts, and unpredictable schedules. Labour arbitrations illustrate barriers to accommodating new mothers who request part-time hours, and reveal the negative impact multiple parental leaves can have on long-term entitlement to employment benefits. Non-employment cases reveal the financial strain imposed on different kinds

of caregivers: parents who provide long-term assistance to adult family members with disabilities; grandparents who assume primary care of their grandchildren when the biological parents are unable to take on that role; and low income families struggling to support three generations in one home when a youth becomes a parent herself. Collectively the cases illustrate the challenges that family responsibilities impose on contemporary families.

This paper does not address the full breadth of cases reflected in Figure 3. Rather I focus on the decisions that address the experiences of parents and other caregivers who are trying to balance work and caregiving responsibilities. These cases, which I characterize as family responsibilities discrimination cases, make up the two largest wedges of the pie chart below, and represent over one third of the family status jurisprudence to date.

Figure 3: Types of Family Status Discrimination



IV. The Development of Family Status Discrimination Tests in Canada: From *Campbell River* to *Johnstone 2014*

Two of the recent, leading upper level court decisions on the meaning and scope of family status discrimination in the employment context deal with jurisdictions in which the family status ground is not defined by the human rights statute, namely, BC and the federal jurisdiction. Both cases dealt with circumstances where a mother had requested a schedule change in order to permit her to better meet the needs of her children. The BC Court of Appeal created the first family responsibilities discrimination test in 2004. The Federal Court, and then the Federal Court of Appeal, respectively

rejected the BC approach in 2007 and 2008, and in 2014 the Federal Court of Appeal fashioned a new four-part test to address the same human rights complaint. The facts of these two cases are important in particular because, as will be discussed later, they illustrate the kinds of families and family caregiving challenges that are finding protection through human rights litigation.

A. Campbell River (2004)

In *Campbell River*, the BC Court of Appeal sought to constrain the scope of family status discrimination such that not every instance of a conflict between a work and family obligation would amount to *prima facie* discrimination, and trigger an examination of the duty to accommodate. In doing so, the Court fashioned the "serious interference with a substantial family obligation" test, which has been applied by some tribunals and arbitration boards over the years, and is often considered a binding authority within BC.

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

Justice Low notes in his decision (at para 14) that Ms. Howard had provided her employer with a letter from her son's paediatrician stating that the child "is a very high needs child with a major psychiatric disorder," and that the mother's availability to care for her son after school was "an extraordinarily important medical adjunct to [the son's] ongoing management and progression in life." After working the new hours from September 4 to September 17, 2001, Ms. Howard attended a meeting of the board of directors to express her concerns about the new hours. Following this meeting, the board issued her a letter advising her that the new hours would be maintained, and one of the findings of the arbitrator was that following receipt of this letter Ms. Howard had a severe anxiety attack. On her doctor's advice she did not return to work. She was ultimately diagnosed with post-traumatic stress disorder (PTSD), and the doctor testified at arbitration that the medical condition was caused by the employment circumstances.

In the original decision, *Campbell River & North Island Transition Society v Health Sciences Assn of British Columbia (Howard Grievance)*, (2002) 110 LAC (4th) 28, Arbitrator Stan Lanyon found that Ms. Howard had not experienced family status discrimination, concluding that the meaning of family status was limited to the pure status of being a parent, and not extending to cover characteristics of that relationship, such as caregiving responsibilities. The Arbitrator concluded (at paras 49-50) that:

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

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

The Arbitrator stated (at para 56) that "the words 'family status' refer to the status of being a parent *per se*, and not to the innumerable (and yet important) circumstances that arise for all families in regard to their daycare needs." Therefore, the grievance was dismissed.

At the Court of Appeal there was no issue as to whether a parent-child relationship fit within the rubric of family status. Rather, the issue was whether the meaning of family status included a parent's caregiving responsibilities toward a child, and to what extent an employer was legally obligated to accommodate the parental responsibilities that flowed from the employee's family status. In its decision the Court considered (at para 28) the following broad approach to family status articulated by the Canadian Human Rights Tribunal in *Brown*:

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

Justice Low (at para 35) found the approach taken in Brown to be overly broad because it would mean that every conflict between a job requirement and a family obligation would give rise to a case of prima facie discrimination, and trigger a duty to explore accommodation. In the absence of a persuasive authority on the meaning and scope of family status discrimination, the Court sought to fashion a test for family status discrimination that would capture more than the status of being a parent, but not all circumstances where employment obligations conflicted with parental obligations, the latter broad approach having the "potential to cause disruption and great mischief in the workplace" (at para 38). Justice Low articulated (at para 39) the new standard as follows: "a prima facie case of discrimination is made out when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employee." He added, "I think that in the vast majority of the situations in which there is a conflict between a work requirement and a family obligation it would be difficult to make out a prima facie case."

On the facts of Campbell River, the Court found that Ms. Howard's experience did amount to discrimination under the new test. The matter was then referred back to the arbitrator for a finding on the accommodation issue and any potential remedy. No further appeals occurred. Interestingly, although the pivotal medical evidence provided to the court suggested disability of both the mother and her child (she was diagnosed with PTSD), the case was not argued as involving discrimination based on either disability or an intersectionality of grounds. I have argued elsewhere that one of the themes emerging from the family status discrimination jurisprudence is that "medical evidence of a disability is what transforms a mundane or normal parenting responsibility into an obligation

triggering a human right that requires accommodation."[18] I revisit this issue below in considering a number of recent family status responsibilities discrimination cases potentially involving multiple grounds.

B. *Johnstone* (2007 and 2008)

The opposing approach to family responsibilities discrimination cases is grounded in the Federal Court, and later Federal Court of Appeal approach, in *Johnstone*. Unlike *Campbell River*, there is not a single iconic decision illustrating the alternative approach, and have instead been many court decisions emerging out of Fiona Johnston's original human rights complaint.

The *Johnstone* case involved an employee returning from a maternity leave who was unable to find a childcare provider that matched her family's needs, and sought accommodation in the form of a fixed daytime schedule. The series of decisions considering her circumstances has resulted in a refashioning of the federal jurisdiction test over time, and this mother is not the first to initiate a family status discrimination complaint against a federal government department in relation to a clash between work and family responsibilities. The *Brown* decision, which took an expansive approach to family status discrimination that was rejected by the Court of Appeal in *Campbell River*, represents one of these earlier cases.

Fiona Johnstone worked as a Customs Inspector employed with the Canada Border Services Agency. The employer maintained a seven day a week, 24-hour a day operation. Ms. Johnstone worked a five-day on, three-day off rotating shift schedule based on a complex 56-day work pattern. In this work environment full-time employees rotated through six different start times over the course of days, afternoons, and evenings with no predictable pattern. In addition, overtime hours were required and not predictable.

To make matters more challenging, Ms. Johnstone's husband worked out of Pearson International Airport as a customs superintendent. She and her husband's schedules typically overlapped 60% of the time, but were not coordinated in any manner. Ms. Johnstone and her spouse found it difficult to secure weekend and overnight childcare, and they could not afford a live-in nanny. On returning from her second maternity leave, Ms. Johnstone requested an accommodation in the form of three fixed 12-hour shifts per week because she was able to secure family assistance with childcare on three fixed days per week. The employer's accommodation policy required an employee to accept part-time employment in exchange for fixed shifts. Ms. Johnstone filed a complaint with the Canadian Human Rights Commission, arguing that the employer's application of the accommodation policy discriminated against her on the basis of family status.

The Commission initially dismissed the complaint at the screening stage, applying the serious interference test articulated in *Campbell River*. In its judicial review findings the Federal Court Trial Division remitted the decision back to the Canadian Human Rights Commission in part because they used the "serious interference" language. The Court stated in *Johnstone 2007* that using "serious interference" as a standard was counter to binding jurisprudence. The judge found persuasive (at para 29) the following critique of *Campbell River* described in the Canadian Human Rights Tribunal decision in *Hoyt v CNR*, [2006] CHRD No 33 (at para 120):

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18 British Columbia Law Institute, *Human Rights and Family Responsibilities: Family Status Discrimination under Human Rights Law in BC and Canada* (2012) at 79 [*Human Rights and Family Responsibilities*].

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

Justice Barnes noted (at para 29) that, "while family status cases can raise unique problems that may not arise in other human rights contexts, there is no obvious justification for relegating this type of discrimination to a secondary or less compelling status." The Court indicated that Campbell River was unduly restrictive due to the fact that "the operative change typically arises within the family and not in the workplace," and characterized that aspect of the test as "wrong in law." The Justice set aside the original decision of the Commission, and referred the matter back to the Commission for a redetermination. The employer sought a review of the Federal Court decision. In its dismissal of the application in Johnstone v Canada (Attorney General), 2008 FCA 101, the Federal Court of Appeal refused (at para 2) to provide an opinion on whether the Hoyt or Campbell River standard was correct, leaving the state of the law somewhat unclear. In its reasons, the Court merely stated (at para 2):

> The Commission's reasons raise a serious question as to what legal test the Commission actually applied in deciding as it did. In our view that is a valid basis for finding the decision of the Commission to be unreasonable, and justifies the order of Justice Barnes referring the matter back to the Commission for reconsideration.

C. Johnstone 2014

In its second decision on Fiona Johnstone's circumstances, Johnstone v Canada (Attorney General), 2010 CHRT 20, the Canadian Human Rights Tribunal found that family status discrimination included childcare responsibilities, and concluded that the employer had discriminated against her by refusing to accommodate her work scheduling needs in relation to caregiving for her children. The Tribunal accepted Ms. Johnstone's evidence that the three-day arrangement permitted the best childcare arrangement under the circumstances and noted that a number of employees had been granted fixed full-time schedules. The Tribunal found (at para 242) that Ms. Johnstone had made out a prima facie case of discrimination by establishing that the employer "had engaged in a discriminatory and arbitrary practice in the course of employment that adversely differentiated Ms. Johnstone on the prohibited ground of family status." The Tribunal ordered that Ms. Johnstone be compensated for lost wages and benefits, and ordered an additional $15,000 for pain and suffering and $20,000 for special compensation.

The Attorney General sought a judicial review of the tribunal decision in Canada (Attorney General) v Johnstone, 2013 FC 113, arguing that the Tribunal had applied an overly broad interpretation of family status by including family childcare obligations and failing to apply the Campbell River test. They asserted (at para 131) that Ms. Johnstone "did not show the reasons for the conflict were due to circumstances beyond her control instead of the result of a series of choices she and her husband jointly made." Based on expert evidence that Fiona Johnstone's childcare care needs were "one of the most difficult childcare situations [the expert] could imagine" (at para 137), and that the employer had made no attempt to accommodate Ms. Johnstone, relying rather on a blanket policy, the Federal Court denied the judicial review.

The Attorney General appealed the Federal Court decision. They argued again for a narrow interpretation of family status that did not include family caregiving obligations. In its 2014 decision, the Federal Court of Appeal ostensibly favoured a broad interpretation, noting (at para 66) that "[t]here is no basis for the assertion that requiring accommodation for childcare obligations overshoots the purpose of including family status as a prohibited ground of discrimination." However, the Court added (at para 68) that "[T]he childcare obligations that are contemplated under family status should be those that have immutable or constructively immutable characteristics, such as those that form an integral component of the legal relationship between a parent and a child." The Court stated (at para 69) that "[i]t is also important not to trivialize human rights legislation by extending human rights protection to personal family choices, such as participation of children in dance classes, sports events like hockey tournaments, and similar voluntary activities."

In its decision, the Court introduced (at paras 94-97) a new four-part test for finding prima facie discrimination in family responsibilities discrimination cases, intending the test to flesh out this choice/obligation distinction. In order to make out a prima facie claim of discrimination (and thereby shift the focus of the analysis onto the accommodation question), an individual must establish that:

(1) The child is under the individual's care and supervision;

(2) The childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice;

(3) The individual has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solutions are reasonably accessible; and

(4) The impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfilment of the childcare obligation.

The Court ruled that, when applied to the facts of the case, Ms. Johnstone's circumstances met the four-part test, and the employer was unable to show a *bona fide* justification. The appeal was thus dismissed with a slight variance in the award.

V. Application of Campbell River, Johnstone 2007 and Johnstone 2014

A. Chronology of Family Status Jurisprudence

A review of the application of *Campbell River*, *Johnstone 2007* and *Johnstone 2014* across the country reveals shifts in the dominant authority. Although generally there has been disagreement about which test provides the right conceptual approach, I see four distinct periods in the development of the law over the past 13 years.

1. The Early Years (2004-2009)—*Campbell River* Dominates

In the years leading up to the decision in Johnston 2014, there emerged a tension over whether the approach articulated in either Campbell River or Johnstone 2007 should be followed. Immediately after the decision in Campbell River the majority of decision makers, especially in the arbitral context, applied the Campbell River standard. Campbell River was followed in Nova Scotia, BC, Ontario, and the federal jurisdiction in the first few years following the decision. This approach

generally resulted in a finding of no discrimination, unless there was evidence to suggest exceptional caregiving needs, such as a child or spouse with a disability. As I have noted elsewhere, these early family responsibilities discrimination cases reflect three inter-related themes: (1) a trend of distinguishing between ordinary versus extraordinary family obligations; (2) a reliance on a second distinction between voluntary versus chosen responsibilities; and (3) a medicalization of family status discrimination suggested by the critical importance of providing medical evidence and other proof of disability or special needs on behalf of the child and/or other family member with caregiving needs.[19]

This emphasis on disability is demonstrated in the reasoning found in *Coast Mountain School District No 82 v BC Teachers' Federation (Sutherland Grievance)*, [2006] BCCAAA No 184 (*Coast Mountain*), a BC grievance arbitration concerning a mother who requested to return to work on a part-time basis for the first six months after her maternity leave ended. The Arbitrator dismissed the argument that the mother had experienced discrimination on the ground of family status largely because her child was healthy. The Arbitrator stated (at para 39):

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

Contrasting facts are found in *Canada Post Corp v Canadian Union of Postal Workers (Somerville Grievance)* [2006] CLAD No 371 (*Canada Post*), which concerned a mother of two children, one of whom exhibited behavioural issues that created childcare challenges. Amongst other issues, the child had been required to withdraw from his preschool due to his behaviour, and the grievor had contacted the Ministry for Child and Family Development for support and assistance in managing her child's aggressive behaviour. Ms. Somerville was employed 'on-call'. The employer's policy changed to require a 70-75% acceptance rates for called-on shifts, which created a problem for the Ms. Somerville, given her challenges finding suitable childcare for one of her children. She requested three months leave to care for her children, but the employer refused, stating that doing so would make her miss her 70-75% target and result in her dismissal. The Arbitrator followed *Campbell River,* and the child's challenging behaviour was a significant factor in terms of why the Arbitrator found Ms. Somerville's shift acceptance rate to be not unreasonable under all the circumstances.

In 2009, in *Power Stream Inc v International Brotherhood of Electrical Workers (Bender Grievance*), [2009] OLAA No 447 (*Power Stream*), an Ontario arbitrator applied the *Campbell River* test, slightly broadening it to include changes in the family as opposed to changes strictly initiated by the employer, and articulated the requirement that a grievor make efforts at "self-accommodation" before alleging discrimination.

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19 See Chapter E in *Human Rights and Family Responsibilities*, *supra* note 18.

2. The Years of Disagreement (2010-2014)

The Power Stream approach found favour in subsequent years, figuring in the reasoning of a number of labour grievance decisions across Canada.[20] Family responsibilities discrimination arguments often failed where the decision-maker felt that the worker had not made adequate efforts to find suitable childcare before asking for a change in work location or hours or other policy exception.[21] The "self-accommodation" criteria was rejected in recent decisions from various juridictions as not appropriately part of the prima facie inquiry, but rather only belonging within a consideration of accommodation once a prima facie case has been established. See for example, SMS Equipment Inc v Communications, Energy and Paperworkers Union, Local 707, 2015 ABQB 162 (SMS), Misetich v Value Village Stores Inc, 2016 HRTO 1229 (Misetich), and Suen v. Envirocon Environmental Services (No. 2), 2017 BCHRT 226 (Suen).

By 2010 decision-makers were fairly evenly split between whether Campbell River or Johnstone 2007 set out the proper approach, except in the federal jurisdiction, where Johnstone appeared to have been accepted as a binding precedent. Even in BC there emerged efforts by the Human Rights Tribunal, dating back to 2008, to distinguish Campbell River, and follow either Johnstone 2007or a similar broad approach.[22]

3. The Test is Termporaraily Settled (2014-2016)

By 2016, this uncertainly appeared mostly resolved. Between 2014 and 2006, almost all reported decisions followed the new approach set out in *Johnstone 2014*, regardless of either geographic jurisdiction, or whether the decision originated as a labour grievance or a human rights complaint. The exception is BC, where *Campbell River* continued to be the leading authority, at least until recently, having been followed in *Kenworthy v Brewers' Distributor (No 2)*, 2016 BCHRT 54.

Most of the reported family responsibilities discrimination decisions occurring since Campbell River have occurred in BC, Ontario, and the federal jurisdiction, with a small number also coming from Alberta, a couple from Nova Scotia, and one case from the North. Figure 4 (at the end of this section) plots the authority of Campbell River, Johnstone, and Johnstone 2014 along a timeline from 2004 to 2016, including most recorded decisions under the family status ground where there was an issue of accommodating caregiving responsibilities.[23] Once colour is added to mark the authority followed in each case, the shifting in the dominant approach across time becomes fairly clear: initially most decision-makers followed Campbell River, then Johnstone, and finally we see the fairly unequivocal dominance of Johnstone 2014 emerging by 2015.

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20 See *Alberta (Solicitor General) v Alberta Union of Provincial Employees (Jungwirth Grievance),* [2010] AGAA No 5; *Alliance Employees Union, Unit 15 v Customs and Immigration Union (Loranger Grievance)*, [2011] OLAA No 24; *Canadian Union of Public Employees, Local 1750 v Ontario (Workplace Safety and Insurance Board),* 2012 CanLII 49876 (ON GSB); *Ontario Public Service Employees Union (Thomson) v Ontario (Liquor Control Board of Ontario)*, 2012 CanLII 67531 (ON GSB).

21 *Ibid*. See also *Halfacree v Deputy Head (Department of Agriculture and Agrifood),* 2012 PSLRB 130, aff'd *Halfacree v Canada (AG),* 2014 FC 360, aff'd *Halfacree v Canada (AG)*, 2015 FCA 98; *Clark v Bow Valley College*, 2014 AHRC 4; and *Canadian National Railway Co v Unifor Council 4000*, [2015] CLAD No. 213.

22 *Haggerty v Kamloops Society for Community Living*, (2008) BCHRT 172; *Cavanaugh v Sea-to- Sky Hotel (no 2*), (2010) BCHRT 209.

23 Applications to dismiss not included.

4. New Uncertainty about the Correct Test (2016-2017)

By 2016, at least one decision-maker expressed a number of concerns regarding the *Johnstone 2014* test. *Misetich* concerned a part-time store employee who argued that her eldercare responsibilities for her 86-yesar old mother prevented her from working in the evenings. Although the Vice-chair found that Tonka Misetich had failed to establish discrimination because she did not provide enough information to the employer regarding her eldercare responsibilities, the Vice-chair went on to offer some comments on the appropriate test.

Vice-chair Jennifer Scott expressed concern (at para 43) that past decisions have sought to articulate a distinct legal test for family status discrimination, including Campbell River, Power Stream, and Johnstone 2014, noting, in a manner recalling the Johnstone 2007 decision, that "[T]here is no principled basis for developing a different test for discrimination depending on the prohibited ground of discrimination alleged." She described (at para 45) the Johnstone 2014 test as imposing a higher standard than for other kinds of discrimination, given the requirement that the family caregiving obligation must be linked to a legal obligation, and pointed out (at para 47) that the four-part test was proving to be difficult to apply in the context of eldercare. She further pointed out that the application of the test to the eldercare context in the decision in Ontario Public Service Employees Union (Bharti) v Canada (Ministry of Natural Resources and Forestry), 2015 CanLII 19330 (ON GSB) (Bharti) (discussed later in this paper) may be imposing an even higher obligation in the eldercare context than in the childcare context. Finally, she noted (at para 48) that the self-accommodation requirement that had been picked up from Power Stream conflated the tests for prima facie discrimination and accommodation.

The Ontario Human Rights Tribunal (at para 129) endorsed the Misetich critique of Johnstone 2014 in Ananda v. Humber College Institute of Technology & Advanced Learning, [2017] OHRTD No. 612, and applied an adverse impact analysis, requiring the complainant to establish that a rule or requirement had an adverse impact because of needs or responsibilities related to the parent-child relationship, and to demonstate a "real disadvantage". The decision was made based on a lack of medical evidence.

In 2017 a number of decision makers have expressed concern about both the *Campbell River* or *Johnstone 2014* approach. *Adair v. Forensic Psychiatric Services Commission (No. 2),* 2017 BCHRT 147 (*Adair*) concerned a forensic security officer with epilepsy who had lost his class 4 drivers license due to a recent seizure. Driving and escourting patients leaving the foresic hospital for appointments and court appearances were a fundamental part of day shift work. Mr. Adair alledged discrimination based on family status when he was required to work evening shifts for an eleven-month period due to his inability to his loss of his license, as the evening work prevented him from spending time with his two young sons. In considering whether discrimination had occurred, the Tribunal considered both *Campbell River* and *Johnstone 2014*, as well as an adverse impact analysis grounded in *Moore v. British Columbia (Education)*, 2012 SCC 61, and concluded that, regardless of the test, the facts did not establish discrimination. Without drawing any conclusions regarding the appropriate test, the Tribunal quoted the critique from *Misetich,* and raised the issue of whether either *Campbell River* or *Johnstone 2014* test were good law in the wake of the Supreme Court of Canada statement in *Stewart v. Elk Valley Coal Corp*., 2017 SCC 30 (*Elk Valley*) that adding qualifiers to the *prima facie* discrimination test, such as significant, was unnecessary (at para 122-23).

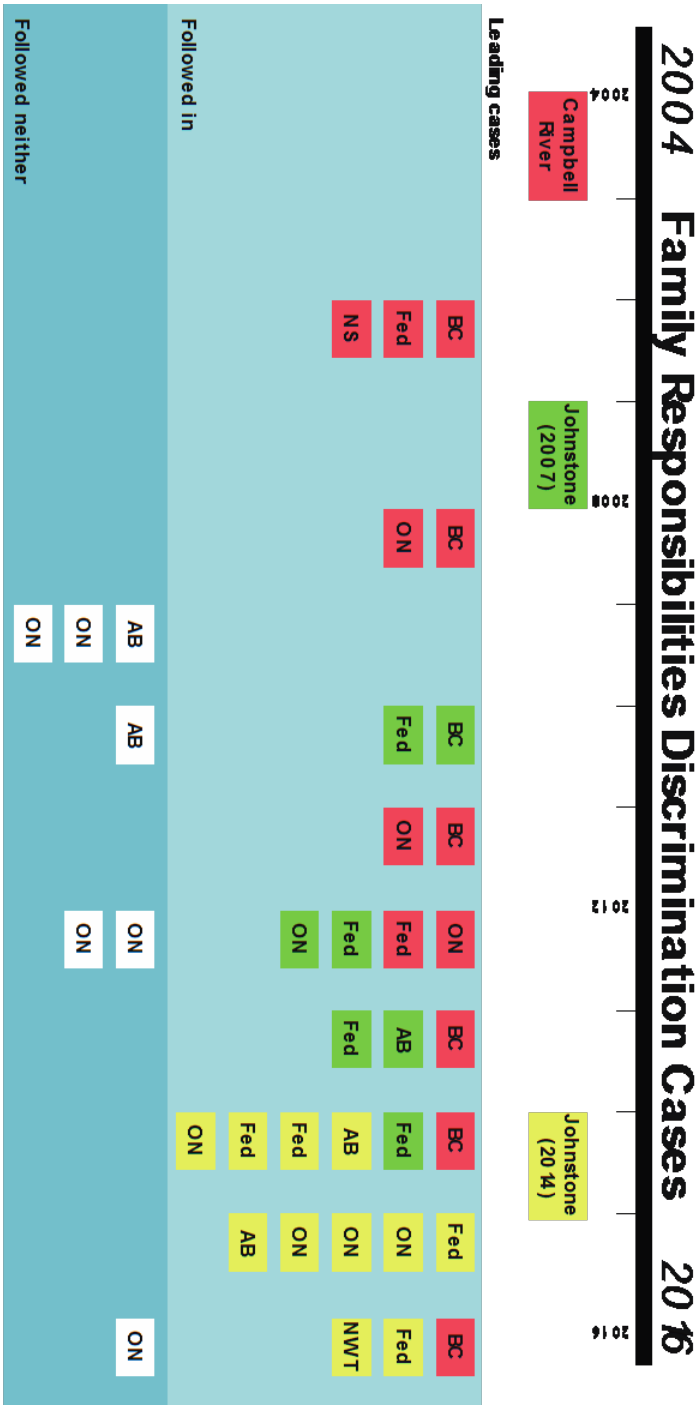
Similarly, in *Suen*, an application to dismiss, while again, the decision does not fall on the identification of the correct test, the Tribunal cites the discussion in *Adair*, and notes that *Elk Valley* raises the question of whether *Campbell River* remains good law. *Suen* involved a worker with a new baby who was being required to work in another province for an indefinite period of

time. The Tribunal found that the facts could constituted a breach, even if *Campbell River* remained good law, and declined to dismiss the case.

In Nash v. Deputy Head (Correctional Service of Canada), 2017 LNPSLREB 4, which was decided prior to Elk Valley, the Canada Public Service Labour Relations and Employment Board followed Johnstone 2014, based on a finding that the employee, who sought a compressed schedule during one of the months when school was out over summer, had not adequately explored alternative childcare arrangements for caring for his six childen, and that, in any event, the employer had offered other work flexibility options to help him to address his childcare obligations. The Board also applied Johnstone 2014 in Guilbault v. Treasury Board (Department of National Defence), 2017 LNPSLREB 1.

It remains to be seen whether this reluctance to follow *Johnstone 2014* will be picked up by other decision-makers. If *Elk Valley* means *Campbell River* and *Johnstone 2014* are not good law, we will likely be coming full circle back to *Meiorin*, and the broader approach espoused in *Johnstone 2007*.

Figure 4


2004 Family Responsibilities Discrimination Cases 2016
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B. Choice versus Obligation in Family Responsibilities Jurisprudence

The cases pre- and post-*Johnstone 2014* reflect persistent reliance on an ideological distinction between obligation versus choice to carve out a way to determine which caregiving relationships may attract human rights protection. Since *Campbell River* many decision-makers have suggested that voluntarily assumed duties cannot be at the foundation of an argument that a barrier to full participation in the workplace triggers family status discrimination. The *Johnstone 2014* four-part test refined the requirement further to a "legal obligation": as noted above, the decision requires that "the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice", in order for the barrier to give rise to discrimination. Although the test specifically references childcare and was developed in the context of a grievance dealing with accommodation of childcare needs, the test has been applied, although generally not favourably, in other circumstances. The cases below provide some examples of the choice/obligation distinction being applied by decision-makers to exclude some relationships and responsibilities from protection.

1. Canadian Staff Union (2006)

One of the earliest statements of this choice/obligation distinction can be found in *Canadian Staff Union v Canadian Union of Public Employees (Reynolds Grievance),* (2006) NSLAA 16 (*Canadian Staff Union*). This case concerned a father who was not considered for a position because he was unwilling to relocate from St. John's to Halifax, due to family obligations, including responsibilities to a child, partner, and aged mother. For fathers, it would seem, being physically present in your children's lives is just a choice.

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

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

Although there was an issue in this case as to whether the family status ground applied to the circumstances, given the state of the law at the time of the grievance (the Newfoundland human rights statute did not then include the family status ground), the Arbitrator found (at para 9) that the union had not made out a case of prima facie discrimination because "it was the grievor's choice, not his marital and family responsibilities, that precluded him from

moving to Halifax." The Arbitrator relied on Campbell River, and described (at para 138) the facts before him as "a far cry from Campbell River." He stated (at paras 142-144):

> The problems involved in moving for work have been exacerbated in the modern world of broken and blended families. The grievor's sons undoubtedly benefit greatly from his regular presence in St. John's but they require no special care from him, and he could have arranged for their maintenance in his absence. The same is true of his partner's son, to whom he has no legal obligation. Stressful as it often is on personal relationships, countless couples live apart for prolonged periods because of job requirements. Proper concern for aged parents has adversely affected many careers, undoubtedly to the credit of those who chose not to put work above all.
>
> If the grievor's partner, mother and children could not have moved to Halifax, he could have moved alone and commuted periodically at his own cost. In *Campbell River* Ms. Howard's difficulties were much more than impractical, highly inconvenient or economic; they were traumatic for her and her ill son, and she did not seek the change that brought them on.
>
> I say this with nothing but the greatest respect for the grievor and the values that have led him to refuse to move to Halifax.

The decision-maker found that a father's desire to live in the same city as his children and spouse reflected a choice. The decision was perhaps the morally correct choice, but a choice none the less, and so his circumstances did not attract human rights protection. One wonders if a decision-maker would make the same comments about a mother.

2. Flatt (2014)

The concept of choice was also the ideological linchpin in Flatt v Treasury Board (Department of Industry), 2014 PSLREB 2 (Flatt),[24] a 2014 federal jurisdiction arbitration that went all the way to the Federal Court of Appeal on review. Laura Marie Flatt worked in the Spectrum Management Operations Branch of Industry Canada, which administers, monitors, and supervises how radio stations, police and fire services, marine and airplane operators, and other agencies utilize the radio frequencies for which they have been issued licenses. By the time she had her first child in 2007 she had advanced within the operation, and had reached the EL-05 level, working, in her words, "pretty much on [her] own, doing radio site inspections and investigating radio interference cases" (at para 18). By 1999 the employer maintained a telework policy "designed to help employees balance their work, personal and family responsibilities" (at para 21).

Ms. Flatt commuted over two hours each day (a 140 km round trip), and since 2009, and prior to her latest maternity leave, had been teleworking one or two days per week. While on her third parental leave, the employer, whose staff complement had decreased, instituted a new policy restricting teleworking to extenuating circumstances, such as medical accommodation, severe weather conditions, or family emergencies. Ms. Flatt alleged discrimination on the grounds of sex and family status when the employer refused to allow her to telework from home full-time for a year following her second maternity leave so that she could breastfeed her youngest child throughout the day. As an alternative, the employer offered a one-year unpaid leave. After the employer denied her request, Ms. Flatt emailed them to express her disappointment, noting that she had researched the benefits of breastfeeding due to the many problems she had had with her second

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24 Aff'd *Flatt v Canada (AG)*, 2015 FCA 250, leave to appeal to SCC refused, *Laura Marie Flatt v Attorney General of Canada*, 2016 CanLII 24872 (SCC).

child, and had found daycare close to her home, which would allow her to work 6 a.m. to 2 p.m., five days a week. By the time the matter reached the Board Ms. Flatt had weaned her child, earlier than she had wished, by approximately age eigthteen months.

The Board found that work requirements that impact an employee's breastfeeding would be discrimination on the basis of family status, and not sex or gender, and applied the *Johnstone 2014* four-part test. The grievance failed because the Board concluded (at para 154) that breast-feeding was not a legal obligation, but rather a choice—albeit a choice mediated by a variety of physical, personal, and social factors—and not an immutable characteristic of gender. In reasoning oddly disguised as feminist, the Board stated (at para 181) that "to assert a protected status to the choice of a mother to fulfill her desire to nourish and bond with her child by way of breastfeeding is, in a sense, to denigrate a woman's choice (whether through personal preference, physical inability or social situation) to fulfill that desire in another way." In contrast, where the "physical needs or illness of a child…dictate that nourishment be supplied by way of breastfeeding…the choice is no longer a choice, it is a legal responsibility."

Once again medical evidence, or lack thereof, was a deciding factor. The Board noted (at paras 37 and 181) that while Ms. Flatt provided public health information and research regarding the value of sustaining breast-feeding for the first two years of a child's life, and indicated her second child had had some health issues she felt could have been prevented had she continued to breastfed him until he was older, "at no point in her testimony did the grievor suggest that her newest child had any condition, illness or disease that made breastfeeding after one year of age a physical or medical necessity—either as the sole source of nourishment or as a supplement." Curiously, with respect to Ms. Flatt's information that there was one childcare option close to the employer that she could make use of but would result in her "working to just cover the cost of daycare", the board stated (at para 183) that fact "does not alone establish that it was not a reasonable alternative." To be clear, the Board stated that the fact that the childcare option would result in her earning no income did not render it an unreasonable option in their view.

In *Flatt v Canada (AG)*, 2015 FCA 250, the Federal Court of Appeal dismissed the judicial review with comments reminiscent of the words of the arbitrator in *Canadian Staff Union*, commending the grievor for making a choice that was in the best interests of her child and family, but noting (at para 38) that "[t]his case is not about that choice but rather about the difficulties of balancing motherhood and career." For Laura Flatt such a distinction may amount to hair-splitting. I expect that from her perspective the case was absolutely about the "choice" to breastfeed her son for as long as she felt was best for him.

3. Bharti (2014)

Bharti addressed whether eldercare could be a legal obligation under *Johnstone 2014* and therefore meet the requirements of the four-part test. Viren Bharti was a statistician with the Ministry of Natural Resources and Forestry. When Mr. Bharti applied for the position in 2005 the posting indicated that the position was located in either Sault Ste. Marie (preferred) or Peterborough. Mr. Bharti had been living in Ottawa and indicated he intended to relocate to Sault Ste. Marie. The employer later allowed Mr. Bharti to work permanently from Peterborough, and Mr. Bharti commuted from Ottawa to Peterborough rather then moving from Ottawa. Mr. Bharti began seeking permission to work from Ottawa in 2006. A temporary secondment allowed him to work from Ottawa for some time. In 2013, he filed a grievance alleging discrimination based on religion, because as a devout married Hindi man he must pray twice a day with his wife, and based on family

status, because he must provide caregiving to his elderly parents. The accommodation he requested was the ability to work permanently from Ottawa.

At the arbitration hearing both parties agreed that the *Johnstone 2014* four-part test applied. Based on *Johnstone 2014* the arbitrator found (at para 14) that "it is necessary for a claim for accommodation in relation to a family member to be founded in a legal responsibility of the claimant towards that family member." The union argued that Mr. Bharti had a legal obligation toward his parents because he had sponsored them into Canada. The Arbitrator expressed the view (at paras 20 and 24) that the sponsorship undertaking created a legal obligation to the Government of Canada to financially support his parents, but not an obligation toward his own parents whom he had sponsored, and that further the only obligation it created in any event was an obligation to provide financial support. It was not an obligation to provide care. From a public policy perspective this is a fairly shocking statement. The notion that Canadian citizens can sponsor older family members into Canada, but otherwise abandon them so long as they provide them with sufficient funds to survive and avoid drawing on public resources, such as welfare and medical services, seems suspicious. Unilingual older adults with disabilities enter Canada with tremendous vulnerability to abuse and neglect, a social dynamic being increasingly documented in the media.

The union also argued the rarely prosecuted section 215(1)(c) of the *Criminal Code*, RSC 1985, c C-46—which creates an offence of failing to provide the necessaries of life to a person who is under one's charge and unable to withdraw himself from that charge, ie a dependency relationship—as the foundation for asserting a legal obligation. Mr. Bharti indicated that both his parents, who were aged seventy-six and seventy-four, had dementia and required assistance to remember to take their medication. His father had a heart condition and diabetes. They both had mobility restrictions. Neither of his parents spoke English, and they required assistance with interpretation. Mr. Bharti indicated he prepared their breakfast, assisted them in the washroom, and with various activities of daily living, including using equipment to check blood pressure and blood sugar levels, and took them to their appointments. From 2005 to 2013, his wife had worked out of the home, and provided assistance while Mr. Bharti was at the office. However, and importantly, no medical evidence of his parent's health needs was provided at the hearing.

The Arbitrator noted (at para 42) there was no evidence that Mr. Bharti's parents could not withdraw from his care or live elsewhere, and insufficient evidence of dependency. The Arbitrator stated that "the personal performance of filial duties does not rise to the level of a legal responsibility. It is "preference", not a "requirement." However, even if such obligations exist, they found (at para 45) that Mr. Bharti had not established that he had made reasonable efforts to meet those obligations through reasonable alternative solutions. Mr. Bharti's evidence was that he had contacted a community agency, but they indicated they could not provide services in his parents' native language,s or provide culturally appropriate care. He also mentioned that an "Indian woman" sometimes came to help out, but testified that "she cannot do my job towards my parents", and that he cannot afford to pay her to be there every day." The Arbitrator stated (at para 48) that while the wish to provide care for his parents personally is "a commendable aspiration", it is not his legal obligation to do so. Moving to Peterborough was considered a reasonable alternative to the arrangement preferred by the grievor, and his eldercare responsibilities did not require him to live in Ottawa.

We see from this case that the legal obligation criteria set out in *Johnstone 2014* sets the bar very high. Interestingly, although there was an allegation based on the ground of religion, the Arbitrator dealt with the grounds separately—even though one of the points Mr. Bharti raised as a barrier to moving to Peterborough was that the city lacked an appropriate place of worship for himself and

his parents. The story told by Mr. Bharti suggests that his parent's caregiving needs were very much tied to cultural identity and religion; his sense of responsibility to provide care may also have been connected to culture. An intersectional approach to analysis that viewed religion, ethnic origin, and family status together may have pointed to a different conclusion. It may also have availed Mr. Bharti of a lower bar for setting out a *prima facie* case of discrimination than the four-part *Johnstone 2014* test.

4. Fleming (2016)

The decision in *Fleming v Treasury Board (Canada Border Services Agency)*, 2016 PSLREB 96 also illustrates the limits of the *Johnstone 2014* test. The *Fleming* grievance dealt with an application for a work transfer in order to be closer to family. Corey Fleming had worked for his employer out of St. Stephen's, New Brunswick since 2008. After a short period of time he requested a transfer to Charlottetown, where his children resided with his wife, requesting an accommodation under marital and family status that would allow him to spend more time with his two young children. He and his wife were legally separated. His request was denied, and he filed a grievance.

Mr. Fleming's separation agreement stated that he and his wife had "joint custody of the children of the marriage, with his spouse having day-to-day care and control of them" and Mr. Fleming "having liberal and reasonable access based on reasonable notice and mutual agreement," as well as two weeks in July and August (at para 49 and 52). The agreement also stated that both parents "shall each have reasonable contact with their children, including daily contact when the children are with the other parent" (para 54). During the period since he had applied for a transfer, he had taken a one-year unpaid leave, during which time the children had spent 40% of their time with him.

The Arbitration Panel applied the *Johnstone 2014* four-part test and found that Mr. Fleming's circumstances did not meet the criteria. They found (at para 126) that the children were not under Mr. Fleming's care and supervision, and that he had not demonstrated that his children had childcare needs flowing from a legal obligation because "neither his work location nor his schedule interfere with any childcare or daycare issues...and there is no evidence that [the mother] does not manage to take care of the children and see to their day-to-day needs, including any childcare, if necessary." In this case Mr. Fleming's family status discrimination argument was rejected because his children did not have an unmet childcare need, as they were safe and well-cared for with their mother. However, the grievance, unlike many of the family responsibilities discrimination cases, such as the facts underlying *Johnstone*, had never been about childcare. The notion that a non-custodial parent could never be entitled to accommodation of his family circumstances is unsettling if not discriminatory in and of itself, and again, poor public policy. The idea that fathers are not intergral to parenting is also sexist and oppressive to women.

5. BC Critique of the Choice/Obligation Distinction and its Gendered Application

In *Suen*, the BC Huamn Rigths Tribunal highlights the gendered underpinnings of recent application of *Johnstione 2014* or *Campbell River* test. They note (at para 93) that this approach would:

> allow as a defence against a claim of discrimination an argument that fundamentally reinforces stereotypical views of the respective roles of mothers and fathers in both the public and private spheres – views that are harmful to both men and women in entrenching expectations and patterns of behaviour that are directly contrary to the purposes of the *Code*.

In the equality rights analysis (at para 94-95) The Tribunal considers the family system, not just the needs of a particular worker:

> I disagree with Envirocon's assertion that Mr. Suen's circumstances do not put him in a group which suffers pre-existing inequality or is impeded in its ability to participate in the economic, social, political or cultural life of BC. Women's struggles to escape stereotypical notions of their roles and responsibilities respecting public and private life are well documented and well litigated. But there is a companion stereotype applied to men that has served to limit their ability to participate in the private sphere, particularly in respect of childcare and men's inclusion in dialogue surrounding how to balance the responsibilities of work and family.
>
> Envirocon's argument hints at this. The outcome of such stereotypes is not only harmful to women in their ability to participate free of impediment in social and economic life at the workplace, but also to men and their ability to participate in social and cultural life at home.
>
> Again, remembering that this case deals not with inconvenient shifts but with complete physical absence for an extended time period from a spouse and four-month-old infant, Envirocon's assertion that Mr. Suen has "no special skill or ability" to make him indispensable in caring for his daughter so minimizes the role of a father in a child's care as to run counter to the purposes of the *Code*. In the specific circumstances of this case, this argument could serve to reinforce ideas that fathers are ancillary to their children's lives; that the brunt of childcare belongs to mothers; and that a coupled parent's obligations are solely the most basic needs of a child with no regard to the co-parenting spouse or a more fulsome recognition of what parenting means in the life and development of a child. I am alive to the possibility that *Campbell River* could open the door to such restrictive interpretations and they are not unheard of. But, in particular under s. 27(1)(d)(ii), I reject such notions vehemently.

The Tribunal explains (at para 91) "in no way do I see either the *Code* or *Campbell River* as abrogating a parent's shared responsibility with the other parent in participating in the care of their child."

The Tribunal also takes issue with the treatment of the choice/obligation distinction that has been so prominent in family status discrimination cases, stating (at para 82):

> In family status cases, while choice is a linchpin in whether a duty to accommodate is even triggered, the point and manner in which choice is engaged is less concrete. Generally, one sees decision-makers grappling with the threshold at which a preference as a member of a family becomes an obligation to a family member. In this sense, there has been a narrow interpretation of what constitutes an obligation. In the absence of a threshold such as in addiction where a choice clearly transforms into something else, decision-makers have characterized as choice everything from mode of childcare (as in *Falardeau v. Ferguson Moving and others*, 2009 BCHRT 272) to in essence having children at all (as in *Canadian Staff Union v. Canadian Union of Public Employees (Reynolds Grievance)* [2006] NSLAA No 15). It is here that establishing a unified approach to family status discrimination has become thorny.

These four grievances discussed above portray caregiving circumstances that don't fit neatly under the *Johnstone 2014* four-part test, but represent well how contemporary living is marked by increasing urban sprawl, and workplaces spread across geography, and sometimes fractured families as well. We meet two fathers asserting their desire to be physically present in the lives of their children, a mother seeking to sustain breastfeeding beyond parental leave, and a son wishing to

personally care for his aged immigrant parents. These caregiving wishes are more than just laudable, as suggested by some of the arbitrators above. Such caregiving relationships and responsibilities are critical to the good functioning of our communities, and integral to our sense of self, and they will likely impact workplace performance if they are not recognized and accommodated. As the BC Human Rigths Tribunal points out, supporting some of these caregivers may also be fundamental to equality.

C. Mapping the Family Caregiving Responsibilities that are Recognized in the Jurisprudence

In over two decades of jurisprudence on the scope of family status discrimination, and the last thirteen years focus on family responsibilities discrimination in particular, most of the cases have dealt with the challenges mothers engaged in paid employment encounter in trying to balance work and care—particularly issues around locating suitable childcare for children with special needs and transitioning through the early years after maternity and parental leave when infants and toddlers are often still nursing. The facts underlying *Campbell River* and *Johnstone* are fairly typical in this regard. Recent family status discrimination cases present some diversity, and some other caregiving relationships are starting to show up in the cases. But many family caregivers and caregiving relationships are absent from the jurisprudence.

1. Which Caregivers Are Being Recognized?

The jurisprudence includes decisions finding discrimination against human rights complainants and grievers under the following circumstances:

a. A father seeking accommodation of his spouse's eldercare responsibilities[25]

b. Eldercare responsibilities more generally[26]

c. Single mothers[27]

d. Husband seeking accommodation to allow him short term time off to care for his young children because of his wife's mental health issues[28]

e. Caregiving for a wife after a miscarriage[29]

f. Mother seeking time off over summer to care for her child with special needs[30]

g. Indigenous complainants seeking to actualize rights under the *Indian Act*, RSC 1985, c 1-5[31]

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25 *Hicks v Human Resources and Skills Development Canada*, 2013 CHRT 20. Application for judicial review dismissed in *Canada (AG) v Hicks,* 2015 FC 599.

26 *International Union of Elevator Constructors, Local 125 v Otis Canada*, [2013] NSLAA No. 4; *Devaney v ZRV Holdings Ltd.*, 2012 HRTO 1590.

27 *SMS*.

28 *Miraka v ACD Wholesale Meats Ltd.,* 2016 HRTO 41.

29 *Closs v Fulton Forwarders Incorporated and Stephen Fulton*, 2012 CHRT 30.

30 *AB v Yellowknife (City)*, 2016 CanLII 19718 (NT HRAP).

h. Whether foster children fall within the meaning of term "child" as it is used in a will[32]

i. Grandparents who were evicted when their infant grandchild moved in with them[33]

j. Children of divorced or separated parents[34]

Note, however, that only the cases related to a-f dealt with discrimination in the workplace. Cases included under g-j deal with housing, services, and other areas.

More than half of family responsibilities discrimination cases involved unionized employees: approximately half of the cases originated as grievance arbitrations and a number of the human rights cases involved unionized workers. As a result, these cases involve a worker in an employment position associated with negotiated benefits. These grievors generally benefit from union counsel also to assist with framing the argument—this is particularly significant with respect to family status claims because there has been so much controversy regarding the scope and meaning of the ground.

A review of the cases also reveals that the large majority of workers who have figured in reported family responsibilities discrimination decisions held fairly decent employment positions: the cases include a licensed practical nurse, a statistician, a teacher, a laboratory technician, a labour relations officer, an architect, a racetrack officer, managers, freight train conductors, correctional officers, postal workers, truck drivers, welders, and border services officers. The cases also include a few lower level cashier or store workers, and some part-time employees. We see few workers engaged in precarious work or balancing multiple jobs. We see few decisions involving minimum wage workers.

2. Which Family Caregivers are Missing from the Cases?

Many people and types of workers are conspicuously absent from family status and family responsibilities jurisprudence.

(1) Parenting and especially mothering relationships dominate. There are less than half a dozen reported decisions involving fathers, and the majority of them were not successful in arguing family status discrimination. The only caregiving we see that falls outside the scope of the nuclear family is eldercare, and as noted above, these relationships may not fit under the *Johnstone 2014* test. There is no mention of siblings, aunts, uncles, grandparents, etc…

(2) We have seen no cases dealing with chosen, non-biological family caregiving, which may be more common amongst historically disadvantaged groups such as people with disabilities and LGBTQ communities.

(3) While there have been a number of cases involving the care of children with special needs or disabilities, there have been few cases involving caregivers with disabilities. In 2014, West Coast Legal Education Action Fund published a report on mothering

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31 *Beattie et al v Aboriginal Affairs and Northern Development Canada*, 2014 CHRT 1, *Tanner v Gambler First Nation*, 2015 CHRT 19. Neither cases were family responsibilities or employment discrimination cases.

32 *Matras Estate*, 2016 ABQB 728.

33 *TEL-72803-16 (Re)*, 2016 CanLII 72246 (ON LTB).

34 *JO v London District Catholic School Board*, 2012 HRTO 732.

with disabilities entitled *Able Mothers*.[35] This report underscores the discriminatory assumptions mothers with disabilities face throughout their lives, in particular by agencies that are supposed to be supporting their ability to provide the best care they can to their children under often challenging circumstances. For example, the state will often remove children from a mother's care rather than provide women with support and assistance with caregiving challenges that may be exacerbated by disability. Presumably working mothers with disabilities may sometimes require accommodation due to family caregiving issues linked to disability and a lack of inclusive workplace design. The experience of single parenting mothers with disabilities engages the intersecting grounds of sex, disability, and family status. The family status jurisprudence does not reflect their experiences.

(4) In recent years we have seen very few cases involving intersecting grounds of culture, ethnicity, or immigration. Notions of family or family obligation can be culture bound or at least linked to culture, and it is likely that a narrow conception of family responsibilities linked to legal obligation, as is suggested in the *Johnstone 2014* test, will exclude those responsibilities to broader family, even though ethnicity and immigration can be linked to historical disadvantage or vulnerability. The *Bharti* grievance discussed above illustrates the dangers of an analysis of family responsibilities that is fairly culturally-neutral.

(5) Although Indigenous people figure in a few recent family status discrimination cases, there are no reported family responsibilities decisions where the person providing care is identified as Indigenous or Indigenous notions of family and family responsibility are engaged. There are also no cases involving a child who is identified as Indigenous.

(6) Although many grandparents are the primary caregivers of young children or adult children with disabilities,[36] their experiences are not reflected in the jurisprudence. Our own research indicates that many older women are the primary caregivers of children, grandchildren, and adult children with disabilities, that they get limited financial support from the state, and face many barriers to quality of life.[37] Data indicates an intersectionality of grounds here as Indigenous grandparents living with grandchildren were more likely to live in skip-generation households than other co-residing grandparents.[38]

(7) Technology has opened the door for people to form family connections and becomes parents through diverse means. In LGTBQ communities children may have more than two parents. Same sex couples may involve friends or other

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35 West Coast LEAF, *Able Mothers: The Intersection of Parenting, Disability and the Law*, online: <http://www.westcoastleaf.org/>.

36 In 2015, Statistics Canada reported that 72,000 grandparents reside with their grandchildren in "skip-generation" households (i.e., without the parents), based on 2011 census data. See Study: Grandparents living with their Grandchildren, 2011, online: < https://www.statcan.gc.ca/daily-quotidien/150414/dq150414a-eng.htm>.

37 Canadian Centre for Elder law (2017), *We are Not All the Same: Key Law, Policy and Practice Strategies for Improving the Lives of Older Women in the Lower Mainland*, online: < https://www.bcli.org/project/older-womens-dialogue-project>.

38 Statistics Canada, *supra*, note 36.

community members as sperm or egg donors or for surrogacy—sometimes a donor is strictly a donor; but other times a child may have three or four parents. None of these stories of family and caregiving are reflected in the family responsibilities cases.

(8) In the family responsibilities cases there is no specific mention of young or teen parents. This is likely a category of workers that face tremendous barriers to working or staying in school, as well as prejudice, and will find themselves working low-wage, part-time, and precarious jobs.

(9) We see only caregiving cases that involve a dyad of caregiver and care-recipient or a relationship of two parents and children. We have seen no cases involving broader circles of support, which are much more common within the community living sector. These complex networks of care that are crucial to some adults living with intellectual disabilities and their families are absent from the jurisprudence.

(10) Also socio-economic status is generally not a factor in any of the cases. Poverty is not discussed, likely because workers with well-paying jobs are developing the narrative around work, care, and accommodation of family responsibilities.

Viewed through the lens of who is missing, the family responsibilities discrimination cases tell a story of relative privilege, in spite of the real and pressing barriers the employees are encountering. We also know, based on the social science research on workplace flexibility and work/life balance, that many of the professionals and employees working jobs they love have the respect and understanding of the employers and enough bargaining power to ask for accommodation when they need it—without having to file a grievance or a human rights complaint. In contrast, it is fairly reasonable to assume that without the structure of a labour union for support, launching a human rights complaint involves a significant amount of both literacy and rights awareness. Most people have never heard of family status discrimination, and it would never cross their minds that they had a legal right grounded in human rights law to request modification of hours or location of work. This may be especially true of some immigrant populations, and of people who have limited formal education. Human rights is a legal process, and so all the well-documented barriers to access to justice apply.

At the same time, caregiving is time-consuming and needs tend to be fairly imminent. Faced with the long, difficult, and expensive dispute resolution process, many family caregivers will simply choose not to pursue the matter. Asserting their human rights may not only deprive their family of funds, but come at the cost of further complicating their caregiving situation. In the context of adult caregiving the idea of filing a complaint may be especially daunting because, as compared with childcare needs, which may be somewhat consistent and predictable, adult caregiving can be brought on by sudden illnesses or unexpected declines, and illness progression can be hard to predict and plan around. It can thus be challenging to map out accommodation needs. If a caregiver is dealing with end of life or palliative care, he or she is going through a period of grief and loss or crisis—not a time when one is well-placed to commence litigation, or think through a rights-based lens.

VI. Conclusion: Moving Forward to Support Family Caregivers

The family status ground is fairly unique in that it was added to most human rights statutes in Canada without the framing being provided first by an equality rights movement. The development of a rights movement for caregivers seems to have come later, and even so, most workers struggling to

balance work and caregiving would never identify themselves as part of a social movement. They are just workers, parents, grandparents, lovers, children, friends—all struggling to make things work.

The family status jurisprudence reveals a discomfort with attaching human rights significance to something so common as the family unit, and to a challenge so ubiquitous as the struggle to balance work and family obligations. The increasing focus in the jurisprudence on obligation versus choice excludes many family relationships and responsibilities. The most recently developed family status discrimination test (*Johnstone 2014*) requires a worker to establish that his or her caregiving responsibilities are grounded in a legal obligation. This standard is problematic: legal obligation has never been required with respect to other grounds. The standard sets the bar very high, and has resulted in decision-making that reinforces gendered roles within families—a turn of events that seems contrary to the principles underlying human rights law.

One of the lessons to be learned from the family responsibilities jurisprudence is possibly that the challenge of inclusive workplace design to support family caregivers from all communities is too big for human rights litigation to handle on its own. Even outside of concerns about the limiting nature of the *Johnstone 2014* test, the potential volume of cases, and the human rights system's limitations in fashioning remedies that reach beyond the circumstances of an individual case, point to a need for government and private sector intervention. Human rights cases map out the tension between who should bear a greater part of the burden in supporting caregivers to participate in the workforce as between the worker and the employer (and sometimes also other employees and the union). The role of a social democratic government remains largely invisible within this articulation of the problem. The purposes of human rights statutes are often much broader than those of labour statutes, being aimed at fostering systemic and social change, and eliminating barriers to full equality. Although many of the family responsibilities discrimination cases arise out of a labour arbitration context, they interpret human rights principles and have a significant impact on the development of human rights law.

The caregiver stories represented in the family responsibilities jurisprudence tell a partial story of family caregiving in Canada. They represent a fairly privileged slice of the population. A view of the cases as a whole, and who is not represented among them, reminds us of the enormous work ahead to reach out to vulnerable and invisible family caregivers—to help them understand their rights and to support them to find options both within and outside the human rights framework. Analysis of the jurisprudence illustrates flaws in the current legal test. An overview of the cases warns us that the new test is excluding caregivers whose work is crucial to family and community, and pointing in directions inconsisternt with good public policy. Moreover, if we develop public policy based only on the stories emerging from the jurisprudence, we also miss the caregivers most in need of our recognition and support.