

# Family Status Discrimination: “Disruption and Great Mischief” or Bridge over the Work-Family Divide?

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## ABSTRACT

*This article examines a distinctive Canadian approach to alleviating work-family conflict: human rights laws that prohibit employment discrimination based on family status. These laws challenge management’s historic right to organize the workplace without regard to workers’ family care responsibilities; properly applied, they should require employers to change or adjust work rules that create unnecessary impediments to family care. However, Canadian adjudicators have been largely persuaded that applying human rights law in this fashion would cause “disruption and great mischief”. To avoid this outcome, they have developed legal tests that protect employers from having to justify conventional workplace practices against standard human rights principles. Such tests operate to limit findings of family status discrimination to the most egregious individual cases. They also impede systemic change and reinforce gender hierarchies in workplaces and families, ignoring the links between work-family conflict and women’s economic, social, and cultural subordination. Under these circumstances, proactive policy approaches to work-family conflict are desirable, but litigation still has a role in promoting gender-inclusive systemic change. There are a number of strategies for family status litigation that are relatively unexplored, in particular the possibility that systemic complaints could circumvent the high prima facie thresholds that operate as barriers to invoking the duty to accommodate, offering opportunities both to develop new legal tests that expose the discriminatory impact of many family-unfriendly work rules and to craft more effective and gender-equal remedies.*

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[T]he gendered separation of social reproduction from economic production constitutes the principal institutional basis for women's subordination in capitalist societies. So for feminism, there can be no more central issue than this.

— Sarah Leonard and Nancy Fraser, "Capitalism's Crisis of Care"<sup>1</sup>

The reconciliation of paid work and unpaid care is arguably the most pressing problem currently facing labour law.

— Nicole Busby, *A Right to Care?*<sup>2</sup>

## I. INTRODUCTION

Family care has only recently been acknowledged as a workplace issue. Within the gendered logic of the male breadwinner family, dominant throughout most of the twentieth century, family care and paid work have belonged in strictly separate spheres. Family care was women's work, relegated to the (unpaid) sphere of social reproduction. Paid work was men's work, generating the financial means to support the family.<sup>3</sup> The male breadwinner model was never as all-pervasive as its myth.<sup>4</sup> Nevertheless, it described many working households in Canada across class lines, and its powerful narrative buttressed the allocation of unpaid

<sup>1</sup> Sarah Leonard & Nancy Fraser, "Capitalism's Crisis of Care: A Conversation with Nancy Fraser," *Dissent* (Fall 2016) 30 at 31.

<sup>2</sup> Nicole Busby, *A Right to Care?: Unpaid Work in European Employment Law* (Oxford: Oxford University Press, 2011) at 1.

<sup>3</sup> This point has been made by countless feminist scholars. See e.g. Joanne Conaghan & Kerry Rittich, eds, *Labour Law, Work and the Family: Critical and Comparative Perspectives* (Oxford: Oxford University Press, 2005); Judy Fudge & Rosemary Owens, eds, *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (Oxford: Hart Publishing, 2006); Meg Luxton, "Feminist Political Economy in Canada and the Politics of Social Reproduction" in Kate Bezanson & Meg Luxton, eds, *Social Reproduction: Feminist Political Economy Challenges Neo-Liberalism* (Montreal and Kingston: McGill-Queen's University Press, 2006) 11 at 23; Nicole Busby & Grace James, eds, *Families, Care-giving and Paid Work: Challenging Labour Law in the 21st Century* (Cheltenham, UK: Edward Elgar, 2011).

<sup>4</sup> It fails to account for many significant social and economic phenomena including single-parent families, the periodic unemployment that has always been a feature of capitalism, and the impact of racism on black and Indigenous family life. See Drucilla K Barker & Susan F Feiner, *Liberating Economics: Feminist Perspectives on Families, Work and Globalisation* (Ann Arbor: University of Michigan Press, 2004) ch 2.

care work to women even in households that did not fit its economic mould. Under nineteenth- and twentieth-century industrial capitalism, it provided the essential foundation for the iron rule that family-care issues should not cross the threshold of the workplace.

In twenty-first-century Canada, the male breadwinner family has largely vanished along with the idea of the “family wage”; women are almost as likely as men to belong to the paid workforce.<sup>5</sup> Two constants remain, however. Employers continue to demand an “unencumbered worker,”<sup>6</sup> along with the right to organize work without regard to workers’ care obligations. And gender roles within families have been slow to change. Care work still needs to be done, and women still bear most of the practical responsibility for doing it.<sup>7</sup> In consequence, women are forced to manage family care without impinging on their work obligations. Their strategies—euphemistically labelled “choices”—often include part-time and precarious forms of work that typically come with lower wages, fewer benefits, fewer promotional opportunities, and minimal or no retirement pensions. The impact on women’s economic welfare is compounded by stereotypical assumptions that women do not merit or want more responsible, higher-paying jobs because they will inevitably prioritize family over work. The unequal burden of family care creates and reinforces women’s continuing inequality both inside and outside the workplace.<sup>8</sup>

In this context, I examine a Canadian legal experiment in reconciling the work-family conflict: prohibiting employment discrimination based on

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<sup>5</sup> Canadian women’s participation in the labour market increased from 21.6 percent to 82.0 percent between 1950 and 2015. Over the same period, men’s participation decreased from 97.1 percent to 90.7 percent. See Melissa Moyser, “Women and Paid Work” in Statistics Canada, *Women in Canada: A Gender-based Statistical Report*, 7th ed (Ottawa: Statistics Canada, 2017), online: <<http://www.statcan.gc.ca/pub/89-503-x/2015001/article/14694-eng.htm>>.

<sup>6</sup> I borrow this term from Anna Chapman. See Anna Chapman, “Work/ Family, Australian Labour Law, and the Normative Worker” in Conaghan & Rittich, *supra* note 3, 79 at 85-8. Chapman adapts it from Sandra Berns’ discussion of the “unencumbered citizen” of liberal theory. See Sandra Berns, *Women Going Backwards: Law and Change in a Family Unfriendly Society* (Burlington, VT: Ashgate, 2002).

<sup>7</sup> In 2010, Canadian women with children who worked full time spent an average of 49.8 hours per week on childcare, compared to 27.2 hours per week for comparable men. See Status of Women Canada (SWC), *Women in Canada at a Glance: Statistical Highlights* (Ottawa: SWC, 2012) at 7.

<sup>8</sup> Susan Bisom-Rapp & Malcolm Sargeant, *Lifetime Disadvantage, Discrimination and the Gendered Workforce* (Cambridge: Cambridge University Press, 2016); Public Policy Institute, *The Impact of Pay Inequality, Occupational Segregation and Lifetime Work Experience on the Retirement Income of Women and Minorities*, by Olivia Mitchell, Philip Levine & John Phillips, Report no 9910 (Washington, DC: American Association of Retired Persons, 1999).

“family status.” This Canadian approach has two distinctive features. In contrast to the United States and the United Kingdom, where “family responsibility” discrimination claims must be litigated as sex discrimination claims, Canadian workers can bring such claims grounded explicitly on family status.<sup>9</sup> In contrast to Australia, the Canadian prohibition reaches not just direct discrimination but also indirect discrimination, which extends its reach well beyond workplace decisions and practices that make explicit distinctions on the basis of family status.<sup>10</sup> Prohibiting family status discrimination engages the legal responsibility of employers in how workers negotiate the boundary between work and family care. It thus has radical potential to disturb the distribution of power between employer and worker, particularly in matters like scheduling and work assignment. There is little evidence to date, however, that these laws have forced employers to modify systemic work practices that disadvantage women with family care obligations. Absent workplace change, the gendered allocation of family care work remains undisturbed.

I begin with a brief review of the legislative history and early application of family status provisions in Canada. As the idea emerged that “family status” encompasses family care obligations, it was rightly perceived as a threat to the power of employers to demand that workers resolve work-family conflicts outside the workplace. Adjudicators have responded to this threat by developing onerous legal tests that erect high *prima facie* thresholds for employees seeking to establish family status discrimination. This approach protects employers from having to justify conventional workplace practices against standard human rights principles. It also helps obscure the gendered roots of the family care issue, reinforcing gender hierarchies in workplaces and families by forcing women to adopt gendered strategies for managing family care. Despite these limitations, family status litigation has been successful in securing accommodations for

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<sup>9</sup> The US federal *Fair Housing Act*, 42 USC §3601 (1988), was amended in 1988 to prohibit discrimination on the ground of “familial status” (defined as having children under eighteen in a household), but anti-discrimination legislation applicable to employment contains no parallel ground. For US law relevant to employment, see Joan C Williams & Stephanie Bornstein, “The Evolution of “FReD”: Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias” (2008) 59:6 *Hastings LJ* 1311. For UK law, see Rachel Horton, “Care-Giving and Reasonable Accommodation in the UK” in Busby & James, *supra* note 3, 137.

<sup>10</sup> Australia’s legislation prohibiting family status (“family responsibilities”) discrimination applies only to direct discrimination and only to dismissal. See Sara Charlesworth, “Law’s Response to the Reconciliation of Work and Care: The Australian Case” in Busby & James, *supra* note 3, 86 at 93. See also Olivia Smith, “Litigating Discrimination on Grounds of Family Status” (2014) 22:2 *Fem Leg Stud* 175, discussing Ireland.

some individual workers. However, its more radical potential to contribute to gender-inclusive systemic change remains unexplored.

## II. THE LEGAL “BACKSTORY”

The 1982 revision of Ontario’s *Human Rights Code* introduced the concept of family status discrimination into Canadian law.<sup>11</sup> This revision also contained a new and explicit prohibition against what the code labelled “constructive discrimination” (otherwise called indirect, adverse effects or adverse impact discrimination). In theory, Ontario legislators should have understood the potential of these combined changes to challenge the entrenched right of employers to organize workplaces without regard to employees’ family care obligations. But there is little evidence that the impact of the new ground on workplaces and employment practices was ever on the legislative radar. *Life Together*, the important 1977 report of the Ontario Human Rights Commission that laid the basis for the 1982 code, discussed family status discrimination almost entirely as an issue in the rental housing market.<sup>12</sup> Although family status discrimination was clearly prohibited in all social areas governed by the code, there is no evidence in the legislative debates or committee reports that Ontario legislators considered its possible impact on employment practices.

Other Canadian jurisdictions seemed equally oblivious to the disruptive potential of the new ground in the realm of employment. The federal government introduced “family status” in 1983 simply to repair an obvious lack of symmetry between the French and English versions of the original human rights statute; the French version included the ground of “*situation de famille*” (but not “*état matrimonial*”), whereas the English version included “marital status” (but not “family status”). The defect was remedied by adding “*état matrimonial*” to the French version and “family status” to the English version.<sup>13</sup> Several other Canadian jurisdictions

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<sup>11</sup> Now *Human Rights Code*, RSO 1990, c H 19, s 11 [OHRC]. A few years later, the Supreme Court of Canada confirmed that discrimination in Canadian law includes both direct and adverse impact discrimination. *Ontario Human Rights Commission and O’Malley v Simpson-Sears Ltd*, [1985] 2 SCR 536, 52 OR (2d) 799 [O’Malley]. In *Cameron v Nel-Gor Castle Nursing Home* (1984), 5 CHRR D/2170 at para 18333(4), 84 CLLC 17008 (Ont Bd of Inq). Peter A. Cumming, sitting as an Ontario Board of Inquiry, discusses the history of section 11 (then section 10) of the Ontario code and its relationship to *O’Malley*.

<sup>12</sup> Ontario Human Rights Commission, *Life Together: A Report on Human Rights in Ontario* (Toronto: Ontario Human Rights Commission, 1977).

<sup>13</sup> For a discussion of the federal legislative history, see *Canada (Attorney General) v Mossop* (1989), 10 CHRR D/6064 at para 4.54, 1989 CanLII 157 (CHRT); *Canada*

subsequently added family status to the grounds in their codes, but neither their legislative history nor their statutory language discloses any common view on its meaning or implications.<sup>14</sup> Ontario defined “family status” as “the status of being in a parent and child relationship,” a definition subsequently adopted in four other provinces.<sup>15</sup> Alberta defined it as “the status of being related by blood, marriage or adoption.”<sup>16</sup> Several codes, including the federal code, leave the term undefined.<sup>17</sup>

No code provides much guidance on how the term should be applied in the context of employment, particularly where what is at issue—as it almost always is in family status cases—is adverse impact rather than direct discrimination. Very few cases emerged in the early days to explore how the ground should be interpreted; those that did focused on whether “family status” could force the recognition of same-sex families<sup>18</sup> and whether it protected particular relationships (being the daughter of X) in addition to abstract status (being a daughter).<sup>19</sup> These cases are important in their own right, but they tell us little about the meaning of “family status” at the interface of work and family. In 2006, almost a quarter-century after the ground was initially adopted, the Ontario Human Rights

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(Attorney General) v Mossop, [1993] 1 SCR 554 at 617-21, 100 DLR (4th) 658 (L’Heureux-Dubé J) [Mossop].

<sup>14</sup> 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 (15 September 2012) at 26, Figure 3, 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)>. This document provides a comprehensive timetable of legislation relating to family status but does not otherwise discuss the legislative history. My research has not uncovered any academic studies on how and why family status attracted the attention of Canadian legislators as a prohibited ground of discrimination and whether they considered the link between family status and gender.

<sup>15</sup> OHRC, *supra* note 11 at s 10(1). Nova Scotia, Saskatchewan, Prince Edward Island, and Newfoundland and Labrador adopted the Ontario approach. *Human Rights Act*, RSNS 1989, c 214, s 3(h); *Human Rights Code*, RSS 1979, c S-24.1, s 2(1); *Human Rights Act*, RSPEI 1988, c H-12, s 1(1) (h 11); *Human Rights Act*, SNL 2010, c H-13.1, s 2(i).

<sup>16</sup> *Human Rights Act*, RSA 2000, c A-25.5, s 44(1)(f). Nunavut adopted the Alberta definition. *Human Rights Act*, SNU 2003, c 12, s 1.

<sup>17</sup> *Canadian Human Rights Act*, RSC 1985, c H-6, s 3(1). See also Manitoba, the Yukon, British Columbia, and the Northwest Territories’ human rights legislation. *Human Rights Code*, CCSM c H175, s 9(2)(i); *Human Rights Act*, RSY 2002, c 116, s 7(k); *Human Rights Code*, RSBC 1996, c 210; *Human Rights Act*, SNWT 2002, c 18, s 5(1).

<sup>18</sup> *Mossop*, *supra* note 13. “Family status” was also pleaded in *Brooks v Canada Safeway*, [1989] 1 SCR 1219, 59 DLR (4th) 321, a pregnancy discrimination case, but since the Supreme Court disposed of the case on the ground of sex, it declined to deal with the meaning of family status.

<sup>19</sup> *B v Ontario (Human Rights Commission)*, 2002 SCC 66, [2002] 3 SCR 403.

Commission was still describing family status as “one of the least understood grounds of the ... *Code*.”<sup>20</sup>

### III. FAMILY STATUS AND FAMILY CARE: RAISING THE THRESHOLD

Early cases focused on bare “status” rather than on the accoutrements of status and lay no groundwork for linking family care to family status. In subsequent phases of family status litigation, however, family care issues became the primary focus, as women workers raised ambitious claims challenging standard workplace rules and practices as obstacles to the performance of family care functions and, therefore, as discrimination on the basis of family status. Such cases forced adjudicators to confront two key questions: whether family care obligations are encompassed within family status and, if so, what obligations are protected within a legal framework that prohibits not just direct, but also adverse impact, discrimination.

*O’Malley v Simpson Sears* established the basic legal test for adverse impact discrimination, holding that a *prima facie* case

arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.<sup>21</sup>

Once a *prima facie* case is proved, an employer is liable unless it can justify its conduct by establishing a statutory defence or otherwise demonstrating that it could not accommodate the employee without undue hardship.<sup>22</sup> Some fifteen years after *O’Malley*, in *British Columbia (Public Service Employee Relations Commission v British Columbia Government Employees’ Union* (more commonly known as *Meiorin*), the Court elaborated on the justification defence, holding that a work rule or standard that creates discriminatory effects can prevail only if the employer can

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<sup>20</sup> Ontario Human Rights Commission, *The Costs of Caring: Report on the Consultation on Discrimination on the Basis of Family Status* (29 November 2006) at 4, online: <[http://www.ohrc.on.ca/sites/default/files/attachments/The\\_cost\\_of\\_caring%3A\\_Report\\_on\\_the\\_consultation\\_on\\_discrimination\\_on\\_the\\_basis\\_of\\_family\\_status.pdf](http://www.ohrc.on.ca/sites/default/files/attachments/The_cost_of_caring%3A_Report_on_the_consultation_on_discrimination_on_the_basis_of_family_status.pdf)>.

<sup>21</sup> *O’Malley*, *supra* note 11 at para 18. The basic test was reinforced more recently in *Moore v British Columbia (Education)*, 2012 SCC 61, [2012] 3 SCR 360 at para 33 [*Moore*].

<sup>22</sup> *O’Malley*, *supra* note 11 at paras 19-23.

show that: (1) the rule was adopted for a purpose rationally connected to the performance of the work; (2) the employer has an honest and good faith belief that it is necessary to fulfill a “legitimate work-related purpose”; and (3) the rule is reasonably necessary to accomplish that purpose.<sup>23</sup> The Court emphasized that to meet the third branch of the test “it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.”<sup>24</sup>

The *O’Malley/Meiorin* rules apply to all prohibited grounds of discrimination. With respect to family status, however, courts and tribunals quickly perceived that a literal application of those rules posed a significant threat to organizational principles presupposing an “unencumbered worker.” Containment strategies began to emerge that restated the rule for establishing a *prima facie* case in family status cases. The evolving case law crystalized around two competing tests: a test generated early in federal jurisdiction, which I will call simply the “federal test,”<sup>25</sup> and a somewhat more onerous test arising in British Columbia, which is known as the “*Campbell River* test.”<sup>26</sup>

The federal test was first articulated in *Brown v Department of National Revenue (Customs and Excise)*, a case dealing with sex and family status discrimination claims filed by Donna Brown, a customs inspector.<sup>27</sup> Brown normally worked alternating shifts but sought a fixed day shift, first to accommodate a difficult pregnancy and subsequently to accommodate childcare obligations since she was unable to find third-party childcare flexible enough to adjust to both her own alternating shifts and those of her husband, a police officer.<sup>28</sup> The employer failed to move quickly or appropriately on the first request and flatly refused the second. There was ample evidence that Brown’s supervisor was animated by both gender bias and personal animus, and the Canadian Human Right Tribunal (CHRT) upheld the sex discrimination complaint. In addition, without

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<sup>23</sup> *British Columbia (Public Service Employee Relations Commission v British Columbia Government Employees’ Union*, [1999] 3 SCR 3, 176 DLR (4th) 1 at para 54 [*Meiorin*]. While the case concerned only one specific justification, the “bona fide occupational requirement” defence under BC human rights legislation, it is now broadly adapted to apply to any justification defence. See e.g. *Moore*, *supra* note 21 at para 49.

<sup>24</sup> *Meiorin*, *supra* note 23.

<sup>25</sup> The early federal test has also been labelled the *Brown* test and the *Hoyt* test.

<sup>26</sup> *Health Sciences Association of BC v Campbell River and North Island Transition Society*, 2004 BCCA 260, 28 BCLR (4th) 292 [*Campbell River CA*]; affirming *Re Campbell River & North Island Transition Society and Health Sciences Association of BC* (2002), 110 LAC (4th) 289, 2002 CarswellBC 3653 [*Campbell River Arb*].

<sup>27</sup> (1993), 19 CHRR D/391993, 1993 CanLII 683 (CHRT).

<sup>28</sup> *Ibid* at 6.



much discussion, it held that “family status” encompassed parental obligations with respect to the care and nurturing of children. In its view, the federal code imposed “a clear duty on the part of the employer to facilitate and accommodate” the employee’s efforts to balance work with family obligations.<sup>29</sup> Applying the *O’Malley* test, the CHRT found that the employer’s scheduling rule did not permit Brown “to participate equally and fully in employment with her employer” and, at the same time, carry out her childcare duties and obligations.<sup>30</sup> The employer failed to demonstrate that it had fulfilled its duty to accommodate to the point of undue hardship. The CHRT found that Brown’s supervisor had “elected to allow his own personal dislike of the Complainant to cloud his judgment” and had failed to consider several available accommodations.<sup>31</sup> Along with individual remedies for Brown, the employer was ordered to submit proof to the commission that it had “an appropriate policy of accommodation for employee transfer.”<sup>32</sup>

A decade later, the British Columbia Court of Appeal confronted its first family status claim in *Health Sciences Association of British Columbia v Campbell River & North Island Transition Society*, a case that reached the court through labour arbitration rather than human rights channels.<sup>33</sup> It involved an employee, Shelley Howard, who held a part-time position as a youth counsellor with a non-profit organization. Howard’s work schedule permitted her to provide after-school care to her son, whose attention deficit hyperactivity disorder and Tourette’s syndrome were linked to serious behavioural difficulties. For program-related reasons, Howard’s employer placed her on a new schedule, extending her workday. She filed a grievance claiming that the employer owed a duty to accommodate her childcare obligations. The arbitrator accepted the argument that “family status” under the BC code governed parent-child relationships,<sup>34</sup> but he did not accept that it encompassed childcare obligations.<sup>35</sup> As he saw it, the legislation protected parents only from employment decisions based on their status as parents (that is, the fact that they were parents);<sup>36</sup> the obligations that come with that status

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<sup>29</sup> *Ibid* at 20.

<sup>30</sup> *Ibid* at 15, 20.

<sup>31</sup> *Ibid* at 21. There was evidence that his “personal dislike” had its roots in the fact that Brown had pushed back against his earlier sexual harassment.

<sup>32</sup> *Ibid* at 22-3.

<sup>33</sup> *Campbell River CA*, *supra* note 26.

<sup>34</sup> *Campbell River Arb*, *supra* note 26 at para 39.

<sup>35</sup> *Ibid* at para 45, 50.

<sup>36</sup> *Ibid* at para 50-1.

remain solely the responsibility of the parents.<sup>37</sup> Accordingly, he dismissed the grievance.

The Court of Appeal took a more expansive view of family status, accepting that it included childcare responsibilities. However, the court rejected the *Brown* test, which, in the court's view, moved much too quickly to the issue of the employer's duty to accommodate, without focusing rigorously enough on whether a *prima facie* case of discrimination had first been made out. As the court put it, the CHRT "seem[s] to hold that there is *prima facie* discrimination whenever there is a conflict between a job requirement and a family obligation."<sup>38</sup> For the court, this was an "overly broad definition ... that would have the potential to cause disruption and great mischief in the workplace."<sup>39</sup> The court held that absent bad faith or some overriding contractual obligation, "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."<sup>40</sup> While Howard's case crossed this onerous threshold, the court observed that "in the vast majority of 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."<sup>41</sup>

Meanwhile, back in federal jurisdiction, employers took heart from the BC decision and were now attempting to persuade the CHRT to abandon its own approach in favour of the *Campbell River* test. The CHRT considered this argument in *Hoyt v Canadian National Railway*, a case involving complaints by Catherine Hoyt that Canadian National Railway (CN) had failed to accommodate both her pregnancy and her parental obligations.<sup>42</sup> Hoyt held an arduous yard conductor job at CN's Edmonton terminal, with responsibility for marshalling out-of-service trains. Yard conductors worked shifts and were required to wear a piece of safety equipment called a belt pack. When Hoyt became pregnant, she began to experience pain performing her job, and her doctor certified that she should work regular hours, avoid hazards and particularly strenuous

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<sup>37</sup> *Ibid* at para 51, 57.

<sup>38</sup> *Campbell River CA*, *supra* note 26 at para 35. The court identified the same flaw in *Woiden v Lynn* (2002), 43 CHRR D/296, 2002 CanLII 8171, a decision of the Canadian Human Right Tribunal (CHRT) finding that scheduled work hours that clashed with the childcare obligations of a single parent triggered a duty to accommodate.

<sup>39</sup> *Campbell River CA*, *supra* note 26 at para 38.

<sup>40</sup> *Ibid* at para 39 [emphasis added].

<sup>41</sup> *Ibid*. The court remitted the matter to the arbitrator to determine whether the employer's justification defence passed the *Meiorin* test.

<sup>42</sup> *Hoyt v Canadian National Railway*, 2006 CHRT 33 at para 1, [2006] CHRD No 33.

activities, and not wear a belt pack.<sup>43</sup> Despite persistent requests from Hoyt and her union, it took CN some three and a half months to come up with suitable accommodation, during which time she remained on unpaid leave.<sup>44</sup> Hoyt was eventually offered a Tuesday-to-Saturday driving assignment that successfully addressed her pregnancy issues but created difficulties with childcare arrangements for her two year old.<sup>45</sup> These difficulties could have been resolved by a relatively simple adjustment to Hoyt's driving schedule, which would have relieved some of her Saturday work. CN refused to make that adjustment.

The CHRT sustained both of Hoyt's complaints.<sup>46</sup> On the family status issue, the tribunal refused to apply the *Campbell River* test. In the CHRT's view, it was "inappropriate" to "select out one prohibited ground of discrimination for a more restrictive definition" because of concerns about workplace disruption; such concerns should be taken into account only at the stage of assessing business necessity and undue hardship, where the onus lay on the employer.<sup>47</sup> Applying the *Brown* test, the CHRT found *prima facie* family status discrimination and failure to accommodate, pointedly observing that Hoyt's predecessor in the driving position had worked a Monday-to-Friday shift.<sup>48</sup> Remedies included an order that CN take measures, in consultation with the Commission, to ensure that its employees understood and properly applied its accommodation policy.

CN had difficulty absorbing the lesson of *Hoyt*. In 2010, it found itself once again before the CHRT in a trilogy of family status discrimination cases involving three women employed as conductors, Denise Seeley, Cindy Richards, and Kasha Whyte. They had all been on a very lengthy layoff but were subject under their collective agreement to a type of recall that required them to move on short notice for temporary, but indefinite, periods from their home base to other bases in the region. Failure to accept such a recall would result in termination. In February 2005, all three received a recall notice ordering them to report from their home base in

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<sup>43</sup> *Ibid* at para 25.

<sup>44</sup> *Ibid* at para 35.

<sup>45</sup> *Ibid* at paras 37-46.

<sup>46</sup> *Ibid* at paras 67, 86-90. The tribunal upheld the sex discrimination complaint in part on the ground that Canadian National Railway (CN) treated the request for pregnancy accommodation less favourably than other accommodation requests. In addition, it found that the employer did not have "an honest and good faith belief" that its refusal to accommodate Hoyt was necessary to fulfill a legitimate business objective; in other words, CN did not pass Step 2 of the *Meiorin* test. This comes very close to a finding of intentional discrimination.

<sup>47</sup> *Ibid* at paras 119-21.

<sup>48</sup> *Ibid* at paras 127-29.

Jasper, Alberta, to Vancouver, British Columbia, within fifteen days. The recall created serious childcare problems for all three. Two were single parents; one of them had complicated custody arrangements, and the other had a child with disabilities. The third was married to a CN locomotive engineer who worked shifts. All three women explained their childcare difficulties and requested relief from the recall order. Despite its comprehensive accommodation policy, CN took the position that employers had no duty to accommodate childcare issues. The women were terminated when they rejected the recall. Their grievances were dismissed by an arbitrator who shared the employer's view of its legal responsibilities: "[W]ith respect to issues such as childcare the onus remains upon the employee, and not the employer, to ensure that familial obligations do not interfere with the basic obligations of the employment contract."<sup>49</sup>

The three women then filed human rights complaints.<sup>50</sup> The CHRT rejected CN's argument that the "[c]omplainant's situation [was] a personal choice not to abide by her professional obligations in order to prioritize other aspects of her life."<sup>51</sup> Instead, it applied the test developed in *Brown*, holding that because CN's work rule prevented the women from fulfilling their duties and obligations as parents and, at the same time, "participat[ing] equally and fully in employment with CN," the onus lay on CN "to demonstrate that the *prima facie* discriminatory standard or action it adopted is a bona fide occupational requirement."<sup>52</sup> Predictably, the CHRT concluded that CN had failed to meet its onus, finding that it had not considered the complainants' individual circumstances and had made no effort to address their requests for accommodation.

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<sup>49</sup> *Canadian National Railway Co and UTU (Whyte) (Re)* (2006), 151 LAC (4th) 328 at para 18. The *Whyte* decision is also reported at *Canadian Railway Office of Arbitration & Dispute Resolution*, Case no 3549 (12 April 2006), online: <<http://arbitrations.netfirms.com/croa/40/CR3549.htm>>. The *Richards* decision is available at *Canadian Railway Office of Arbitration & Dispute Resolution*, Case no 3550 (12 April 2006), online: <<http://arbitrations.netfirms.com/croa/40/CR3550.htm>>. Both arbitration decisions focus on the collective agreement and do not consider whether CN's approach to accommodating childcare issues violated the code.

<sup>50</sup> Under current law in most Canadian jurisdictions, Richards and Whyte, whose grievances were arbitrated, would not have been permitted to take their complainants to a human rights tribunal once they were dismissed at arbitration. See Elizabeth Shilton, "Choice, but No Choice: Adjudicating Human Rights Claims in Unionized Workplaces in Canada" (2013) 38:2 Queen's LJ 461. Seeley's case was never arbitrated.

<sup>51</sup> *Seeley v Canadian National Railway*, 2010 CHRT 23 at para 124, [2010] CHR.D. No 23 [Seeley CHRT]. The CHRT issued three separate decisions but made similar findings in the three cases: *Seeley* CHRT; *Richards v Canadian National Railway*, 2010 CHRT 24; and *Whyte v Canadian National Railway*, 2010 CHRT 22.

<sup>52</sup> *Seeley* CHRT, *supra* note 51 at para 126.

CN applied for judicial review of *Canada (Attorney General) v Seeley*, framing the issue starkly: “CN submits that the underlying issue in this proceeding is whether the question of balancing obligations of family life and employment duties will be transferred from the home to the work place.”<sup>53</sup> The case ultimately made its way up to the Federal Court of Appeal (FCA), where it was heard together with another family status case, *Johnstone v Canadian Border Services Agency*.<sup>54</sup> That case involved Fiona Johnstone’s request for an adjustment to her work schedule to accommodate caring for her two small children. As a full-time customs inspector employed by the Canada Border Services Agency (CBSA), Johnstone worked rotating shifts, as did her husband, who was also an employee of the CBSA. Commercial childcare centres did not provide the flexible hours demanded by shift rotation, and Johnstone requested a fixed shift to accommodate her childcare needs. Like CN, the CBSA had an accommodation policy, but it did not apply it to accommodation requests related to childcare. Instead, such requests were addressed under a different policy that required employees to pay a price for a transfer to a fixed shift: reversion to part-time status, with consequent loss of wages and benefits and poorer promotional prospects. Johnstone accepted part-time work but filed a human rights complaint alleging discrimination on the grounds of family status.

Johnstone’s claim was arguably more radical than those raised in the CN trilogy since she sought not simply one-time accommodation but relief from a rotating shift schedule for a period of several years. Before the tribunal, the CBSA acknowledged that family status covered parent-child relationships but argued that it protected only “pure status” (that is, the fact of the relationship) and did not encompass care obligations accompanying that status.<sup>55</sup> In the alternative, it urged a higher burden of proof in family status cases and argued that Johnstone had failed to make out a *prima facie* case. As CN saw it, her childcare problems were personal; they resulted not from the CBSA’s scheduling practices but, rather, from Johnstone’s own life choices.<sup>56</sup> The CHRT was not persuaded. It found that the CBSA’s policy adversely “affected Ms. Johnstone’s employment opportunities including, but not limited to promotion, training, transfer, and benefits on the prohibited ground of family status.”<sup>57</sup> Since the CBSA

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<sup>53</sup> 2013 FC 117 at para 55 [*Seeley FC*].

<sup>54</sup> *Johnstone v Canada Border Services*, 2010 CHRT 20, [2010] CHR D No 20 [*Johnstone CHRT*].

<sup>55</sup> *Ibid* at para 215.

<sup>56</sup> *Ibid* at paras 88, 268.

<sup>57</sup> *Ibid* at para 242.

had taken no steps to accommodate Ms. Johnstone's request for full-time work, a finding of discrimination inevitably followed. In addition, the CHRT found the CBSA's refusal to accommodate "reckless and willful" since the CBSA was the successor employer to the respondent in *Brown* and had clearly failed to implement *Brown*'s systemic order.<sup>58</sup>

The FCA dismissed both appeals, issuing its principal reasons in *Johnstone*. The court confirmed its formal adherence to the *O'Malley* approach, piously rejecting the *Campbell River* test on the ground that there should be no "hierarchies of human rights."<sup>59</sup> However, it then insisted that on a contextual interpretation the term "family status" itself limited the types of childcare obligations that would justify calling on the employer to accommodate. As the court saw it,

[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. As a result, the childcare obligations at issue are those which a parent cannot neglect without engaging his or her legal liability.<sup>60</sup>

The FCA saw this limitation as necessary to avoid "trivializ[ing] 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."<sup>61</sup> The court stated its new test as follows:

[I]n order to make out a *prima facie* case where workplace discrimination on the prohibited ground of family status resulting from childcare obligations is alleged, the individual advancing the claim must show (i) that a child is under his or her care and supervision; (ii) that the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice; (iii) that he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such

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<sup>58</sup> For the history of this refusal, see *ibid* at paras 53-77. To reflect this conduct, the CHRT made an order of special damages. *Ibid* at paras 379-82.

<sup>59</sup> *Canada (Attorney General) v Johnstone*, 2014 FCA 110 at para 81, [2015] 2 FCR 595 [Johnstone FCA]. The Federal Court of Appeal (FCA) also adjusted the remedial orders.

<sup>60</sup> *Ibid* at para 70.

<sup>61</sup> *Ibid* at para 69.

alternative solution is reasonably accessible, and (iv) that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.<sup>62</sup>

The Court found that both Johnstone and Seeley met this test.

While the FCA rejected the *Campbell River* test on the grounds that it created a double standard, its new test is remarkably similar.<sup>63</sup> *Campbell River* required complainants to show a serious interference with a substantial parental (or other family) obligation to make out a *prima facie* case. *Johnstone's* requirement that the family obligation be a legal obligation is arguably even more onerous. In addition, the FCA's insistence that complainants make every reasonable effort to solve their own problems before seeking accommodation from their employers—a requirement that has become known as “self-accommodation”—raises the bar even higher.<sup>64</sup> Despite this, the FCA saw its test as conforming to the prevailing human rights standard.

And, in this, it may well be right. The test clearly bulks up the *O'Malley* requirements. But as Denise Réaume and other scholars have pointed out, this is a phenomenon we have seen more generally in Canadian courts and tribunals.<sup>65</sup> The trend towards assimilating the human rights code concept of discrimination to that under section 15 of the *Canadian Charter of Rights and Freedoms* requires “something more” than mere adverse impact before the burden shifts to the respondent to justify a rule.<sup>66</sup> Réaume is critical of the “something more” requirement, arguing that it distorts the fundamental “architecture” of human rights regulation: “[T]he sophisticated web of exemptions available, varying in

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<sup>62</sup> *Ibid* at para 93.

<sup>63</sup> Federal tribunals have already made this observation. See *Flatt v Treasury Board (Department of Industry)*, 2014 PSLREB 2, 121 CLAS 127 [*Flatt* PSLREB], *aff'd* in *Flatt v Canada (Attorney General)*, 2015 FCA 250, 2016 CanLII 24872, leave to appeal to SCC refused [*Flatt* FCA].

<sup>64</sup> See Lyle Kanee's critique of this requirement in this volume.

<sup>65</sup> Denise Réaume, “Defending the Human Rights Codes from the Charter” (2012) 9 *JL & Equality* 67. See also Benjamin Oliphant, “Prima Facie Discrimination: Is Tranchemontagne Consistent with the Supreme Court of Canada's Human Rights Code Jurisprudence?” (2012) 9 *JL & Equality* 33. This trend is more visible in some Canadian jurisdictions than in others. Notably, the Nova Scotia Court of Appeal specifically rejected a “something more” test in that province as a matter of statutory construction. See *International Association of Firefighters, Local 268 v Adekayode*, 2016 NSCA 6 at paras 70-8, 2015 CLLC 230-025 (NS HRC), *aff'g* on other grounds.

<sup>66</sup> Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

stringency along several dimensions, is best understood as signaling the legislature's intention that the important normative work of determining the scope of liability under the [codes] should be done at the point of considering whatever exemptions may be available to the respondent."<sup>67</sup>

Despite such criticisms, tribunals that reject an explicit higher threshold for family status cases have nevertheless begun to rely on this *Charter*-driven trend to rationalize decisions that come out in very much the same place as *Campbell River* and *Johnstone*. An example is *Misetich v Value Village Stores*, a case involving eldercare in which the Human Rights Tribunal of Ontario (HRTO) rejected both the *Johnstone* and *Campbell River* tests because it saw them as creating a more onerous threshold test for family status discrimination than other grounds.<sup>68</sup> The HRTO distanced itself from *Johnstone*'s requirement that family obligations must amount to legal obligations to be relevant to discrimination analysis; as the HRTO put it, "[t]here may be many obligations that caregivers have that may not emanate from their legal responsibilities, but are still essential to the parent/child relationship."<sup>69</sup> It likewise repudiated the concept of "self-accommodation."<sup>70</sup> In developing its own test, however, the HRTO accepted the need to prove more than mere negative impact linked to a prohibited ground to make out a *prima facie* case: "The negative impact must result in real disadvantage to the parent/child relationship and the responsibilities that flow from that relationship, and/or to the employee's work."<sup>71</sup> While the HRTO emphasized that the impact assessment must be done contextually, it saw the nature of the impact and the question of whether the complainant had other supports available as relevant to whether there was *prima facie* discrimination. Although the HRTO insisted that considering other available supports is qualitatively different than "self-accommodation," in practical terms, the test operates much like the *Johnstone* test to increase the burden on complainants seeking to establish a *prima facie* case.<sup>72</sup>

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<sup>67</sup> Réaume, *supra* note 65 at 69.

<sup>68</sup> *Misetich v Value Village Stores Inc*, 2016 HRTO 1229, 2016 HRTO 1641 at paras 42-8, request for consideration refused.

<sup>69</sup> *Ibid* at para 46. The Human Rights Tribunal of Ontario (HRTO) expressed concern that a test that turned on legal obligations alone was inappropriate for eldercare cases, where legal responsibilities were not so likely to be at issue. *Ibid* at paras 46-7.

<sup>70</sup> *Ibid* at para 48.

<sup>71</sup> *Ibid* at para 54.

<sup>72</sup> *Ibid* at para 56.



#### IV. THE GENDERED IMPACT OF HIGH THRESHOLDS

Family status jurisprudence is clearly converging on a high threshold test for *prima facie* discrimination. Regardless of how the threshold is articulated, however, employees with trivial complaints do not get through the front door. Employees who have not made bona fide efforts to find their own childcare are not likely to succeed, whether or not their failure to do so is labelled “self-accommodation.” Employees lose their cases if altering or bending the workplace rule at issue would pose a genuine hardship to the employer. So do higher thresholds really make a meaningful difference to case outcomes? Why do employers fight so hard for high threshold tests to stop these claims? Are the consequences of high thresholds more than merely procedural?

The answer is clearly yes. Bulking up the content of the *prima facie* case increases the odds that employers will be shielded from having to justify their workplace practices.<sup>73</sup> Employers argue against low *prima facie* thresholds on the ground that they will be forced to expend resources on defending against “trivial” complaints. But, in fact, it is the opposite of “triviality” they are really concerned about. What strikes fear into the heart of employers is the pervasiveness and seriousness of the problem of reconciling work and family care obligations within workplaces in which we have normalized working conditions that place extraordinary pressures on family life—or, to use the language of *O'Malley*, imposed adverse effects on the ground of family status. As one arbitrator frankly acknowledged, “[o]n a basic level, attendance at work interferes with family obligations.”<sup>74</sup> However, instead of following this reasoning to its logical conclusion that such rules constitute *prima facie* discrimination on the basis of family status, adjudicators insist that it is simply “untenable” to “accept[] the proposition that any employer action, which has a negative impact on a family or parental obligation, is *prima facie* discriminatory.”<sup>75</sup> Arbitrators express concern that “[t]o find discrimination in every ... circumstance of adverse effect would freeze the employer’s ability to act to meet its economic needs as virtually every action could have some negative effect on the parental duties of one employee or another.”<sup>76</sup> These

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<sup>73</sup> See Réaume, *supra* note 65; Oliphant, *supra* note 65. See also Dianne Pothier, “Tackling Disability Discrimination at Work: Toward a Systemic Approach” (2010) 4:1 McGill JL & Health 17.

<sup>74</sup> *Siemens Milltronics Process Instruments Inc v Employees Association of Milltronics*, 225 LAC (4th) 354 at para 64, 112 CLAS 325 (Ontario Arbitration) Arbitrator John Stout.

<sup>75</sup> *Ibid.*

<sup>76</sup> *International Brotherhood of Electrical Workers, Local 636 v Power Stream Inc. (Bender Grievance)*, [2009] OLAA No 447 at para 56, 186 LAC (4th) 180 (Ontario

comments echo the *Campbell River* prediction that “disruption and great mischief” in the workplace will follow if employers are forced to respond to the exigencies of family life.<sup>77</sup>

This preoccupation with potential “floodgates” problems is warranted if the goal is to shore up the walls of the male breadwinner workplace. From that perspective, interpretive strategies that impede complainants make sense. But, as we have seen, the efforts of adjudicators to place limits on the concept of family status turn on formalistic distinctions and bright-line tests—“something mores”—which bear little or no relationship to the equality-promoting goals of human rights legislation. And they ignore almost completely the gendered core of the discrimination issue inherent in the work-family conflict. In early cases such as *Brown* and *Hoyt*, the CHRT recognized the nexus between gender and family status discrimination because direct sex discrimination had tainted employer decisions to refuse to accommodate the complainants’ childcare responsibilities. By the time we reach the railway trilogy—*Seeley, Richards v Canadian National Railway*, and *Whyte v Canadian National Railway*—the gendered nature of the clash between the complainants’ needs and formal work requirements has become almost entirely invisible in the reasoning of the adjudicators. It is obvious that the employer’s vigorous resistance to applying its accommodation policy to childcare issues was rooted in its traditional attitudes to women in the workplace. However, the decisions make no reference to CN’s long history of discriminatory employment practices; indeed, they make scant reference even to *Hoyt*, in which CN had previously been found liable for failure to accommodate childcare needs.<sup>78</sup> Likewise in *Johnstone*, the adjudicators acknowledged the CBSA’s history as a recidivist employer by ordering special damages, but they do not comment on the gendered roots of that history, which are very evident in *Brown*.

Adjudicators would get more quickly to the gendered heart of the family care issue if they took gender into account in approaching the real-life problems embedded in family status claims. A rare example of this approach is *Communications Energy and Paperworkers Union, Local 707 v SMS Equipment*, in which Arbitrator Lyle Kanee upheld the grievance

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Arbitration) Arbitrator Norm Jesin [*Power Stream*]. See also *Alberta (Solicitor General) v AUPE* (2010), 192 LAC (4th) 97, 101 CLAS 8 (Alberta Arbitration) Arbitration Chair Allen Ponak.

<sup>77</sup> *Campbell River CA*, *supra* note 26 at para 38.

<sup>78</sup> See *CN v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114, 40 DLR (4th) 193, in which the Supreme Court of Canada upheld a path-breaking CHRT decision holding CN liable for systemic sex discrimination in hiring and promotion practices and ordering it to hire a woman for at least one in every four “non-traditional” vacancies until female representation reached the 13 percent national average.

of a mother who sought a day shift in order to manage the social and economic costs of work and family life.<sup>79</sup> As described by the arbitrator, the grievor was “the single mother of two children under the age of six, with no childcare support from the children’s fathers or any other family members. She is working in a non-traditional job (female welder) on a non-traditional shift in a non-traditional pattern (rotating).”<sup>80</sup> Kanee’s decision provides a detailed account of the real-life challenges faced by the grievor—her attempts to balance the costs of daytime care for her young children with her own need for sleep, her anxiety about leaving them in third-party care for up to twenty hours a day for seven straight days, her desire to spend at least some personal time with them, and the unmanageable cost of paying for childcare both for days while she slept and nights while she worked.

Assisted by expert evidence, the arbitrator placed the grievor’s personal situation in the broader context of the disadvantaged position of women in the workforce and the disproportionate impact of work-family conflict on single mothers. To the employer’s argument that the grievor’s burdens were the result of her personal choices, and that she could have done more to “self-accommodate,” the arbitrator expressed the view that “self-accommodation” efforts are relevant only at the stage of determining reasonable accommodation.<sup>81</sup> He found a *prima facie* case of family status discrimination, and, in the absence of evidence that the employer’s rotating shift requirement was a bona fide occupational qualification, he allowed the grievance.

In sharp contrast is *International Brotherhood of Electrical Workers, Local 636 v Power Stream (Bender Grievance)*.<sup>82</sup> This arbitration decision is frequently, but wrongly, cited as a model of contextual analysis.<sup>83</sup> The grievances involved were filed by four male linemen challenging a change in shift-scheduling policy that required four ten-hour shifts per week instead of allowing workers to opt for five eight-hour shifts. For the grievors, a shorter working day had allowed for better integration of work and family obligations. The employer resisted their requests for accommodation, citing various inefficiencies and inconveniences

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<sup>79</sup> *Communications, Energy, and Paperworkers Union, Local 707 v SMS Equipment Inc* (2013), 238 LAC (4th) 371, 116 CLAS 285 (Alberta Arbitration), aff’d in 2015 ABQB 162 Arbitrator Lyle Kanee [SMS].

<sup>80</sup> *Ibid* at para 62.

<sup>81</sup> *Ibid* at para 69.

<sup>82</sup> *Power Stream*, *supra* note 76.

<sup>83</sup> See e.g. *Seeley FC*, *supra* note 53 at para 81. See also *Johnstone FCA*, *supra* note 59 at para 72; *Flatt PSLREB*, *supra* note 63 at para 173.

associated with offering employees a choice of shift schedules but acknowledging that it had no “undue hardship” defence.<sup>84</sup> One grievor succeeded in establishing a *prima facie* case of family status discrimination. He owed his success to the fact that his “carefully crafted” childcare arrangements were the subject of a joint-custody agreement with his wife. Under his prior eight-hour schedule, he could take the children to and from daycare when he had custody; under his new ten-hour schedule, he could not. The arbitrator was persuaded that the prior arrangement was “in the best interest of not only [the separated spouses], but their children as well.”<sup>85</sup> He rejected the employer’s submissions that the grievor could have self-accommodated.<sup>86</sup> So far, so good.

The other grievors, however, got less sympathetic treatment, although the evidence suggests that their childcare arrangements were just as “carefully crafted.” Two were married; in both cases, their wives stepped in to take over the childcare duties their husbands were no longer able to perform because of the schedule change—one by leaving her job and the other by taking on additional domestic duties on top of a full-time job. The arbitrator dismissed these grievances, noting that the grievors had “been able to fulfill their parental obligations by rearranging duties with their spouses. That is what families do every day.”<sup>87</sup> The gender implications of such solutions are self-evident since the costs of this “self-accommodation,” in lost work opportunities and increased domestic burdens, would therefore be imposed on the women in the family. Of course, the arbitrator is correct to observe that solutions like this are what “families do every day”; they may be the best available in a gender-unequal world in which women’s earning power is less than men’s. But such solutions exacerbate gender inequality, while letting employers completely off the hook.

We see a similar absence of gender-sensitive analysis in the treatment accorded to the fourth grievor, the father of sons aged thirteen and sixteen. He testified that the longer working day made it more difficult and more exhausting to manage his household responsibilities as a single parent, such as “grocery shopping, making dinner and keeping the house clean.”<sup>88</sup> In addition, the change prevented him from getting home on time to coach

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<sup>84</sup> *Power Stream*, *supra* note 76 at para 8.

<sup>85</sup> *Ibid* at para 67.

<sup>86</sup> *Ibid* at para 69: the grievor had “arranged his life to accommodate the previous schedule and he should not have been required to accommodate the new schedule in the manner suggested to deal with his substantial parental obligations without an inquiry as to whether the Employer could accommodate him.”

<sup>87</sup> *Ibid* at para 64.

<sup>88</sup> *Ibid* at para 23.

his sons' sporting events.<sup>89</sup> The arbitrator dismissed these realities as a "fact of life" for working parents and, therefore, irrelevant to a claim of discrimination.<sup>90</sup> If these "facts of life" had been assessed through a gender lens, the grievor's dilemma would have been understood within the broader context of the vulnerability of single parents, which is an artefact of gender inequality regardless of the gender of any individual single parent. Through a gender lens, the arbitrator would have seen that changes in work schedules and increases in the length of the working day have a differential adverse impact on single parents, which directly affects their ability to fulfill their family responsibilities. A gender lens might even reveal that parental participation in sports and other supplementary activities may be more fundamental to the parenting of children who live in a single-parent family. From a gender perspective, it is not unreasonable to call upon the employer for evidence that the new scheduling practice met the *Meiorin* test of business justification and that the grievor's needs could not be accommodated short of undue hardship.

An even starker example of the erasure of gender is the most recent Federal Court venture into the family status arena, *Flatt v Canada (Attorney General)*.<sup>91</sup> The case involved a request by Laura Flatt, a federal public servant, to "telework" (that is, work from home) as an accommodation to facilitate breast-feeding. When Flatt's request was refused, she filed a grievance alleging discrimination on grounds of sex and family status. In apparent ignorance of decades of feminist scholarship on the concept of intersectionality, the Public Service Labour Relations and Employment Board (PSLREB) placed "sex" and "family status" in watertight compartments. As the PSLREB saw it, breast-feeding is only a mechanism for "establishing a solid nourishing and nurturing bond between an infant and his or her mother"; these are components of the parent-child relationship, an issue of family status rather than sex.<sup>92</sup> Furthermore, the PSLREB expressed the view that breast-feeding is one mechanism among many and women are not obligated to choose it. Requiring accommodation for breast-feeding would "denigrate" [*sic*] the nurturance choices of women who did not opt to breast-feed or who weaned their children early in order to return to work.<sup>93</sup> The FCA likewise saw breast-feeding as a choice by Flatt that the employer had no obligation

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<sup>89</sup> *Ibid* at para 20.

<sup>90</sup> *Ibid* at para 65.

<sup>91</sup> *Flatt* FCA, *supra* note 63.

<sup>92</sup> *Flatt* PSLREB, *supra* note 63 at paras 156-7.

<sup>93</sup> *Ibid* at para 154.

to support.<sup>94</sup> As the court saw it, a choice to breast-feed would trigger a duty to accommodate only if there were some special medical reasons for that choice, in which case the onus would fall on the mother to establish such a reason as part of her *prima facie* case.<sup>95</sup>

The PSLREB made clear its strong preference for a high *prima facie* threshold in family status cases. It was influenced by “floodgate” concerns similar to those we have seen animating the arbitration cases; if Flatt’s choice to breast-feed was indulged, other choices would have to be indulged as well. The consequence would be managerial chaos: “Given the almost infinite variety of the modern family, the result could be the Balkanization of the workplace as each employee established his or her own personal accommodation tailored to his or her own family situation.”<sup>96</sup> But the PSLREB was equally influenced—as was the reviewing court—by a perception that the complainant sought to have her cake and eat it too: to give her child the benefits of breast-feeding and, at the same time, maintain a full-time job. The court did not disapprove of Flatt’s choice to breast-feed; on the contrary, the court went out of its way to express support.<sup>97</sup> However, it was not prepared to accord equal respect to the grievor’s choice to seek conditions in which she could combine breast-feeding with a full-time job. As the court saw it, “[t]his case is not about that choice [to breast-feed] but rather about the difficulties of balancing motherhood and career. It is about balancing the rights of mothers and that of employers having regard to the basic principle that one must be at work to get paid.” The clear implication is that breast-feeding is a choice best made by “stay-at-home” mothers: “In the case of breastfeeding, the onus is on the working-outside-the home mothers to make a *prima facie* case of discrimination.”<sup>98</sup>

Much of the case law assumes a clear distinction between obligations and choices. Impediments to fulfilling obligations may attract relief under human rights law, but the indulgence of mere choices will not. In fact, the distinction is frequently far from clear. Virtually every decision about fulfilling the core obligations that accompany the parent-child

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<sup>94</sup> Troublingly, both the Public Service Labour Relations and Employment Board (PSLREB) and the FCA took the view urged on them by counsel for the employer and Flatt that the *Johnstone* test would apply to these facts regardless of whether the complaint was treated as sex or family status discrimination. See *Flatt* FCA, *supra* note 63 at paras 27, 32. If this suggests a common view that a high threshold is appropriate in cases involving family care regardless of how they are framed, there is no authority for such a proposition.

<sup>95</sup> *Ibid* at para 33.

<sup>96</sup> *Flatt* PSLREB, *supra* note 63 at para 172.

<sup>97</sup> *Flatt* FCA, *supra* note 63 at para 38.

<sup>98</sup> *Ibid*.

relationship—providing healthy nutrition, safe shelter, responsible supervision, good education—involve choices, at the very least about means. What is really at issue here is the extent to which women will be allowed the autonomy to make their own choices about how to fulfill their care obligations and still maintain good jobs. Diana Majury captures that double-edged quality of women’s choices within the social and economic constraints of an unequal society:

Choice limited by the context of inequality; coercion labelled as choice; choice restricted by access to money, resources, and education; qualified choice as part of a struggle for emancipation—these are women’s choices. There is no unqualified choice and the extent to which such choice is assumed is the extent to which equality is similarly assumed and inequality is therefore rendered invisible and unchallengeable.<sup>99</sup>

And both edges of the “choice” sword are made sharper for working women by the power imbalance inherent in the employment relationship. In the context of current family status jurisprudence, choice is doubly penalized. Women who make choices that conflict with the preferences of their employers are denied accommodation because they have failed to exhaust care options that mesh more readily with existing work rules. Within the constraints imposed by gender inequality, however, such options frequently reinforce traditional gender roles within families. They leave women “self-accommodated” in substandard jobs for which they will pay in current salary and benefits, in future income and promotional opportunities, and, lifelong, in the form of retirement benefits linked to labour force participation.

The emphasis on choice is really an argument about causation. If employer choices about work organization and work rules are regarded as immutable, then clashes between work and family are logically seen as caused not by the rules themselves but, rather, by employee lifestyle choices—to be a single parent, to have children (and how many), to use professional daycare instead of ad hoc arrangements with family, friends, and neighbours, to refuse the nanny option, to live in a small town rather than a big city. But if workplace structures are understood as contingent—

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<sup>99</sup> Diana Majury, “Women are Themselves to Blame: Choice as a Justification for Unequal Treatment” in Fay Faraday, Margaret Denike & M Kate Stephenson, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 209 at 218.

as choices made by employers with the unencumbered worker in mind—we would see the issue of causation quite differently. We would be much more likely to interrogate family-hostile working conditions like those that prevail in the railways and the CBSA. We would certainly be quicker to question if it is really necessary to a thriving economy to organize work around the gendered and obsolete assumption that workers come without family responsibilities.

We do ask such questions when we apply the *Meiorin* test, requiring employers to justify their employment practices against the standard of reasonable business necessity and to demonstrate that even where that standard is met, they have genuinely explored whether it is possible to be flexible for workers disadvantaged by those practices because of family care responsibilities. However, employers are not put to the *Meiorin* test unless the claimant can make out a *prima facie* case. Where *prima facie* thresholds are high, employers rarely find their arrangements questioned. If thresholds were lower—as under *O'Malley*—employers might well find themselves litigating in a climate in which the only real issue was the *Meiorin* test and the duty to accommodate. Outcomes would almost certainly be very different.

## V. CONCLUSION

To date, the family status case law has largely accepted a conception of a “normal” workplace that does not seriously question the employer’s right to establish workplace rules and structures without regard to the exigencies of family life. Workers whose needs clash with these rules and structures are positioned as deviant; the message is that “normal” workers fit into the “normal” workplace. The reality is different. As many adjudicators have frankly conceded, the so-called “normal” workplace” is often deeply hostile to family life. Ironically, it is this reality that drives the concern that the floodgates will open if employers are put to the proof that workplace rules and practices that interfere with the routine demands of family life are truly bona fide occupational requirements—in other words, that they are truly necessary to the running of their businesses.

In addition, most current jurisprudence has ignored the deep roots of the family care issue in an ideology of women’s economic, social, and cultural subordination. It turns on the casual acceptance of a legal requirement that before employers can be asked to change, or even to bend their rules, employees themselves must do their best to “self-accommodate,” despite the fact that the available alternatives impose gendered costs and deepen women’s inequality. The male breadwinner/female homemaker world is now long gone. But until employers are put to the proof that it is truly a business necessity to require



working parents to shape their lives around work rules generated in that world, women must continue to compromise income, promotional opportunities, and benefits to meet their family care obligations. They must continue to make “choices” that impose a high price not just on themselves but also on the (mostly female) family members who step in to deal with childcare problems and emergencies and on women of the global south who constitute the “nanny option” for middle-class Canadian women.<sup>100</sup> These are serious consequences—for women, for families and family relationships, and for society as a whole.

Given the radical challenge that family status claims pose to the workplace status quo, the practical results reflected in family status cases have been remarkable. They have gone at least some distance towards forcing employers to acknowledge social reproduction as a cost of doing business and requiring them to internalize some of that cost.<sup>101</sup> The successful cases, however, have focused almost entirely on individual accommodation rather than on systemic change. They involve less typical situations: single parents, women in non-traditional jobs, children with special needs, and workers on unpredictable rotating shifts, rather than the routine jobs and routine crises of family life for working parents.<sup>102</sup> The frequently modest and temporary accommodations granted by adjudicators do not contest the fundamental right of employers to call the shots without regard to employee needs and aspirations. And, as we know from *Seeley* and *Johnstone*, and *Brown* and *Hoyt* before them, individual successes do not readily translate into systemic change in the face of employer determination to keep the workplace free of “encumbered” workers.

Does this mean that we should declare the “family status” experiment a failure? Have we reached the limits of the gender equality gains that can be achieved by continuing to litigate family status discrimination claims? Law and litigation have always been limited tools for social change, and reactive litigation is unlikely to be the most effective way to get at the deeply embedded problems posed by the twenty-first-century family care problem. Proactive measures have a role to play here; legislation and other public policy measures are more likely to take us directly to the heart of

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<sup>100</sup> See Shirley Lin, “‘And Ain’t I a Woman?’: Feminism, Immigrant Caregivers, and New Frontiers for Equality” (2016) 39 Harv JL & Gender 67.

<sup>101</sup> See Lisa Phillips, “There’s Only One Worker: Toward the Legal Integration of Paid Employment and Unpaid Caregiving” in Law Commission of Canada, ed, *New Perspectives on the Public-Private Divide* (Vancouver: UBC Press, 2003) 3.

<sup>102</sup> Even in the *SMS Communications* case, the arbitrator is careful to emphasize that the circumstances in which the grievor found herself “are not the circumstances of ‘ordinary’ working parents.” *SMS*, *supra* note 79 at para 62.

the problem. It is beyond the scope of this article to canvass all available options. One policy solution worth considering, however, is imposing a free-standing pro-active duty on employers to review and revise family-hostile work practices, a duty that starts from the premise that family care is a “cost of production,” for which employers as well as employees have responsibility, and does not depend on proof that the individual work rules have inflicted damage on individual women.

But, meanwhile, there is also room for litigation. The Canadian experiment with family status discrimination is still a work in progress, reflecting not only the limitations of litigation but also its possibilities. We should not discount the benefits of individual accommodation, even if the realities of the litigation model mean that those benefits are available almost exclusively to women fortunate enough to hold relatively good jobs, typically in unionized workplaces, with access to the resources for effective litigation. And there remain litigation possibilities that have not been fully exploited. More could be done with intersectional analysis. If the comfortably gender-neutral ring of the term “family status” has masked the gendered nature of the family care issue, offering evidence and framing arguments that force employers and adjudicators to confront the impact of their decisions on women might well improve outcomes. In addition, more could be done to challenge employer practices of direct/intentional discrimination. Entrenched and gendered attitudes to the relationship between work and family clearly lay at the heart of the earlier cases in which employers treated requests for family care accommodation with scarcely veiled—or even open—contempt. Those entrenched attitudes have not disappeared, and there continues to be evidence of employer accommodation policies that are tainted by prejudice and stereotyping. Employer refusals to acknowledge family care issues as human rights issues, such as we saw in both the *Johnstone* and railway cases, should be treated as direct discrimination—the low-hanging fruit for equality litigation—which has much more difficulty passing the *Meiorin* test.

Even more promising outcomes can be expected if resources are assembled to launch systemic complaints. The high *prima facie* thresholds that have been such an obstacle to reaching the core issues are clearly designed only with individual claims in mind. Systemic cases would offer opportunities to devise new tests, which could not logically turn on concepts like self-accommodation. Furthermore, within a systemic model, we could seek much more effective remedies. For individual claims, accommodation in the form of “bending” or “waiving” the rules almost inevitably presents itself as the preferred solution when work rules impede a worker’s ability to manage both work and family obligations. But “accommodation talk” risks reinforcing the false perception that “normal”

workers do not experience work/family conflict.<sup>103</sup> The better approach—and the one most consistent with *Meiorin*—is to think of individual accommodation as the solution only where systemic measures fail. To be compliant with *Meiorin*, work rules must first pass a test of business necessity. Justice Beverley McLachlin could not have made that any clearer when she stated that to pass that test flexibility must be built right into the rules, unless flexibility would itself produce undue hardship.<sup>104</sup> If adjudicators took this injunction seriously, many routine workplace rules would not survive.

High *prima facie* thresholds in family status cases operate as a bulwark against the erosion of employer power to keep family care issues out of the workplace. They stack the deck in favour of employers by permitting them to evade the *Meiorin* test, avoiding serious challenge on the key questions of whether family-hostile and inflexible work rules are really necessary. If they are demonstrably necessary, they will remain in place under the *Meiorin* test. If accommodation is really a hardship, it will not be ordered. But, as the law is currently being applied, we reach those questions only in exceptional cases. In a country constitutionally committed to the principle of gender equality, this is not good enough.

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<sup>103</sup> Shelagh Day & Gwen Brodsky, “The Duty to Accommodate: Who Will Benefit?” (1996) 75 Can Bar Rev 433 at 462, quoted with approval by McLachlin J in *Meiorin*, *supra* note 23 at para 41. See also Gwen Brodsky, Shelagh Day & Yvonne Peters, *Accommodation in the 21st Century* (March 2012), online: Canadian Human Rights Commission <[http://www.chrc-ccdp.gc.ca/proactive\\_initiatives/default-eng.aspx](http://www.chrc-ccdp.gc.ca/proactive_initiatives/default-eng.aspx)>.

<sup>104</sup> *Meiorin*, *supra* note 23 at paras 66-8. Brodsky, Day & Peters, *supra* note 103 at 10, calls this the “big idea” inherent in the *Meiorin* test: “Accommodation is not only tinkering, for individuals; it is systemic. It is not only after-the-fact; it is proactive. Therein lies the big idea of accommodation, and the transformative promise of *Meiorin*.”