

# Working Time and Family Life: Looking at the Intersection of Labour and Family Law in Québec

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## ABSTRACT

*“Availability” is a key concept in both labour and family law. This article explores how labour and family law intersect and interact when there is a potential conflict between employers’ availability requirements and the availability requirements for parenting in shared custody arrangements. Through case law illustrations from Québec in both family and labour law, it looks at how tribunals have treated the conflict between employees’ work availability and the fulfillment of custody obligations. The article suggests that the two branches of law appear to be talking past each other on the question of working parents’ availability, particularly in relation to working-time arrangements. In addition, the disparities that are maintained by labour law in the treatment of precarious workers may also possibly be being reproduced in the family law forum. Although the article presents exploratory research and firm conclusions are premature, it appears clear that labour law will not be able to continue to perpetuate a strict family life/work divide for much longer and will have to take into consideration developments in family law and the evolution of family structures.*

## I. INTRODUCTION

“Availability” is a key concept in both labour and family law. In the case of labour law, the requirement for employees to be available to work stems from the managerial prerogative to determine working time, limited only by legislated and negotiated norms. Although an employee’s control over working time varies from country to country,<sup>1</sup> it is relatively weak in

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<sup>1</sup> Colette Fagan et al, *The Influence of Working Time Arrangements on Work-Life Integration or ‘Balance’: A review of the international evidence. Conditions of Work*

Canada. Employee availability requirements tend to be high, and schedule predictability tends to be low.<sup>2</sup> In the family law context, parents' availability is a crucial factor in deciding which custody arrangement is in the child's "best interest," which is the guiding criterion in Canadian family law.<sup>3</sup> As in many countries, Canadian labour law initially developed on the basis of two interconnected premises: the traditional male breadwinner family and the worker who is "unencumbered" by family care responsibilities.<sup>4</sup> The reality today is different. In Canada, women make up almost half of the workforce, although they are still disproportionately responsible for family responsibilities.<sup>5</sup> Family structure has also changed over the years, and the number of children who do not live with both of their biological or adoptive parents has increased. Family law with respect to shared parenting has also evolved with both parents maintaining significant contact with their children if they separate and fathers spending more time with their children.<sup>6</sup> While equal custody

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*and Employment Series No 32* (Geneva: International Labour Office, 2012); Sangheon Lee, Deirdre McCann & Jon C Messenger, *Working Time around the World: Trends in Working Hours, Laws and Policies in a Global Comparative Perspective* (Geneva: International Labour Office, 2007).

- <sup>2</sup> Guylaine Vallée & Dalia Gesualdi-Fecteau, "Setting the Temporal Boundaries of Work: An Empirical Study of the Nature and Scope of Labour Law Protections" (2016) 32:3 Intl J Comp Lab L & Ind Rel 344; see also Ontario, Ministry of Labour, *Changing Workplaces Review: Special Advisors' Final Report* (Toronto: Government of Ontario, May 2017) at 187-98, 218-25, online: <[http://www.ontario.ca/document/changing-workplaces-review-final-report?\\_ga=2.52454443.2080625556.1520186449-843331976.1520186449](http://www.ontario.ca/document/changing-workplaces-review-final-report?_ga=2.52454443.2080625556.1520186449-843331976.1520186449)>.
- <sup>3</sup> *Divorce Act*, RSC 1985, c 3 (2nd Supp), ss 16(8), 17(5) [*Divorce Act*]; art 33 CCQ; *Young v Young*, [1993] 4 SCR 3.
- <sup>4</sup> Jane Lewis, "The Decline of the Male Breadwinner Model: Implications for Work and Care" (2001) 3 Social Politics 152; Joan Acker, "Inequality Regimes: Gender, Class, and Race in Organizations" (2006) 20:4 Gender and Society 44.
- <sup>5</sup> Melissa Moysen, "Women and Paid Work" in Statistics Canada, *Women in Canada: A Gender-based Statistical Report*, Catalogue No 89-503-X (Ottawa: Statistics Canada, 2017), online: <<http://www.statcan.gc.ca/pub/89-503-x/89-503-x2010001-eng.pdf>>; Anne Milan, Leslie-Anne Keown & Covadonga Robles Urquijo, "Families, Living Arrangements and Unpaid Work" in Statistics Canada, *Women in Canada: A Gender-Based Statistical Report*, Catalogue No 89-503-X (Ottawa: Statistics Canada, 2011), online: <<http://www.statcan.gc.ca/pub/89-503-x/89-503-x2010001-eng.pdf>>; Katherine Marshall "Generational Change in Paid and Unpaid Work" in Statistics Canada, *Canadian Social Trends*, Catalogue No 11-008-X (Ottawa: Statistics Canada, 2011) at 13, online: <<http://www.statcan.gc.ca/pub/11-008-x/2011002/article/11520-eng.pdf>>.
- <sup>6</sup> Michel Tétrault, *Droit de la famille*, 3rd ed (Cowansville, QC: Yvon Blais, 2005), see, in particular, chapter entitled "Les droits de l'enfant, sa personne et le litige familial" [Tétrault, *Droit de la famille*]. See Susan B Boyd's trenchant feminist analysis of the evolution of family law with respect to custody arrangements. Susan B Boyd, *Child, Custody, Law, and Women's Work* (Don Mills, ON: Oxford University Press, 2003). See further discussion later in the article.

between parents after a divorce or a separation is not predominant, there is a heavy trend towards some form of shared physical custody.<sup>7</sup>

This article looks at how labour and family law intersect and interact when there is a potential conflict between employers' availability requirements and the availability requirements for parenting in shared custody arrangements. Case law from Québec in both family and labour law illustrates how tribunals have treated the conflict between employees' work availability and the fulfillment of custody obligations. It also reveals a certain discourse on these issues. We examine if and how family law forums respond to the availability requirements of labour law and if and how labour law forums respond to availability requirements in shared custody situations. The underlying question is whether and how labour law shapes family law and whether family law could ultimately push labour law to evolve beyond the model of the "unencumbered," fully available worker. The aim is to broaden the discussion on work-family conflict and to determine whether there is a dialogue between these two branches of law.

After a description of the situation of working parents in Québec, we look at the recent evolution of family law and the prevalence of the norm of shared parenting and then examine how labour law deals with work-family conflict. We end with a discussion on the intersections of family and labour law that shows that in fact the two branches of law appear to be talking past each other on the question of working parents' availability. We also discern some gendered differences in the treatment of availability issues in the case law, whereby women are presumed to be more available than men to fulfill parenting responsibilities. We acknowledge that the limited sample of cases we draw on does not permit definitive conclusions about the interaction of these two bodies of law. We do think our analysis justifies the call for further research along these lines.

## II. THE SITUATION OF WORKING PARENTS IN QUÉBEC

It has been twenty years since an integrated family policy was launched in Québec with three main pillars: universally accessible, state-subsidized educational childcare services with a reduced "\$5-a-day" parental contribution; improved fiscal measures for families with children under the age of eighteen; and provincial parental leave insurance that was a significant improvement over the existing federal scheme and that includes

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<sup>7</sup> Francine Cyr et al, *Prévalence de la garde partagée chez les familles québécoises ayant un enfant né en 1997-1998: profil sociodémographique et psychologique*, research report presented to the Québec Ministry of Justice, Québec (2011); Michel Tétrault, *La garde partagée et les tribunaux: une option ou la solution?* (Cowansville, QC: Yvon Blais, 2006).

paid paternity leave that cannot be transferred to the child's mother.<sup>8</sup> While the universal nature of childcare services has been eroded with the gradual introduction of parental contributions based on family income,<sup>9</sup> the objective of encouraging more male parents to take paid leave upon the birth or the adoption of a child has been met. The number of men who take paid leave rose sharply from 2006, the year of the scheme's implementation, until 2009, and it continues to rise, albeit at a slower rate. In 2016, 59,983 men took paid leave, compared to 38,269 in 2006.<sup>10</sup> In 2013, while only 12.2 percent of newborns or adopted minor children outside of Québec had fathers who took, or intended to take, a period of parental leave, this number rose to 83 percent inside Québec.<sup>11</sup>

The provincial parental insurance scheme has had a positive impact on the sharing of parenting responsibilities between mothers and fathers.<sup>12</sup> It should also be noted that fathers who take paternity leave are also regarded favourably by family law courts; the case law tends to show that fathers who take leave are viewed as demonstrating their willingness to be involved in their children's lives when the parents separate and the custody and access rights involving very young children are at issue.<sup>13</sup> Of course, this does not mean that the Québec parental insurance scheme has solved problems underpinning the gendered division of labour in the home. A recent Québec study suggests that when both parents are present, fathers

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<sup>8</sup> Québec, Ministère du Conseil exécutif, *Nouvelles dispositions de la Politique familiale: Les enfants au cœur de nos choix* (Québec City: Government of Québec, 1997). Compared to elsewhere in Canada, Québec has the most generous paid leave for expectant mothers and new parents with the entry into force of the Québec parental insurance plan in 2006 and changes to minimum employment standards legislation. *Act Respecting Parental Insurance*, CQLR c A-29.011; *Act Respecting Labour Standards*, CQLR c N-1.1, ss 81.2-81.17 [*Labour Standards Act*]; Québec, Ministère de la Famille et des Aînés, *Analyse comparative des politiques en matière familiale dans les provinces canadiennes* (Québec City: Government of Québec, June 2011).

<sup>9</sup> Universality was severely undermined in an omnibus budget bill in 2015. See *An Act Mainly to Implement Certain Provisions of the Budget Speech of 4 June 2014 and Return to a Balanced Budget in 2015-2016*, SQ 2015, c 8, ss 160ff.

<sup>10</sup> Québec, Conseil de gestion de l'assurance parentale, *Rapport annuel de gestion 2016* (Québec City: Government of Québec, 2017) at 33. The number of women who take paid leave has also risen: in 2016, 68,361 women took paid leave, compared to 65,130 in 2006.

<sup>11</sup> Statistics Canada, "Employment Insurance Coverage Survey, 2013," *The Daily* (19 January 2015), online: <<http://www.statcan.gc.ca/daily-quotidien/150119/dq150119b-eng.pdf>>.

<sup>12</sup> Conseil de gestion de l'assurance parentale, *Retombées économiques et sociales du régimes québécois d'assurance parentale: Bilan de dix ans d'existence* (Québec City: Government of Québec, 2016) at 81-97, online: <[http://www.cgap.gouv.qc.ca/publications/pdf/RQAP\\_bilan\\_10ans.pdf](http://www.cgap.gouv.qc.ca/publications/pdf/RQAP_bilan_10ans.pdf)>.

<sup>13</sup> Valérie Laberge, "Le congé de paternité et la garde d'enfant," *Chronique D'Expert* (blog) (2 April 2014), online: <<http://www.editionsyvonblais.com/blog/valerie-laberge/le-conge-de-paternite-et-la-garde-denfant-8/>>.

still continue to occupy particular functions (for example, leisure activities versus staying home to look after a sick child), while mothers continue to shoulder a greater “mental burden” with respect to family responsibilities.<sup>14</sup> A broader discussion on the effective sharing of parenting responsibilities, however, is beyond the scope of this article.

But the arrival of a child is obviously only the beginning of family responsibilities. As we will see, when returning to work after parental leave, many mothers and fathers find themselves in an environment that is not welcoming to employees with family responsibilities. This is especially true when it comes to working time arrangements that may conflict with parenting responsibilities. A recent statistical survey from Québec concerning parents with children aged zero to five years old showed that 31 percent of working parents had an “atypical” work schedule—that is, an irregular, evening, night, or weekend schedule.<sup>15</sup> Men were slightly more likely to have this type of schedule (33 percent), as were parents in single-parent families (34 percent).<sup>16</sup> At the same time, working parents reported having access to one or several measures to help balance work and family life: 56 percent of working parents reported having flexible work schedules; 54 percent had some paid family leave; 27 percent had adapted working time arrangements including shorter work weeks; and 20 percent could work from home.<sup>17</sup> However, 22 percent reported having access to none of these measures; this was the case for 25 percent of male parents, 35 percent of working parents without a high school diploma, and 33 percent of those with only a high school diploma.<sup>18</sup>

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<sup>14</sup> Conseil du Statut de la femme, *Avis: Pour un partage équitable du congé parental* (Québec City: Conseil du Statut de la femme, 2015) at 39ff, online: <[https://www.csf.gouv.qc.ca/wp-content/uploads/avis\\_partage\\_conge\\_parental.pdf](https://www.csf.gouv.qc.ca/wp-content/uploads/avis_partage_conge_parental.pdf)>.

The Conseil du Statut de la femme (Council on the Status of Women) proposes to convert three weeks of parental benefits to non-transferable paternity benefits that a father can take if the mother is not a Québec Parental Insurance Plan beneficiary. The goal of this recommendation is to foster fathers’ parenting abilities so that they would no longer see themselves in the role of “second parents” in which mothers take on a disproportionate amount of the mental load of parenting.

<sup>15</sup> Institut de la statistique du Québec (ISQ), *Mieux connaître la parentalité au Québec: Un portrait à partir de l’Enquête québécoise sur l’expérience des parents d’enfants de 0 à 5 ans, 2015* (Québec City: Government of Québec, 2016) at 78, online: <<http://www.stat.gouv.qc.ca/statistiques/conditions-vie-societe/environnement-familial/eqepe.pdf>>.

<sup>16</sup> *Ibid.*

<sup>17</sup> Flexible work schedules include the possibility of arriving and leaving work at different times. Paid family leave includes the possibility for the employee of using his or her paid sick days for family obligations. *Ibid* at 80.

<sup>18</sup> *Ibid* at 80-1.

The proportion of working parents who had access to three or four of these measures increased with the level of formal education. The survey found that family structure and the number of children had no statistically significant impact on access to such measures.<sup>19</sup> Thirty-three percent of working parents with “atypical” schedules and 39 percent of those who work fifty or more hours a week reported that their work responsibilities always or often interfered with their family life.<sup>20</sup> Those with less access to measures to counter this interference also reported a larger negative impact of work on their family life.

Although the “traditional” family remains the dominant model, children are more likely than before to see their parents separate. According to the 2011 General Social Survey on Families, about 1.2 million separated or divorced Canadians had children under the age of eighteen.<sup>21</sup> In Québec, 37.7 percent of children under the age of twenty-five live with a single parent or in a blended family.<sup>22</sup> After a separation, while children still remain mostly with their mother,<sup>23</sup> they live in shared custody situations 28 percent of the time.<sup>24</sup> What has significantly increased over the past thirty years is the contact between fathers and children after a separation. When the children live with their mother, two-thirds of fathers maintain significant contact with regular or frequent access.<sup>25</sup> Combined with the shared custody data, three-quarters of separated fathers maintain a sustained parental relationship with their children.<sup>26</sup> Significant contact between the two parents and their children after a separation has thus become the norm, leaving both mothers and fathers to juggle work and family life.

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<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.* at 82-3.

<sup>21</sup> Maire Sinha, “Parenting and Child Support after Separation or Divorce” in Statistics Canada, *Spotlight on Canadians: Results from the General Social Survey, 2014*, Catalogue No 89-652-X—No 001 (2014) at 5, online: <<http://www.statcan.gc.ca/pub/89-652-x/89-652-x2014001-eng.pdf>>.

<sup>22</sup> This statistic is based on the 2011 General Social Survey: 25.8 per cent of children live with a single parent and 11.9 per cent live in a blended family. Marie-Christine Saint-Jacques et al, eds, *Séparation parentale, recomposition familiale: enjeux contemporains* (Québec City: Presses de l’Université du Québec, 2016) at 15-16. In the case of children under five years, 81 per cent live in a family with their biological or adoptive parents, 8 per cent live with a single parent and about 10 per cent in a blended family. ISQ, *supra* note 15 at 41.

<sup>23</sup> In Canada and Québec, this is the case for about 70 percent of children. Sinha, *supra* note 21 at 9; Cyr et al, *supra* note 7 at 25.

<sup>24</sup> Cyr et al, *supra* note 7 at 25.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

### III. SHARED PARENTING AND THE REQUIREMENT TO BE AVAILABLE

In Québec civil law, child custody is one of the rights and duties of parental authority that can be entrusted to one or both parents; other attributes are the supervision, education, and maintenance of their children.<sup>27</sup> Both parents exercise parental authority together, even if custody is entrusted to one of the parents after a separation.<sup>28</sup> This constitutes a difference with other Canadian provinces where the term “custody” normally refers to all of the rights and obligations that the parents have towards the child.<sup>29</sup> When separation occurs, the only criterion to decide how custody will be determined is the “best interest of the child.”<sup>30</sup> This criterion leaves considerable discretion to the judge.<sup>31</sup> There is no legal presumption that shared custody should be privileged,<sup>32</sup> but the Québec Court of Appeal has determined that if certain criteria are met it should be seriously considered.<sup>33</sup> Shared custody is defined as at least 40 percent of the time spent with one parent, and the remaining time spent with the other.<sup>34</sup> It is often seen as an ideal form of custody arrangement that promotes greater democratization of family life and fosters better relationships between parents and children.<sup>35</sup> Shared custody arrangements vary widely and are

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<sup>27</sup> Art 599 CCQ.

<sup>28</sup> *Ibid*, arts 600, 605. In exceptional cases, for serious reasons, one of the parents can be deprived of all or part of this authority (*ibid*, art 606).

<sup>29</sup> The difference between the concept of legal custody and physical custody does not exist in Québec. See Department of Justice Canada, *Final Federal-Provincial-Territorial Report On Custody and Access and Child Support: Putting Children First* (November 2002) at 7-8, online: <<http://www.justice.gc.ca/eng/tp-pr/fl-lf/famil/flc2002/pdf/flc2002.pdf>>. However, a Senate public bill proposes to create an obligation for parents in the process of divorce to provide a parenting plan that recognizes that each parent retains their authority and responsibility for the care, development, and education of the child. Bill S-202, *An Act to Amend the Divorce Act (Shared Parenting Plans)*, 1st Sess, 42nd Parl, 2015, cl 4(g) (second reading 6 October 2016).

<sup>30</sup> *Divorce Act*, *supra* note 3, ss 16(8), 17(5); arts 33, 514 CCQ.

<sup>31</sup> *Van de Perre v Edwards*, 2001 SCC 60 at para 13.

<sup>32</sup> *Droit de la famille - 091541*, 2009 QCCA 1268 at para 6; *Droit de la famille - 14576*, 2014 QCCA 590 at para 6.

<sup>33</sup> *Droit de la famille - 15272*, 2015 QCCA 346 at para 6; *GG c JP*, 2005 QCCA 210 at para 4.

<sup>34</sup> *Regulation Respecting the Determination of Child Support Payments*, CQLR, c C-25.01, r 4, s 6.

<sup>35</sup> Denyse Côté, “D’une pratique contre-culturelle à l’idéal-type: la garde partagée comme phénomène sociale” (2006) 27:1 *Revue québécoise de psychologie* 15; Denise L. Whitehead, “Is Shared Custody the ‘Alchemy’ of Family Law?” (2015) 35:1 *Can Fam LQ* 1. See also Jean Pineau & Marie Pratte, *La famille* (Montreal: Éditions Thémis, 2006) at 860.

not limited to every other week with one or the other parent, which is just one example; they can also change over time.

A 2013 study compared Québec judgments that referred to custody arrangements; in 1998, 79 percent of the judgments confirmed that the mother would have sole custody compared to 5.4 percent of fathers; in 2008, this was the case for 60.5 percent of mothers and 13.5 percent of fathers.<sup>36</sup> The same study showed that, in 1998, 8 percent of custody arrangements mentioned in judgments were shared; meanwhile, this figure was 19.7 percent in 2008.<sup>37</sup> Since the 1990s, judges have increasingly been awarding shared custody,<sup>38</sup> underlining the principle that children should have access to both parents.<sup>39</sup> Some authors have claimed that the courts have established a rebuttable presumption that physical custody should be shared,<sup>40</sup> while others have proposed introducing a legal

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<sup>36</sup> This is the most recent comprehensive analysis of judgments available. The study analyzed 2,000 child support orders made in 2008 and 1,503 made in 1998 in the province of Québec. These orders addressed both cases where there was a dispute between the parents with respect to physical custody and the cases where the parents agreed on the custody arrangement, which was mentioned in the judgment, but not on child support. Émilie Biland & Gabrielle Schütz, “Physical Custody of Children in the Province of Québec: A Quantitative Analysis of Court Records,” *Collection Que savons-nous?*, online: <[http://www.arucfamille.ulaval.ca/sites/arucfamille.ulaval.ca/files/que\\_savons-nous\\_5-ang\\_en\\_ligne.pdf](http://www.arucfamille.ulaval.ca/sites/arucfamille.ulaval.ca/files/que_savons-nous_5-ang_en_ligne.pdf)> at 4 [Biland & Schütz, “Physical Custody”].

<sup>37</sup> *Ibid.*

<sup>38</sup> See Marie-Christine Kirouack, “Les enfants en bas âge et ces ordonnances qui les concernent” in Barreau du Québec, *Développements récents en droit familial* (Cowansville, QC: Yvon Blais, 2013) 1 at 103-4; Valérie Laberge, *Pour une présomption légale simple de garde alternée au Québec* (Montreal: Université du Québec à Montréal, 2013), online: <<https://archipel.uqam.ca/5610/1/M12886.pdf>> [Laberge, *Pour une présomption*]; Michel Tétrault, *La garde partagée et les tribunaux: une option ou la solution?* (Cowansville, QC: Yvon Blais, 2006); Élisabeth Godbout, Claudine Parent & Marie-Christine Saint-Jacques, “Le meilleur intérêt de l’enfant dont la garde est contestée: enjeux, contexte et pratiques” (2014) 20 *Enfances Familles Générations: Revue interdisciplinaire sur la famille contemporaine* 168 [Godbout, Parent & Saint-Jacques, “Le meilleur intérêt de l’enfant”].

<sup>39</sup> Elisabeth Godbout, Claudine Parent & Marie-Christine Saint-Jacques, “Positions Taken by Judges and Custody Experts on Issues Relating to the Best Interests of Children in Custody Disputes in Québec” (2015) 29:3 *Intl JL Pol’y & Fam* 272 at 291-2 [Godbout, Parent & Saint-Jacques, “Positions Taken by Judges”].

<sup>40</sup> See e.g. Michel Tétrault, “De choses et d’autres en droit de la famille—La garde exclusive : une exclusivité ... Ou comment on crée une présomption de garde partagée,” *Droit de l’enfant: Deuxième colloque*, Collection Blais, vol 19 (Cowansville, QC: Yvon Blais, 2013) 63; Inès Le Roy, “La garde partagée ... une présomption jurisprudentielle?” (2006) 27 *Revue québécoise de psychologie* 33; see also Pineau & Pratte, *supra* note 35 at 477. Goubau points out that there have been two schools of thought, with some judges very favourably inclined towards shared custody, while others are more wary. Dominique Goubau, “La garde partagée: vogue passagère ou tendance lourde?” in Benoît Moore, ed, *Mélanges Jean Pineau* (Montreal: Themis, 2003) 107.



presumption of shared custody.<sup>41</sup> Public opinion in Québec also appears to be strongly in favour of shared custody, particularly for children who are over two years old,<sup>42</sup> and some authors argue that this form of custody has become the reference for newly separated parents and is now the dominant social norm in Québec.<sup>43</sup> However, one recent study of family lawyers and their experience negotiating custody arrangements suggests that the prevalence of shared custody arrangements varies according to the parents' revenue; the higher the parents' revenue, the more likely that a shared custody agreement will be reached and the lower the parents' revenue, the more likely that the mother will have custody.<sup>44</sup>

When parents separate, they generally decide custody arrangements between themselves.<sup>45</sup> They may file a motion in court to obtain custody and child support; if they are married, they can make such a request in a divorce proceeding.<sup>46</sup> Even when legal proceedings are filed, parents will nevertheless most often reach an agreement. The intervention of the court to settle a custody dispute occurs in less than 10 percent of cases.<sup>47</sup> In this context, the case law gives a very imprecise picture of the nature and extent of shared custody arrangements since most arrangements are increasingly decided out of court, and a hearing before a judge is a last resort.<sup>48</sup> The criteria developed by the courts nevertheless serve as a guide to determine shared custody arrangements outside of the judicial forum, notably in the context of family mediation.<sup>49</sup> The best interest of the child is the absolute

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<sup>41</sup> See e.g. Laberge, *Pour une présomption*, *supra* note 38.

<sup>42</sup> Godbout, Parent & Saint-Jacques, "Le meilleur intérêt de l'enfant," *supra* note 38 at 180.

<sup>43</sup> See e.g. Denyse Côté & Florina Gaborean, "Nouvelles normativités de la famille: la garde partagée au Québec, en France et en Belgique" (2015) 27:1 CJWL 22 at 39-43.

<sup>44</sup> Muriel Mille & Hélène Zimmermann, "Des avocats et des parents: Demandes profanes et conseils juridiques pour la prise en charge des enfants au Québec" (2017) 95:1 *Droit et société* 43 at 54-5.

<sup>45</sup> About 40 percent of separated Canadian parents do not formalize their custody arrangements in a court order. Godbout, Parent & Saint-Jacques, "Le meilleur intérêt de l'enfant," *supra* note 38 at 174.

<sup>46</sup> Art 586 CCQ; *Divorce Act*, *supra* note 3, ss 15.1, 16.

<sup>47</sup> Biland & Schütz, "Physical Custody," *supra* note 36 at 4; see also Godbout, Parent & Saint-Jacques, "Positions Taken by Judges," *supra* note 39 at 272-3; Godbout, Parent & Saint-Jacques, "Le meilleur intérêt de l'enfant," *supra* note 38 at 174.

<sup>48</sup> Émilie Biland & Gabrielle Schütz, "Tels pères, telles mères? La production des déviations parentales par la justice familiale québécoise" (2014) 97:4 *Genèses* 26 at 28-9, n 4.

<sup>49</sup> Parents are increasingly being strongly encouraged to resolve their dispute through mediation. For example, parents wishing to be heard by a judge to resolve a custody dispute are legally required to attend a "parenting after separation" information session. According to the Ministry of Justice, 84 percent of couples who use mediation are able to come to an agreement. See Justice Québec, "Family Mediation: Negotiating a Fair Agreement" (Québec City: Government of Québec, 2017), online: <

criterion and will be determined by looking at a series of factors, most importantly parental ability and availability, the stability of the child, the proximity of the parents' residences, the age and the preference of the child (if applicable), the parents' capacity to minimally communicate with each other, and comparable values and parenting approaches.<sup>50</sup>

Parental availability is therefore an important factor that will be examined when determining which parent should be awarded custody.<sup>51</sup> The study mentioned earlier on the role of lawyers in reaching custody arrangements without a judgment (for example, through mediation or judicial certification of an out-of-court agreement) also confirms the importance of availability with respect to professional obligations as a key factor in the negotiation of fathers' custody rights.<sup>52</sup> It is thus important to know what availability entails in this context. Michel Tétrault describes it in the following terms:

Availability is understood as the time during which a parent can be physically and psychologically present for his or her child, in the environment where the child is living. It is not appropriate to award time to a parent who works during this period, but to the parent who is the most available in accordance with the needs of the child. In evaluating the "future" availability of a parent, the case law at least has determined that the past is often a guarantee of the future, and that a parent's availability must ensure stability for the child and must not be temporary. Availability must allow each parent to fully exercise his or her parental authority for the periods that the child is with him or her.<sup>53</sup>

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and-families/separation-and-divorce/family-mediation-negotiating-a-fair-agreement/>; see also *Code of Civil Procedure*, RSQ c C-25.01, ss 417-24.

<sup>50</sup> *Droit de la famille - 16261*, 2016 QCCA 224 at para 8; *Droit de la famille - 091541*, 2009 QCCA 1268 at para 67.

<sup>51</sup> *Droit de la famille - 132210*, 2013 QCCA 1398 at para 16; Valérie Laberge, "L'interprétation du meilleur intérêt de l'enfant dans les litiges de garde" (2013) 72 *Revue du Barreau* 65 at 88-92, online: <<https://www.barreau.qc.ca/pdf/publications/revue/2013-tome-72-1.pdf>>.

<sup>52</sup> Mille & Zimmermann, *supra* note 44 at 47.

<sup>53</sup> Tétrault, *Droit de la famille*, *supra* note 6 at 1459-60 [translated by authors].

When both parents have comparable parental abilities, their availability can tip the balance in their favour.<sup>54</sup> This availability must be real and of “good quality” for shared or exclusive custody to be awarded.<sup>55</sup>

For instance, in the case of a farmer who had exclusive custody, the Québec Court of Appeal determined that being in the same vicinity as his five-year-old daughter on the farm while he worked (milking the cows early in the morning and in the evenings and so on) did not constitute adequate availability even though he could communicate with her using a walkie-talkie-style child monitor. Exclusive custody had been ordered when the father’s parents still lived on the farm, which was no longer the case. According to the court, availability entails being present for the important moments of the child’s day:

[We] [the Court of Appeal] are of the view that the trial judge made a palpable error by giving exclusive custody to the respondent [the father]. He should have given it to the appellant [the mother] since, given her work schedule, she has the required availability to be present when the child wakes up, gets dressed, gets ready for her day and also to be there when she gets back from school. On the contrary, because of his work schedule the respondent cannot offer his daughter the daily supervision and care she needs before she leaves for school and when she comes back from school.<sup>56</sup>

While this rather extreme case does not concern an “employee” covered by labour legislation, it does provide some guidance as to the type of availability required in shared custody cases.

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<sup>54</sup> *Droit de la famille - 161813*, 2016 QCCS 3519, aff’d *Droit de la famille - 17396*, 2017 QCCA 353 (both parents had good parental abilities, but since they lived in two remote towns, the custody was entrusted to the mother who was not working and therefore had a high availability to offer the child). See also e.g. *Droit de la famille - 17265*, 2017 QCCS 517, appeal as of right to the Court of Appeal (in an ideal world, the judge would have granted shared custody of the two children, but the parents lived too far apart. For the stability of the children and because the mother was more available, the custody was entrusted to her); *Droit de la famille - 101273*, 2010 QCCS 2405, aff’d *Droit de la famille - 102904*, 2010 QCCA 1987 (the parental abilities of both parents were established, but the custody was entrusted to the mother, notably because the father, who was a real estate broker, worked all hours of the day during the week and on weekends).

<sup>55</sup> *Droit de la famille - 131013*, 2013 QCCA 711 at para 10.

<sup>56</sup> *Droit de la famille - 101922*, 2010 QCCA 1440 at para 26 [translated by authors].

In another case, the Superior Court made it clear that irregular and unpredictable work schedules do not favour shared custody:

The evidence shows [that the father's previous work schedule] seriously affected his availability and that in the future [his] availability on Monday and Tuesday mornings will be problematic. He does in fact have to leave for work around 6:30 am. He probably will not be present for the children's breakfast and for getting them ready for school. ...

In addition, ... he has confirmed that the terms of his employment are going to be reevaluated. In consequence, his overall availability every morning and evening during the week in the short, medium and long terms is uncertain. Especially as ... his sister does not intend to participate in looking after the children as she has done in the past. ...

As for Madame [the mother], the unrefuted evidence confirms her availability to look after her children. The maternal grandmother also lives [in the same city].

In matters concerning parents' availability, between choosing a certain situation and an uncertain situation, the best interest of the children commands that a certain situation must be favoured; in the short, medium and long terms this certainty with respect to availability lies with Madame.<sup>57</sup>

This last case emphasizes the need for the availability to be predictable.

Having to frequently call upon third parties to look after children is generally treated as an indicator of insufficient availability.<sup>58</sup> The case law has thus determined that the availability must be the parent's and not, for example, the parent's new spouse's.<sup>59</sup> For instance, in one case, when a father's shift was changed from days to evenings (from 3 pm to 11 pm) and the mother was available to look after the children, the judge ended a shared custody arrangement, even if the father's new spouse was available to look after the children in the evenings.<sup>60</sup>

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<sup>57</sup> *Droit de la famille - 15999*, 2015 QCCS 1967 at paras 166-7, 169-70 [translated by authors].

<sup>58</sup> *Droit de la famille - 132210*, *supra* note 51 at para 17, citing *Droit de la famille — 678*, [1990] RDF 395.

<sup>59</sup> *Droit de la famille - 101922*, *supra* note 56 at para 2; *Droit de la famille - 123210*, 2012 QCCS 5764 at para 45. Courts have however accepted that other family members, such as grandparents and aunts compensate for a parent's lack of availability. See e.g. *Droit de la famille - 15999*, 2015 QCCS 1967.

<sup>60</sup> *NF v GL*, 2003 CanLII 33370 (QCCS), *aff'd L (G) v F (N)*, 2004 CanLII 14904 (QCCA).

When working parents can demonstrate that to some extent they can compensate for their atypical or irregular work schedule, shared custody may be granted. This was confirmed in a 2013 Québec Court of Appeal case:

As we can see, a large number of [the father]'s work periods appear to be in conflict with the periods in which he has custody. On 28 days of the 56 days when the [father] has the child with him, ... twelve do in effect seem to be problematic. ...

[The mother's] grievances in this respect seem to be justified. I, however, note [that by adjusting the days on which the father has custody there would be a third less problematic days]. ... This solution addresses part of the [mother]'s concerns.

That leaves Wednesdays and Thursdays. [The trial judge] was very conscious of the difficulties caused by the [father]'s atypical schedule, but he concluded that this was not a serious objection to him looking after the child on these days. ...

In other words, when the [father] works on these Wednesdays and Thursdays, he seems to be in a position to change his schedule to adapt it to the operating hours of the facilities where the child will be, to use accumulated vacation days and to count on his mother [to help him].<sup>61</sup>

Although, in this case, the father's schedule was atypical, which had created problems with the custody arrangement, according to the evidence presented, his employment situation (he was a federal border services agent) gave him sufficient leeway to be able to organize his shifts and hours of work when needed.<sup>62</sup> This contrasts with the situation described above where the father appeared to have little idea of what his future working hours would be. The court also mentioned that the mother did not work and, therefore, had considerable availability, but it reminded her that she would eventually have to go back to work and should not be acting as a babysitter on the weekends when the father worked.<sup>63</sup>

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<sup>61</sup> *Droit de la famille - 132210*, *supra* note 51 at paras 22-6 [translated by authors].

<sup>62</sup> See also e.g. *Droit de la famille - 163189*, 2016 QCCS 6414 at para 43 (the father was working during the nights, but he testified that he had enough seniority to get day shifts if it was necessary to obtain shared custody of his young daughter).

<sup>63</sup> *Droit de la famille - 132210*, *supra* note 51 at paras 19, 28.

In another judgment, however, where the mother sought to modify a shared custody arrangement to every other week, the court maintained the “atypical shared custody arrangement” based on the atypical work schedule of the father,<sup>64</sup> who, over a period of three weeks, had seven consecutive days’ leave, five evening shifts, two days’ leave, and then seven day shifts:

The Court is aware that the [mother] has some disadvantages, that the change she requires would allow her to better plan her time, ... in short it would make life easier for her.

Unfortunately, the Court is of the view that all these inconveniences and irritants must give way to the limited availability of the [father] in order to enable him to spend quality time with his daughters.<sup>65</sup>

The father testified that he had unsuccessfully tried to obtain a regular schedule,<sup>66</sup> with the result that, in the end, his lack of control over his working time negatively affected the mother’s control over her time. The ability of working parents to organize their working time depends on individually and collectively negotiated norms and arrangements since the legislative framework confirms management’s right to control working time. As we illustrate next, labour tribunals appear to show little sympathy towards parents in shared custody arrangements.

#### **IV. BETWEEN A ROCK AND A HARD PLACE: THE MODERN FAMILY MEETS THE NOT-SO-MODERN WORKPLACE**

While Québec is often touted as being avant-garde in its approach to parental leave and work-family balance,<sup>67</sup> a closer look at the province’s laws and policy shows that, while paid parental leave is more generous and affordable childcare is more accessible than elsewhere in Canada, labour legislation has not yet been adapted to contemporary working parents’ situations, especially with regard to working time. In addition, contrary to

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<sup>64</sup> *Droit de la famille - 162316*, 2016 QCCS 4459 at para 10.

<sup>65</sup> *Ibid* at paras 43-4 [translated by authors].

<sup>66</sup> *Ibid* at para 38.

<sup>67</sup> See Diane-Gabrielle Tremblay, Andrea Doucet & Lindsay McKay, “Le congé parental et la politique familiale au Québec: une innovation sociale du monde francophone dans la mer anglophone de l’Amérique du Nord,” *Les Cahiers du CRISES, Collection Études théoriques*, Doc ET1501 (January 2015), online: <[https://crises.uqam.ca/upload/files/publications/etudes-theoriques/CRISES\\_ET1501.pdf](https://crises.uqam.ca/upload/files/publications/etudes-theoriques/CRISES_ET1501.pdf)>.

the situation that prevails in all other Canadian jurisdictions,<sup>68</sup> the Québec Court of Appeal has determined that employers have no duty to accommodate workers based on their family “status” (or “situation”) under human rights legislation.<sup>69</sup> Although this right is circumscribed elsewhere in Canada and under federal jurisdiction by the case law, and, among other things, requires that employees take measures to find alternative solutions, employers do have the duty to adjust working time arrangements to employees’ family situations if they meet the criteria developed by the case law.<sup>70</sup> This accommodation can be temporary or permanent and encompasses the obligation to provide a schedule that is compatible with “routine” childcare responsibilities.

In the absence of collectively or individually negotiated norms that increase employees’ control over their working time, management rights in this respect are only bounded by minimal restrictions in the Québec *Act Respecting Labour Standards*.<sup>71</sup> There is no maximum workweek in

<sup>68</sup> *Canadian Human Rights Act*, RSC 1985, c H-6, ss 3(1), 7; *Human Rights Code*, RSBC 1996, c 210, s 13; *Alberta Human Rights Act*, RSA 2000, c A-25.5, s 7(1); *Saskatchewan Human Rights Code*, SS 1979, c S-24.1, ss 2(1)(m.01)(iv), 16; *Human Rights Code*, SM 1987-88, c 45, s 9(2)(i); *Human Rights Code*, RSO 1990, c H.19, s 5; *Human Rights Act*, RSNS 1989, c 214, s 5(1)(d), (r); *Human Rights Act*, RSPEI 1988, c H-12, ss 1(1)(d), 6(1)a); *Human Rights Act*, 2010, SNL 2010, c H-13.1, ss 9(1), 14; *Human Rights Act*, RSY 2002, c 116, ss 7(k), 9(b); *Human Rights Act*, SNWT 2002, c 18, ss 5(1), 7(1); *Human Rights Act*, SNu 2003, c 12, ss 7(1), 9(1). New Brunswick very recently amended its legislation to include “family status” as a prohibited ground of discrimination. See Bill 51, *An Act to Amend the Human Rights Act*, New Brunswick, 2017, c 24, s 2.1; see also British Columbia Law Institute, “Human Rights and Family Responsibilities: Family Status Discrimination under Human Rights Law in British Columbia and Canada,” BCLI Study Paper No 5 (September 2012), online: <[http://www.bcli.org/sites/default/files/Family\\_Status\\_Study\\_Paper.pdf](http://www.bcli.org/sites/default/files/Family_Status_Study_Paper.pdf)>.

<sup>69</sup> *Procureure générale du Québec v Association des juristes de l’État*, 2017 QCCA 103; *Beauchesne v Syndicat des cols bleus regroupés de Montréal (SCFP-301)*, 2013 QCCA 2069; *Syndicat des intervenantes et intervenants de la santé Nord-Est québécois (SIISNEQ) (CSQ) v Centre de santé et de services sociaux de la Basse-Côte-Nord*, 2010 QCCA 497; see also Stéphanie Bernstein, “Addressing Work-Family Conflict in Québec: The Gap between Policy Discourse and Legal Response” (2017) 20:2 CLELJ 273.

<sup>70</sup> See e.g. *Canada (Attorney General) v Johnstone*, 2014 FCA 110; *Misetich v Value Village Stores Inc.*, 2016 HRTO 1229. For analysis of these and other cases, see Elizabeth Shilton, “Family Status Discrimination: ‘Disruption and Great Mischief’ or Bridge over the Work-Family Divide?” in this issue; Lyle Kanee & Adam Cembrowski, “Family Status Discrimination and the Obligation to Self-Accommodate” in this issue; Sheila Osborne Brown, “Discrimination and Family Status: the Test, the Continuing Debate, and the Accommodation Conversation” in this issue.

<sup>71</sup> See *Labour Standards Act*, supra note 8, ss 52-59.0.1, 78. On 12 June 2018, *An Act to Amend the Act Respecting Labour Standards and Other Legislative Provisions Mainly to Facilitate Family-Work Balance*, SQ 2018, c 21 [Bill 176], was adopted and most of its provisions came into force the same day. Among the changes, several amendments were made to working time and leave provisions. As of 1 January 2019, employees will

Québec, although employees can refuse to continue working once they have worked fifty hours.<sup>72</sup> But there is no general right to refuse to work overtime. Employees are also entitled to a weekly minimum rest period of thirty-two hours, which can fall any time during the week. There is no maximum workday, although employees can refuse to work after having worked fourteen hours in a day (twelve hours if they have irregular schedules) or after having worked four hours beyond their normal workday. Employers are not required to post schedules in advance (or at all) or advise workers of schedule changes. Nor must they guarantee a certain number of hours of work per week, leaving workers in a position where they may be likely to accept all available hours for economic reasons, even if the hours conflict with family responsibilities. There are no restrictions on broken shifts, night shifts, or weekend shifts or on the requirement to be available on call or to respond to employers' requests outside of scheduled work hours when at home. Minimum employment standards legislation in Québec also protects management rights by allowing employers to decide if employees have to work on legal holidays as well as when they can take their vacation.<sup>73</sup> It can thus be very difficult for workers to coordinate work obligations with family time. This situation is compounded in shared parenting situations.

Some family situations beyond maternity and parental leave were timidly taken into account with amendments to the *Act Respecting Labour Standards* introduced in 1990, which were further modified and arguably improved in 2002.<sup>74</sup> But these more recent legal provisions essentially apply to unavoidable family responsibilities. As with the working time and holiday provisions, these provisions do not fully recognize that employers have a role to play to reduce the interference of work in family life. Employees are protected against reprisals if they refuse to work beyond their normal work

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be able to refuse to work after having worked two hours instead of four beyond their normal workday. They will also, in most cases, be able to refuse to work if their employer has not notified them five days ahead of time. This new provision does not constitute an obligation for employers to inform employees of their schedules; it only provides employees with protection against reprisals if they refuse to work (see s 9).

<sup>72</sup> *Landry c Matériaux à bas prix ltée*, 2004 QCCRT 553 at paras 20-7.

<sup>73</sup> With the exception of the Saint-Jean Baptiste holiday, an employer can require that the employee work and take a compensatory holiday in the three weeks before or after the legal holiday. Employees only have the right to know the date of their vacation one month beforehand. See *Labour Standards Act*, *supra* note 8 ss 60, 63, 64, 72; *National Holiday Act*, CQLR, c F-1.1, s 2.

<sup>74</sup> *An Act to Amend the Act Respecting Labour Standards and Other Legislative Provisions*, SQ 1990, c 73; *An Act to Amend the Act Respecting Labour Standards and Other Legislative Provisions*, SQ 2002, c. 80. Some improvements were also introduced by Bill 176, such as the lengthening of some of the existing family leave and the extension of the list of people who can be considered family care providers. See Bill 176, *supra* note 71, s-32.



hours because their presence is required to fulfill obligations relating to the care, health, or education of their child or their spouse's child.<sup>75</sup> They will nevertheless have to demonstrate that they have taken reasonable steps to find an alternative solution to refusing to work.<sup>76</sup> There is thus no general right to refuse overtime for family reasons beyond protection against reprisals if an employee has found no alternative solution.<sup>77</sup>

The *Act Respecting Labour Standards* also provides for a total of ten days of unpaid leave per year, which can be split into half-days (or into hours with the employer's consent) for employees to fulfill obligations relating to the care, health, or education of a child.<sup>78</sup> Again, employees will have to demonstrate that reasonable steps were taken to limit the leave and its duration. This last provision also fails to take into account the routine responsibilities of parenting and again reflects a lack of recognition that workers are very often parents since the burden of proof is on the employee to show that he or she could not make alternate arrangements.<sup>79</sup> The Act also perpetuates the "dual-partnered nuclear working family" and fails to take into account the heterogeneity of family situations, such as the existence of working grandparents or siblings who have childcare responsibilities.<sup>80</sup>

In a grievance alleging a failure to accommodate an employee in a work-family conflict situation, an arbitrator clearly stated that the goal of the provision enabling workers to use ten days a year for family responsibilities is not to accommodate shared parenting arrangements.<sup>81</sup>

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<sup>75</sup> *Labour Standards Act*, *supra* note 8, s 122(6).

<sup>76</sup> *Lussier c Syndicat des cols bleus regroupés de Montréal (SCFP, 301)*, 2010 QCCRT 462 at para 32.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Labour Standards Act*, *supra* note 8, s 79.7. Bill 176, *supra* note 71, provides for two of the ten days to be paid for employees with three months of service for the same employer as of January 1 2019.

<sup>79</sup> *Ibid.*, s 79.8ff. Employees can also take up to twelve weeks of unpaid leave per year in the case of the grave illness of a child if they can demonstrate that their presence with the child is necessary. Unpaid leave with guaranteed job security can also be extended in some cases to 52 or 104 weeks.

<sup>80</sup> Michelle Weldon-Johns, "From Modern Workplaces to Modern Families: Re-envisioning the Work-Family Conflict" (2015) 37:4 J Soc Welfare & Fam L 395. In the future, this may be partially remedied with the extension by Bill 176, *supra* note 71, of the list of people who can be considered family care providers.

<sup>81</sup> *Université de Montréal et Syndicat des employés d'entretien de l'Université de Montréal, section locale 1186, SCFP — FTQ (Fernand Landry)*, 2014 QCTA 685 at para 58 [*Université de Montréal*]; see also *Bouchard v 9180-6166 Québec Inc (Honda de la Capitale)*, 2015 QCCRT 31. This last case did not concern a shared custody arrangement, but the Labour Relations Board came to the same conclusion on the use of the provision to organize more complicated childcare arrangements (the

The complainant worked for the security service of a university and asked his employer to arrange his work schedule to take into account the fact that he had custody of his child every other week. When the employer refused, the complainant used some of his personal days and then tried, without success, to use his accumulated overtime to render his schedule more flexible when he had his daughter. While the grievance concerned a claim of psychological harassment and discrimination on the basis of his family status (which is not protected under Québec human rights legislation), the arbitrator did interpret the legal provisions on the right to ten days of leave per year for family obligations. According to the arbitrator,

[I]t seems evident that the ... provision's objective is not to permit the establishment of an adjusted schedule on a regular basis. Rather, it is a provision that allows the employee to cope with occasional situations relating to a child's care, health, education, etc. ... It is not enough to argue having custody of a child every two weeks to be able to take advantage of [the provision]. ...

The employer cannot accept the complainant's demands to be able to be absent at the beginning of his shifts. ... This is the only demand that he has made in order to find a solution for the shared custody of his daughter one week out of two. He has made no other serious effort, nor taken any other serious steps. ...

He did not explore any other alternative solution generally used in our society ... to look after his daughter other than occasionally calling upon his parents. [It is our opinion] that this attitude is far from being the taking of reasonable steps to limit leave for family reasons. ... [T]he general impression that emerges is that [the complainant] ... tried to do indirectly what he was denied, that is, be granted ... an adjusted schedule.<sup>82</sup>

Here it is clear that the arbitrator did not find that the legislative intent was to diminish the interference of work in family life. The decision confirms that the onus is entirely on the employee to demonstrate that she or he has exhausted reasonable alternatives and that the employer is not required to accept requests that involve regular and routine family responsibilities.

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complainant's spouse was frequently absent, and she had to work several evenings a week and was therefore not available for her children).

<sup>82</sup> *Université de Montréal, supra* note 81 at paras 58, 64-5 [translated by authors].

Thus, there is no obligation on the employer's part to be proactive in helping the employee find a solution.

In an earlier 2010 Québec Labour Relations Board decision, a provincial correctional officer refused to stay in his post after the end of his shift at 4 pm as ordered by his superior to ensure that the regulatory minimum number of officers was present on the floor.<sup>83</sup> He received a written notice and two suspensions after refusing to stay past his normal working hours. The complainant had the custody of his nine- and eleven-year-old children, who attended a school over 40 kilometres from their home.<sup>84</sup> He was not from the region and had no family that could assist him to make sure his children got home safely from school and were looked after. The school after-hours childcare service closed at 6 pm. Although his superior did offer to let him go and get his children before the service closed, there was no one at home to look after them. He admitted that at the time he had not made an effort to find someone else to look after his children, although he did in part solve the problem by moving to the municipality where his children went to school two months later.

The law states that the complainant had to demonstrate that he had taken reasonable steps to find an alternative solution to refusing to work beyond his usual shift. The Labour Relations Board found that he had failed to do so and that management's right to require him to work overrode his parental responsibilities:

For an employee to be able to legally refuse to work beyond his normal working hours, despite being required to work, he must have taken reasonable means to fulfil his parental obligations in another way. Even if this is an obligation of means and not of results, he must undertake the reasonable steps available, in accordance with the circumstances. ... He cannot purely and simply refuse to work beyond his normal working hours by hiding behind his parental responsibilities without trying to find a solution.<sup>85</sup>

This case brings to the fore the inadequacy of existing legal provisions in taking into account the difficult situations in which parents find themselves when trying to fulfill routine parental responsibilities as well as the

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<sup>83</sup> *Perras v Québec (Ministère de la Sécurité publique)*, 2010 QCCRT 19, application for review denied, 2010 QCCRT 268 [*Perras*].

<sup>84</sup> The facts of the case do not specify whether or not this was a shared custody arrangement.

<sup>85</sup> *Perras*, *supra* note 83 at para 20; see also paras 21-3 [translated by authors].

resistance of labour tribunals to being sympathetic to workers who experience work-family conflict.

In another case from 2008, the employee of an industrial cleaning company was in a shared custody arrangement in which he had his young daughter every other week.<sup>86</sup> At first, he managed to organize his work and family time, but the person he had hired to look after his daughter during his evening and night shifts moved, and he was left without childcare. He tried to find another person to look after his daughter but, finally, had to ask his employer to not give him night shifts. The employer maintained that, according to the collective agreement, the employee had to be available to work evenings, nights, and on call. Employees were frequently informed of a shift only one hour in advance in order to respond to the needs of the company's principal client. After having refused to work night shifts, and although the employer confirmed that he was otherwise a good employee, he received several disciplinary notices and was ultimately fired because of his lack of availability. The employer claimed that it would not be fair to make an exception for him under the collective agreement and give him the shift he needed every other week since all of the employees had to be available twenty-four hours a day, seven days a week. The union argued that the employer had a duty to accommodate the employee under the *Act Respecting Labour Standards* and the *Québec Charter of Human Rights and Freedoms* and had not demonstrated that it would experience undue hardship if a schedule accommodation was found.<sup>87</sup> The arbitrator finally substituted the dismissal by a six-month suspension to give him a "last chance."

Even though the arbitrator accepted that the employee's reason for not being sufficiently available was "serious and commendable," he stated "the cause of his absences, shared custody of his minor child, is the result of the grievor's choice and is not outside of his control."<sup>88</sup> Therefore, "the grievor must fulfil his principal duty as an employee and perform his work. The employer is within its right to demand that the grievor be available to work."<sup>89</sup> The arbitrator also found that the employer had correctly applied the collective agreement and that the minimum conditions provided for in the *Act Respecting Labour Standards*—a law of public order—had also been respected.<sup>90</sup> He underlined that being in a shared custody arrangement was

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<sup>86</sup> *Syndicat des travailleurs d'Environnement Godin (CSN) c Environnement Godin Inc*, 2008 CanLII 7003 (QC SAT) [Environnement Godin].

<sup>87</sup> *Charter of Human Rights and Freedoms*, 1976, C-12, ss 10, 16, 20.

<sup>88</sup> *Environnement Godin*, *supra* note 86 at paras 54, 60.

<sup>89</sup> *Ibid* at para 61 [translated by authors].

<sup>90</sup> Standards of "public order" are imperative standards of public policy from which a contract cannot derogate. See arts 8, 9 CCQ. The *Act Respecting Labour Standards* provides that "any provision that contravenes a labour standard or that is inferior thereto is absolutely null." See *Labour Standards Act*, *supra* note 8, s 93.

not protected as a prohibited ground of discrimination under Québec's *Charter of Human Rights and Freedoms*. According to the arbitrator, "[u]nder the present state of the law, unless otherwise agreed upon, the notion of work-family balance does not go so far as to oblige an employer to accept an employee's request to work one out of two weeks in a post that requires availability to be on call, in particular evenings and nights."<sup>91</sup> In this case, despite the fact that the employee had his union's support, the employer was able to invoke the collective agreement to justify its lack of flexibility in finding a solution to lessen the employee's work-family conflict. The arbitrator determined that the grievor had made a personal choice to be in a shared custody arrangement and that it was up to him to organize his life outside of work to be able to meet his parental responsibilities and not up to the employer to find him a suitable working-time arrangement.

#### **V. NEVER THE TWAIN SHALL MEET? SOME REFLECTIONS ON THE INTERSECTION OF LABOUR AND FAMILY LAW**

The question we initially wanted to explore was whether labour and family law intersect and interact to see if we can discern a dialogue between the two. The case law illustrations presented here do not seem to indicate such a dialogue; the two branches of law appear to be talking past each other on the questions of availability and working-time arrangements. On the one hand, family case law demands of a parent who has custody that he or she be available and personally able to look after his or her children. In the family case law illustrations presented above, the real constraints and limitations imposed by labour law on working parents are barely considered. On the other hand, the existing weak labour law provisions examined in this article do not take into account the requirements of family law and appear to contradict them, since it is implied that employees have to find a solution so as not to have to be available for their children. In the labour case law illustrations, tribunals ignore the requirements of family law and give precedence to management rights, squarely relegating family responsibilities to the private sphere.

The family case law illustrations that have been discussed concern situations where fathers are requesting shared custody, which is increasingly the norm. While the illustrations are but a sample of a large corpus of judgments, courts still appear to expect mothers to be more available for their children and presume that when a father cannot organize a "family-friendly" working arrangement, the mother will be able to adapt.

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<sup>91</sup> *Environnement Godin*, *supra* note 86 at para 51 [translated by authors].

As such, the courts either deny the father shared custody<sup>92</sup> or minimize the impact that the father's difficult schedule may have on the mother's time management.<sup>93</sup> The implicit message is that responsibility for children is still essentially the remit of women.<sup>94</sup>

While case law is only the tip of the iceberg since the vast majority of cases are settled out of court, it is perhaps significant that the reported labour law cases often involve men who are grappling with shared custody arrangements. The labour case law illustrations concern fathers who have custody of their children and whose requests for working-time arrangements have been flatly turned down by their employer. As the heavy tendency towards shared custody continues to be confirmed and as working men become more "encumbered" with family responsibilities, a provocative question is whether it will finally be the voice of fathers in shared parenting arrangements that will galvanize tribunals into proposing an interpretation of labour law and collective agreement provisions that recognizes that employees are often also parents and prod the legislature into adopting provisions that oblige employers to consider alternate working time arrangements when employees are faced with work-family conflict. These illustrations from the labour case law tend to show that this is not happening at the moment. However, if this were to be the case one day, it raises questions about gender neutrality and bias in law; with the prevalence of the dual-earner household today, women have been expected, up to now, to figure out how to reconcile work and family life.

It is evident that family law has evolved to encourage fathers to share more fully in parenting responsibilities in the best interest of children. Yet, despite improvements in family leave, government discourse on the need for better work-family balance policies,<sup>95</sup> initiatives on voluntary work-family balance standards,<sup>96</sup> and decades of representations by women's

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<sup>92</sup> See note 54 above.

<sup>93</sup> See *Droit de la famille - 162316*, *supra* note 64 and text accompanying note 66.

<sup>94</sup> See in particular Judy Fudge, "Working-Time Regimes, Flexibility, and Work-Life Balance: Gender Equality and Families" in Catherine Krull & Justyna Sempruch, eds, *Demystifying the Family/Work Conflict: Challenges and Possibilities* (Vancouver: UBC Press, 2011) 170, online: <<https://ssrn.com/abstract=1918109>>.

<sup>95</sup> See e.g. Ministère de la Famille, *Plan stratégique 2012-2017* (Québec: Government of Québec, 2013), online: <[http://www.mfa.gouv.qc.ca/fr/publication/Documents/plan\\_strategique\\_2012-2017.pdf](http://www.mfa.gouv.qc.ca/fr/publication/Documents/plan_strategique_2012-2017.pdf)>.

<sup>96</sup> See e.g. Bureau de Normalisation du Québec, *Standard BNQ 9700-820 Work-Family Balance*, online: <<http://www.bnq.qc.ca/en/standardization/health-at-work/work-family-balance.html>>. This voluntary standard developed by a group of labour market stakeholders representing government, employers, and unions certifies employers that commit to ensuring a series of work-family balance measures in the workplace that go beyond what the law provides for. Since its adoption in 2011, only a handful of employers have applied for and obtained certification.

organizations and other actors to enable women not to be hindered professionally by their family responsibilities,<sup>97</sup> labour law has still not lowered the principal barrier to reconciling work and family responsibilities: control over working time. This is particularly problematic for more precarious workers with few economic resources to pay for childcare services and little or no time sovereignty since studies show that they experience more work-family conflict.<sup>98</sup> It can be gleaned from the case law that more precarious workers may be at a disadvantage when it comes to proving their availability in the family law forum. The worker who has a very unpredictable schedule, through no fault of his or her own, may be less likely to obtain shared custody than a worker who is in a position to mobilize different strategies and rights in the workplace to arrive at a satisfactory working-time arrangement.<sup>99</sup> In this instance, labour law can have a potentially negative effect on the exercise of parental rights. Not only is there a lack of dialogue between family and labour law, but the disparities that are maintained by labour law in the treatment of workers are also possibly being reproduced in the family law forum.

## VI. FURTHERING THE REFLECTION ON THE NEXUS BETWEEN LABOUR AND FAMILY LAW

This article has modestly tried to open a discussion on the apparent lack of dialogue between two branches of law that directly affect a great many people's lives on an ongoing basis. We are fully aware that it is hazardous to draw firm conclusions from case law illustrations. The case law most often represents the most difficult cases since the vast majority of disputes in both family and labour law do not end up before the courts, and, if they do, they are often settled before finally coming to adjudication. From a methodological perspective, several reasons make it difficult to claim an exhaustive case law search: mention of availability issues may be termed in many ways by adjudicators and very creative full-text word searches are

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<sup>97</sup> More recently, in January 2016, a broad coalition of Québec unions, women's organizations, and organizations representing families launched a comprehensive political platform to engage discussion on concrete means to reduce work-family conflict. See Coalition pour la conciliation famille-travail-études, *Plateforme politique pour faire face aux nouveaux défis* (January 2016), online <<https://ccfte.files.wordpress.com/2016/01/plateforme-ccfte-janvier-2016.pdf>>.

<sup>98</sup> See e.g. Philip Bohle, "Work-Life Conflict in 'Flexible Work': Precariousness, Variable Hours and Related Forms of Work Organization" in Irena Iskra-Golec, Janet Barnes-Farrell & Philip Bohle, *Social and Family Issues in Shift Work and Non Standard Working Hours* (Switzerland: Springer, 2016) 91.

<sup>99</sup> Mille and Zimmermann, *supra* note 44 at 54-5.

required, leading inevitably to omitting some cases; indexation and case abstracts often do not mention this issue; and while the case law is very voluminous, particularly in family law, not all cases are reported. It should also be noted that many workers do not mobilize their rights outside of the workplace to seek third party intervention in a dispute, and may or may not manage to reach arrangements with their employers. At the same time, several of the case law illustrations above suggest that there should be further exploration of adjudicators' discourses in both family and labour law to verify whether there is a discernable gendered appreciation of men's and women's availability both at work and for family responsibilities. Given the limitations of case law research, we hope to further inform our exploratory legal research through qualitative data from interviews with different actors, particularly with workers with variable or asocial work schedules in shared custody arrangements. In the interim, we can tentatively advance that labour law will not be able to continue to perpetuate the family life/work divide for much longer and will have to take into consideration developments in family law and the evolution of family structures.