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Accommodating Family Responsibilities in the Workplace

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I. INTRODUCTION

Although "family status" is included as a protected ground in human rights statutes in almost all jurisdictions in Canada, it has received relatively little attention as compared to other grounds of discrimination such as sex, disability, race and sexual orientation.[1] However, family status has received increasing legal attention in recent years due to heightened public concern over the balancing of work and family responsibilities. Shifts in family composition and demographics, together with the ongoing erosion of state-funded programs such as daycare, have led to increased pressure on employees who increasingly have to juggle caregiving and employment responsibilities.

However, as with other accommodation claims, claims to discrimination based on family status require a careful balancing of employee and employer interests to permit employees to meet family responsibilities without causing undue hardship to employers. As described below, the legal analysis of the accommodation of family responsibilities in Canada remains in the early stages of development. Two conflicting approaches can be found in the caselaw as to the test to be applied at the *prima facie* case step of the discrimination analysis. The first approach would require employees to demonstrate a serious interference with a substantial family obligation. The second approach considers the first

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[1] *Canadian Human Rights Act*, ss. 3(1), 7, and 10; British Columbia *Human Rights Code*, s. 13(1); Alberta *Human Rights, Citizenship and Multiculturalism Act*, s. 7(1); Saskatchewan *Human Rights Code* s. 16(1); Manitoba *Human Rights Code* s. 9; Ontario *Human Rights Code* s. 5(1); Nova Scotia *Human Rights Act*, s. 5(1)(h); Prince Edward Island *Human Rights Act*, s. 6(1); Newfoundland and Labrador *Human Rights Code*, s. 9; Yukon *Human Rights Act*, s. 7(e); *Northwest Territories Human Rights Act*, s. 7(1); Nunavut *Human Rights Act*, s. 7. Quebec's *Charter of Human Rights and Freedoms* protects against discrimination based on "civil status" and " social condition". New Brunswick's *Human Rights Act* protects against discrimination based on "social condition". The protections in the latter two provinces may or may not include protection from discrimination based on family status.

approach overly restrictive and seeks to analyse family status discrimination as other grounds of discrimination, without the higher threshold at the first step. Most claims to date have failed at the first step of the discrimination analysis without proceeding to the accommodation step. Therefore the caselaw on the accommodation of family responsibilities remains largely undeveloped.

This article reviews the two approaches to the *prima facie* discrimination step found in the caselaw on family status. Following this, it draws on the accommodation analysis applied to other grounds of discrimination to identify principles to be applied to various issues related to the accommodation of family responsibilities in the workplace.

II. DEFINITION OF FAMILY STATUS

Many provincial statutes do not define "family status". Most of the statutes that do define the term define it to mean"the status of being in a parent and child relationship".[2] However, in accordance with the broad and purposive approach used for the interpretation of human rights statutes, tribunals and courts have interpreted family status to cover non-biological parent and child relationships (e.g adoptive parental relationships). Also, some courts and tribunals have held that family status protections should apply to persons who act in the position of a parent to a child, whether or not they are in fact a parent (e.g. legal guardians).[3] The ground of family status may also cover elder care relationships – that is, relationships between adult children and individuals who stand in a parental relationship to them.[4]

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[2] Ontario *Human Rights Code*, s. 10(1); Saskatchewan *Human Rights Code*, s. (2.1)(h.1) [the Code further defines "child" and "parent"); Nova Scotia *Human Rights Act*, s. 3(h); Newfoundland and Labrador *Human Rights Code*, s. 2(e.1) [the Code further defines "child"]. Nunavut's *Human Rights Act* defines "family status" to mean "the status of being related to another person by blood, marriage or adoption".

[3] *York Condominium Corp. No. 216 v. Dudnik (No. 2)* (1990), 12 C.H.R.R. D/325 at para. 165, aff'd (1991), 14 C.H.R.R. D/406 (Ont. Div. Ct.).

[4] See: Ontario Human Rights Commission, "Policy and Guidelines on Discrimination Because of Family Status" (March 2007) at p. 10.

III. EVOLUTION IN CLAIMS AND FRAMEWORK OF ANALYSIS

A. Emerging Claims for the Accommodation of Family Responsibilities

The bulk of older family status cases, and also some of the more recent cases, deal with issues such as the unequal distribution of benefits, anti-nepotism policies, or the failure to recognize certain types of family relationships (e.g. same-sex relationships). There also exists a large body of caselaw dealing with the treatment of pregnancy in the workplace.[5]

More recent caselaw has accepted that protections against family status discrimination would include protections against discrimination in relation to an individual's family responsibilities.[6] Over the past several years, an increasing number of family status discrimination claims seek accommodations which would permit employees to balance work and family responsibilities. Frequently, workplace policies, practices and culture do not take into account employees' caregiving responsibilities. Many workplaces are still built around the assumption that employees are members of families composed of two persons, one of whom provides all necessary caregiving for children, elders, and other family members. For this reason, an increasing number of family status cases involve employees' requests for workplace accommodations that would permit them to fulfill caregiving responsibilities, especially towards children.

Below are some examples of policies and circumstances that may give rise to claims of discrimination based on family status:

i. Absenteeism policies - when rigid attendance management programs

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[5] In *Brooks v. Canada Safeway*, [1989] 1 S.C.R. 1219, the Supreme Court of Canada recognized pregnancy-related discrimination as sex discrimination, but it could also be analyzed as family status discrimination.

[6] *Health Sciences Association of British Columbia v. Campbell River and North Island Transition Society* (2004), 240 D.L.R. (4th) 479 (C.A.) ["*Campbell River*"].

and absenteeism policies do not accommodate the needs of persons with various types of caregiving responsibilities;

ii. Leaves of Absence - when an employer provides paid or unpaid leaves for employees with needs related to disability, pregnancy, creed or other reasons but denies such leaves to employees with caregiving responsibilities;

iii. Work schedules and overtime - when an employer refuses to rearrange work and overtime schedules to accommodate employees with caregiving responsibilities;

iv. Travel requirements - when an employer requires an employee to travel or relocate for work without any accommodation for caregiving responsibilities; and

v. Work-related entitlements - when discrepancies in the treatment of full and part-time employees in regards to certain entitlements (e.g. seniority accrual) has an adverse impact on employees who are forced to work part-time due to caregiving responsibilities.

All of these matters raise complex questions concerning the balancing of work and family obligations and the obligations of employees and employers in this process.

B. Framework of Analysis

It is commonly accepted in the caselaw that the traditional human analysis applies to family status cases. The first step requires the complainant to demonstrate a *prima facie*

case of discrimination.[7] If the complainant is successful at establishing a *prima facie* case of discrimination, the onus shifts to the employer to demonstrate a *bona fide* occupational requirement (BFOR). As part of the BFOR analysis, the employer must demonstrate that it has accommodated the employee up to the point of undue hardship.[8]

This framework of analysis has been widely accepted in the caselaw. The divergence between cases has turned on the relative emphasis placed on each the two steps. One line of cases has placed emphasis on the *prima facie* discrimination step. These cases have set a relatively high threshold at this initial step. The decision-makers in this line of cases often do not ever reach the BFOR/accommodation step of the analysis as many of cases fail at the first step.

Some other cases have critiqued the analysis used in the first series of cases. In particular, this second set of cases has critiqued the high threshold placed at the first step. Courts and tribunals in this second set of cases have called attention to the apparent conflation of the *prima facie* discrimination and BFOR/reasonable accommodation steps in the first line of cases. Adjudicators in the second set of cases have critiqued the tendency for courts and tribunals in the first line of cases to take into account factors that may be more appropriately taken into account at the reasonable accommodation step of the analysis. Both of these approaches are reviewed in the following sections.

IV. First Hurdle: Establishing a *prima facie* Case of Discrimination

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[7] A complainant does not have to demonstrate membership in a disadvantaged group. As the Supreme Court of Canada stated in *B. v. Ontario, ibid*. at p. 429: "It is a misconception to require the complainant to demonstrate membership in an identifiable group made up of only those suffering the particular manifestation of the discrimination. It is sufficient that the individual experience differential treatment on the basis of an irrelevant personal characteristic that is enumerated in the grounds provided in the Code." Therefore, courts and other decision-makers have not applied the s.15 analysis from *Law v. Canada* to family status discrimination claims.

[8] *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)*, [1999] 3 S.C.R. 3 ["*Meiorin*"]

A. *Campbell River* and Similar Cases

A pivotal and frequently cited decision on the accommodation of family responsibilities in the workplace is the British Columbia Court of Appeal's decision in *Health Sciences Association of British Columbia v. Campbell River and North Island Transition Society* ("*Campbell River*").[9] The grievor in the case claimed that her employer discriminated against her on the basis of family status by changing her work schedule in a way that prevented her from providing after-school care to her psychologically disabled son. The arbitrator dismissed the grievance. He ruled that protections against family status discrimination only dealt with the status of being a parent and child, not with family responsibilities such as child care arrangements. The British Columbia Court of Appeal quashed the arbitrator's decision. It ruled that the union had established a *prima facie* case of discrimination and remitted the grievance to arbitration for a determination of the employer's duty to accommodate.

The Court of Appeal in *Campbell River* held that the definition of family status encompassed family responsibilities. However, the Court rejected the approach taken in previous cases[10] which had accepted that *any* conflict between a work requirement and family responsibilities would constitute a *prima facie* case of discrimination. The Court rejected this approach as unworkable. It held that a *prima facie* case of discrimination would only be 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.[11]

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9 *Supra* note 7.

10 *Brown v. Department of National Revenue (Customs and Excise)*, [1993] C.H.R.D. No. 7; *Woiden v. Lynn*, [2002] C.H.R.D. No. 18.

11 *Ibid.* at para. 39 [emphasis added]. It is unclear whether the Court intended to establish a requirement that the discrimination arise from a change in a term or condition of employment imposed by the employer. It is possible that it used this wording only because it reflected the facts before it – i.e. the

The Court added 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."[12] Notwithstanding this caution, the Court ruled that the grievor in the case did establish that she had a "substantial parental obligation" to care for her psychologically disabled son and that the change in her work schedule did constitute a "serious interference" with that obligation.

The decision in *Campbell River* opened the door for an expansion of the parameters of family status discrimination to include cases involving conflicts between work rules and family responsibilities. However, the Court set a relatively high threshold that employees would have to meet to establish *prima facie* discrimination before a decision-maker will go on to consider whether an employer has established a BFOR, including meeting its duty to accommodate.

The British Columbia Court of Appeal's analysis in *Campbell River* has been followed by arbitrators and human rights tribunals in several subsequent cases. In almost every decision applying the *Campbell River* analysis, decision-makers have dismissed the grievance/complaint at the first step of the analysis. The following employee claims have been found to fail at the *prima facie* discrimination step, as they were found not to involve a serious interference with substantial family obligations:

- A mother's request for an extension of her parental leave because she was unable to find daycare for her son. (*Evans v. UBC*)[13]

- A mother's challenge to her dismissal which was motivated in part by the fact

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scheduling change it was dealing with was imposed by the employer. Many cases that have applied the *Campbell River* approach have not treated this part of the decision as a necessary requirement to establish *prima facie* discrimination.

12 *Ibid.*

13 [2007] B.C.H.R.T.D. No. 348 upheld on judicial review [2008] B.C.J. No. 1453 (S.C.).

that she began working part-time to spend more time with her young children. The Court found that she had been wrongfully dismissed, but refused to award *Wallace* damages for the alleged family status discrimination. (*Stuart v. Navigata*)[14]

- A father's exclusion from an employment competition because he was unable to report regularly to the employer's Halifax office. He was unable to report to the office because he lived with his partner and her son in St. John and had joint custody of two sons from his previous marriage. The arbitrator held that the grievor's conflict arose from "everyday marital and family commitments" and that his inability to relocate was due to his own personal choice. According to the arbitrator, the grievor could have moved and commuted periodically at his own cost. (*Canadian Staff Union v. CUPE*)[15]

- A mother's request to work half-time upon her return from maternity leave in order to breast feed her baby. The arbitrator noted that the grievor's child was in good health and progressing normally. He stated that, if he had found *prima facie* discrimination in the case, the same finding would have to be made for every mother denied the option of working part-time after her maternity leave, subject only to the employer showing undue hardship. (*Coast Mountain School District No. 82 v. British Columbia Teachers' Federation*)[16]

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[14] [2007] B.C.J. No. 662 (S.C.)

[15] [2006] N.A.L.A.A, No. 15 (Christie). The Arbitrator noted that, had he found *prima facie* discrimination, he would have concluded that the employer could have granted the grievor's request to work from St. John's without "undue hardship". Strangely, the arbitrator stated that this supported the importance of setting a higher threshold at the *prima facie* discrimination step in order to avoid disruption and great mischief in the workplace. He did not explain how accommodations that did not amount to undue hardship would nevertheless cause "disruption and great mischief in the workplace".

[16] [2006] B.C.C.A.A.A. No. 184 (Munroe).

- A mother's request for a two day leave to monitor her diabetic son's blood sugar levels while he participated in a hockey tournament in another city. The human rights tribunal accepted that assisting the son with his diabetes was a parental obligation. However it ruled that his participation in the hockey tournament was not essential to his well-being and that the mother's attendance was not necessary. (*Palik v. Lloydminster Public School Division No. 99*)[17]

- A challenge to the elimination of part-time positions in a ministry of the British Columbia government (*Esposito v. British Columbia (Ministry of Skills, Development and Labour*)[18]

Decision-makers in the cases cited above dismissed claims at the *prima facie* discrimination step for one or more of the following interrelated reasons: (1) they characterized the family responsibilities at issue as ordinary or every day obligations, rather than exceptional obligations, (2) they characterized the responsibilities as arising from the employee's choice rather than circumstances that could not be avoided, and/or (3) they stressed that employees have an obligation to ensure that family responsibilities do not conflict with work duties.

In an additional case applying analysis similar to that in *Campbell River*, an arbitrator upheld the dismissal of a single mother who had refused to accept recall from lay off to a position in another province because of child care and custody concerns.[19] The grievor feared that moving her son would risk a custody battle with his father. She also did not want to disturb her young son's living and schooling arrangements. The union did not

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17 (2006), 58 C.H.R.R. D/149 (Sask. H.R.T.).

18 [2006] B.C.H.R.T.D. No. 300.

19 *United Transportation Union v. Canadian National Railway Co.*, [2006] C.L.A.D. No. 319 (M. Picher).

advance a discrimination argument in the case, but instead took the position that the grievor had a "satisfactory reason", within the meaning of the collective agreement, for refusing recall to another province. The union argued that the employer had acted arbitrarily by failing to turn its mind to the grievor's situation. Using reasoning similar to that in *Campbell River*, the arbitrator ruled that with issues such as childcare, the onus is on the employee, not the employer, to ensure that family responsibilities do not interfere with work duties.

The arbitrator in *CUPW v. Canada Post (Sommerville)* is one of the few to uphold the grievance of a dismissed employee using the *Campbell River* analysis. He reinstated a mother who was dismissed for refusing a majority of work assignments because of significant difficulties locating suitable daycare options for her son.[20] The son had been asked to leave his daycare because of his aggression and anger towards other children. The grievor worked as a letter carrier for Canada Post. Initially, she worked as a casual employee, then became a part-time employee. In 2005, she decided to return to casual on-call work in order to be more available to her two young children. She had several reasons for this: her husband was working, her son was exhibiting behavioural problems at school, her parents could no longer provide full-time care for her children, and she could not locate a day care that was open after 5 PM. The grievor was dismissed on the grounds that she was not "reasonably available" for assignments, within the meaning of the collective agreement, because she refused the majority of assignments she was offered. Many of the assignments were made on short notice, as the grievor was called early to perform a shift the same day.

Arbitrator Lanyon found that the union had established *prima facie* discrimination in the case. However, since the parties had not discussed accommodation options, he went on to decide the case on the proper interpretation to be given to the "reasonably available" standard in the collective agreement. He interpreted the standard in light of the analysis

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[20] [2006] C.L.A.D. No. 371 (Lanyon).

found in *Campbell River* and found the grievor's restricted availability to be reasonable given what he noted was her fundamental statutory and common law obligation to care for her child. Arbitrator Lanyon accepted the principle that employees are expected to arrange their family responsibilities to enable them to attend to their work duties. He also accepted that many employees face problems securing proper child care. However, he held that the grievor's difficulties exceeded those of the vast majority of people due to her struggles with her son's behavioural problems, the lack of daycare and mental health resources in the rural community where she lived, and the difficulty she faced in finding evening child care on short notice. The arbitrator reversed the dismissal and reinstated the grievor. The decision is one of the rare instances where a decision-maker applying the *Campbell River* analysis has upheld the employee's claim (ironically, one of the only other decisions is the *Campbell River* decision itself).

With the exception of Ontario, human rights commissions across the country have not established policies or guidelines for the analysis of family status claims. The Ontario Human Rights Commission's Policy and Guidelines on Discrimination Because of Family Status appears to adopt the analysis of cases such as *Campbell River*. The Policy notes that

> [n]ot every circumstance related to family status and caregiving will give rise to a duty to accommodate...In most circumstances where there is a significant conflict between an important caregiving responsibility and an institutional rule, requirement, standard or factor, a duty to accommodate will arise.[21]

However, the Policy stresses the importance of carrying out a contextual assessment of particular situations. According to the Human Rights Commission:

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[21] Ontario Human Rights Commission, "Policy and Guidelines on Discrimination Because of Family Status" (March 2007) at p. 28.

(a) The assessment of the caregiving responsibility should be grounded in the practical, lived reality of caring for children, elders, and/or persons with disabilities. It should also take into account the range of family forms that exist in society.

(b) Individual caregiving needs must not be viewed as isolated, personal issues. Instead they must be viewed in the context of the disadvantages faced by caregivers, particularly those who suffer intersecting disadvantage as a result of being female, racialized, low-income, lone parents, gay/lesbian/bisexual and/or newcomers to Canada.

(c) In order to determine whether a rule or requirement "significantly" interferes with a caregiving responsibility, it is important to take into account whether adequate social supports and services are available to assist the individual with her or his caregiving needs.[22]

B. Critiques of *Campbell River* Analysis

A second set of decisions under the *Canadian Human Rights Act* has critiqued the approach taken in *Campbell River*. These decisions argue that the *Campbell River* analysis conflates the threshold issue of *prima facie* discrimination with the second step requiring the establishment of a BFOR.

The Canadian Human Rights Tribunal refused to apply the higher threshold for making out a *prima facie case* in *Hoyt v. Canadian National Railway*.[23] The case involved a claim to family status discrimination by an employee who was forced to take unpaid leave for three shifts that she could not perform due to her inability to secure childcare on the week-end.

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22 *Ibid*. at pp. 28-33.

23 *Hoyt v. CNR*, [2006] C.H.R.D. No. 33.

The case was a complicated one involving CN's failure to reasonably accommodate the employee's pregnancy. Rather than accommodating the employee, CN placed her on an unpaid leave for more than three months. CN finally contacted the employee after three and a half months to offer her a different position. She accepted the position but was unable to secure child care for three of her Saturday shifts in the new position. CN denied her request for a scheduling change and told her she would have to take unpaid leave for the three shifts. The Canadian Human Rights Tribunal ruled that by doing so CN discriminated against the employee on the basis of family status.

The Tribunal rejected the approach taken to family status discrimination in *Campbell River*, stating:

> With respect, I do not agree with the Court's analysis [in *Campbell River*]. Human rights codes, because of their status as 'fundamental law,' must be interpreted liberally so that they may better fulfill their objectives [citations omitted]. It would, in my view, be inappropriate to select out one prohibited ground of discrimination for a more restrictive definition.
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> In my respectful opinion, the concerns identified by the Court of Appeal [in *Campbell River*], being serious workplace disruption and great mischief, might be proper matters for consideration in the *Meiorin* analysis and in particular the third branch of the analysis, being reasonable necessity. When evaluating the magnitude of hardship, an accommodation might give rise to matters such as serious disruption in the workplace, and serious impact on employee morale are appropriate considerations (see *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* [1990] 2 S.C.R. 489 at pp. 520 - 521). Undue hardship is to be proven by the employer on a case by case basis. A mere apprehension that undue hardship would result is not a proper reason, in my respectful opinion, to obviate the analysis.[24]

The Federal Court of Canada Trial Division affirmed this reasoning in *Johnstone v. Canada*.[25] Citing cases that have cautioned against treating different types of

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[24] *Ibid.* at paras. 120-21.

[25] *Johnstone v. Canada (Attorney General)*, [2007] F.C.J. No. 43 at para. 29 ["*Johnstone*"].

discrimination differently, the Court stated that there is no justification for relegating family status discrimination to secondary status even if it may raise unique problems.[26] The Court also rejected as wrong in law the apparent requirement, found in *Campbell River*, that the discrimination arise from a change to a term or condition of employment imposed by the employer.[27]

On the facts of the *Johnstone* case, the Court reversed a Canadian Human Rights Commission decision that an employee had not been discriminated against when forced to accept part-time hours in return for a fixed shift schedule. The Court held that an employer's rotating shift policy was *prima facie* discriminatory against the applicant on the basis of family status. The policy adversely affected the applicant as it made it virtually impossible for her and her spouse (who worked for the same employer) to find childcare. The employer permitted the applicant to switch to a fixed shift schedule but required her to reduce her hours to less than full-time hours. The Federal Court held that the permission to switch to fixed shifts was an inadequate accommodation measure since it relegated the applicant to part-time status. The Court remitted the matter to the Commission for a redetermination on the merits by a new decision-maker.

The Federal Court of Appeal dismissed the appeal in the case. However, the Court of Appeal expressly stated that it "express[ed] no opinion on what the correct legal test is".[28] It ruled that the Commission's decision was unreasoanble as there was a serious question as to what legal test the Commission actually applied in the case.

C. Analysis

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[26] *Ibid*. at para. 29. The Court cites *ONA v. Orillia Soldiers Memorial Hospital* (1999), 169 D.L.R. (4th) 489 at para. 44 (Ont. C.A.) and *Meiorin, supra* note 7 at paras. 45-46..

[27] *Johnstone, ibid.* at para. 29.

[28] *Johnstone v. Canada (Attorney General)*, [2008] F.C.J. No. 427 at para. 2.

It remains to be seen whether the critiques of the *Campbell River* analysis will continue to be raised in future caselaw. For the time being at least, the *Campbell River* analysis remains the dominant one in the caselaw.

It should be noted that the court in *Campbell River* appeared to require, not only a "serious interference" with a "substantial family obligation", but also that the discrimination arise from a change in a term or condition of employment imposed by the employer.[29] This last part of the test would seem unjustified. Many cases involving the accommodation of family responsibilities will arise not as a result of a change made by the employer, but due to a change in the employee's circumstances (e.g. birth of a child, sickness of a family member). Excluding such changes from the discrimination analysis would unjustifiably hollow out the protections against family status discrimination. Moreover, such a requirement is not imposed on other grounds, such as disability. That is, employers have a duty to accommodate persons who become disabled while working with the employer; there is no requirement that the differential treatment arise from a change made by the employer. For these reasons, this part of the *Campbell River* test is unjustified and, in any event, does not appear to have been followed in several cases applying the *Campbell River* analysis.

The requirement in *Campbell River* that a complainant establish a serious interference with a substantial family obligation has both merits and drawbacks. It could be argued that the different treatment of the ground of family status is warranted in cases involving family responsibilities because of the element of choice involved in these cases. That is, it could be argued that, to some extent, people "choose" to have children or to care for family members, or choose different care-giving arrangements. It could be argued that this element of choice justifies the higher threshold, lest all family/work conflicts (no matter how minor) constitute *prima facie* discrimination. The problem with this argument is that, even if people do choose to have children, they do not choose to have problems finding child

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[29] As noted in footnote 10 above, it is not clear whether the Court in *Campbell River* intended to establish this requirement as part of the test for a finding of *prima facie* discrimination.

care. Also, they often do not genuinely "choose" to care for family members but rather do so out of a sense of obligation. Therefore, what appears to be choice may be seen as a combination of choice and a sense of obligation.[30]

The *Campbell River* analysis can also be critiqued for subjecting the ground of family status to more restrictive treatment than other grounds protected under human rights legislation. There is no explicit requirement that claimants show a substantial interference with a significant interest with respect to other grounds under human rights legislation.[31] From a principled point of view, if protected grounds are to be subject to a different analysis, there must be a good reason for it. Otherwise, such differential treatment could set a disturbing precedent whereby certain grounds of discrimination could be treated more favourably than others. Moreover, the higher threshold at the *prima facie* discrimination step may effectively blur the two steps of the human rights analysis. This may occur as many of the factors considered when assessing whether there has been a "substantial interference" would also be considered in assessing the employee's duty to participate in the accommodation process if the analysis reaches the accommodation step of the analysis.

V. Second Step: the Accommodation Analysis

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[30] Moreover, it is a sense of obligation from which society benefits, and therefore one which should be promoted and supported. However, if it is the case that society benefits from the willingness of individuals to care for family members, then it could be argued that the obligation to facilitate this caregiving lies with the state and not employers. Indeed, a larger question that arises is whether privatizing the burden of accommodating caregiving obligations by placing it on employers may let governments off the hook. It may in effect provide a disincentive for governments to appropriately fund caregiving supports such as universal daycare.

[31] Such a requirement is however required in the s. 15 analysis under the *Canadian Charter of Rights and Freedoms*: *Law v. Canada*, [1999] 1 S.C.R. 497. There is some debate in the human rights caselaw as to whether, and under what circumstances, the *Law v. Canada* test should apply in the human rights context: see for e.g. *Ontario Secondary School Teachers' Federation v.Upper Canada District School Board*, [2005] O.J. No. 4057 (Div. Ct.) and *Preiss v. British Columbia (Attorney General),* [2006] B.C.H.R.T.D. No. 587.

The standard BFOR/accommodation/undue hardship analysis set out in cases such as *Meiorin*,[32] *Renaud*,[33] and *Central Alberta Dairy Pool*[34] would apply to family status discrimination. However, since most cases involving family status discrimination fail to clear the first hurdle of demonstrating a *prima facie* case, there is little consideration of the accommodation stage of the analysis in the caselaw.

One of the few decided cases to engage in an analysis of the duty of reasonable accommodation and an assessment of undue hardship in relation to family status is the Alberta human rights panel's decision in *Rennie* v. *Peaches and Cream Skin Care.*[35] The panel made a finding of *prima facie* discrimination in the case where a mother was dismissed for refusing evening shifts due to difficulties in finding evening child care. However, it found that the employer would suffer undue hardship if it was required to accommodate the complainant by permitting her not to work evening shifts. In assessing undue hardship, the panel applied the factors set out in *Central Alberta Dairy Pool*, which are applied to other types of discrimination: financial cost, problems of morale among other employees, and problems with the interchangeability of the workforce. Applying these factors, the panel accepted the employer's submission that it could not accommodate the employee's restrictions without suffering undue hardship.

As this decision illustrates, the accommodation for needs related to family status will often require greater flexibility of policies and procedures rather than significant monetary expenditures. Beyond the impact on the employer, accommodations may also have an

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32 *Supra* note 8.

33 *Central Okanagan School District 23 v. Renaud*, [1992] S.C.R. 970 ["*Renaud*"].

34 *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489 [*"Central Alberta Dairy Pool*"].

35 (2006), 59 C.H.R.R. D/42. One of the few other cases is *OPSEU v. Ontario Public Service Staff Union (DeFreitas Grievance),* [2005] O.L.A.A. No. 396. In that case, arbitrator Shime held that the union employer failed to reasonably accommodate an the grievor by refusing to reimburse her for additional child care expenses she incurred when she was required to attend a mandatory training session put on by her employer.

impact on other employees in the workplace. The challenge for adjudicators in future cases will be to determine how much flexibility is required of employers, how much of an impact on other employees is legitimate, and how much would amount to undue hardship.

Claims to accommodation of family responsibilities will involve many of the same types of questions raised by accommodation claims based on other grounds of discrimination. For example, what obligations does an employee have in the process? How much responsibility does an employee have to make alternate arrangements? How much information can an employer ask for regarding an employees family responsibilities and the alternate arrangements that an employee has looking into? What types of accommodations must an employer consider (e.g. modified scheduling, transfers to other positions, etc.)

While the accommodation of family responsibilities raises many of the same issues as accommodation based on other protected grounds, it may also present distinct features. Most family status accommodation cases involve scheduling conflicts. In this respect they most closely resemble religious accommodation cases involving employees who refuse to work on particular days of the week or days of the year due to their religious beliefs. The accommodation of family responsibilities in certain cases also resembles the accommodation of disabilities as it may involve a reduction or modification in hours of work or work schedules. As the most developed caselaw on accommodation, the caselaw on disability accommodation provides useful analysis to be applied to longer term accommodations that involve transfers and the potential displacement of other employees.[36] Family status accommodation differs from either religious or disability accommodation, however, in that outside resources may resolve the employee's conflict between work and their family responsibilities. As such, most family status accommodation cases will raise the question of what efforts an employee may be reasonably required to

[36] For a detailed discussion on the accommodation of employees with disabilities, see Brian Etherington, "Recent Developments in the Duty to Accommodate Employees with Disabilities in Canadian Arbitration Law (NAA Conference, Ottawa May 22, 2008).

make in order to avail themselves of outside resources prior to making accommodation requests of their employer.

A. Employee's Accommodation Responsibilities

It is well accepted that employees have a duty to participate in the accommodation process by informing their employer of their accommodation needs and providing their employer with sufficient information to fashion appropriate accommodations.[37] These same responsibilities would also apply with respect to the accommodation of family responsibilities. Employees seeking accommodations would have a responsibility to inform their employer of that they have caregiving needs, and to identify the nature and extent of the conflict between these needs and their work responsibilities. This may raise privacy concerns around the amount of information that an employee is required to share about their personal circumstances with their employer. As with other forms of accommodation (e.g. disability), adjudicators will seek to balance the employee's privacy rights with the employer's interest in ensuring that the accommodation is necessary. Adjudicators may apply the principle from the caselaw on disability accommodation that employers are only permitted to make reasonable requests for information that is required to clarify the nature and extent of accommodation that is needed. Employers would also be required to take steps to ensure the confidentiality of any information obtained.

Employees would be expected to make reasonable efforts to avail themselves of outside resources available to them prior to seeking accommodations from their employer. This expectation generally does not arise in cases involving other forms of accommodation, as there typically exist no outside resources that would resolve a conflict between work and religious observance or disability. Therefore, the expectation that an employee would avail themselves of available outside resources is particular to family status accommodation.

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[37] *Renaud, supra* note 33.

This is an issue that can be expected to be a thorny one as parties and adjudicators grapple with what efforts an employee may be reasonably required to take to access outside resources. For example, should an employee be required to tolerate inadequate caregiving arrangements, how much family disruption should they be required to endure, and how much should they be required to pay for alternate arrangements? The Ontario Human Rights Commission takes the position that an employee seeking an accommodation should be expected to make reasonable efforts to take advantage of outside resources available to them. However, the Commission notes that such resources should most appropriately meet the accommodation needs of the individual, be consistent with good caregiving practices and not place undue burden on the family.[38]

Adjudicators will take a similar approach and require employees to make reasonable efforts to take advantage of outside resources. However, the determination of what is reasonable will become particularly important as employees in most cases would be able to avail themselves of alternate caregiving arrangements if financial resources were not an issue. For example, many of the decided cases involve mothers who seek accommodations from their employers to take care of children because no family members are available to assume these responsibilities and no daycare is available at the time required (e.g. evenings). In such situations, it can always be argued that a further alternative would be for the employee to pay for a nanny or other caregiver. However, such a requirement may not be reasonable, especially if the cost is substantial and the caregiving requirement is one that is likely to extend over the long term. As this example illustrates, the issue of family status accommodation will often raise the issue of whether an employee should reasonably be required to bear significant expenses when seeking alternate arrangements. In making this assessment, it is important to keep in mind that the ground of family status is a protected ground under human rights legislation. Requiring employees to bear the cost of accommodations would be inconsistent with the broad, liberal and purposive approach to human rights and the quasi-constitutional status of the rights protected in this legislation.

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[38] *Supra* note 21, p. 31.

B. Accommodations That Do Not Affect Other Employees

It is well established in the caselaw on disability accommodation that employers must investigate the possibility of modifying or re-bundling job duties in a way that can be performed by an employee with a disability. Likewise, employers would likely be required to consider whether modifications can be made to the work requirements of employees with family obligations without giving rise to undue hardship. Such modifications may include: flexible hours, compressed work weeks, reduced work hours, job sharing, leaves of absence, telework, etc.

The same undue hardship factors applied in other cases would apply to family status accommodation. It should be noted that certain human rights statutes specifically list factors to be considered in assessing undue hardship. For example, s. 11(2) of the Ontario *Human Rights Code* provides that the following factors are to be considered: cost, outside sources of funding, if any, and health and safety requirements. The caselaw is split as to whether such factors are the only factors that may be considered or whether instead the factors set out in *Central Alberta Dairy Pool* may also be considered: financial cost, problems of morale among other employees, and problems with the interchangeability of the workforce.[39]

As with other forms of accommodation, employers will be required to withstand some hardship, but not hardship that is considered to be "undue". However, employers (and unions) are not required to institute accommodations that would require a substantial departure from the normal operation of the terms and conditions of employment set out in the collective agreement.[40]

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[39] See for e.g. the following Ontario cases which adopt different approaches to this issue: *Ingersoll (Town) and London Civic Employees, Local 107* (2003), 122 L.A.C. (4th) 402 (D.R. Williamson) (list of factors in Ontario Code is exhaustive and *Gentek Building Products Ltd. and U.S.W.A., Local 1105* (2003), 119 L.A.C. (4th) 193 (Surdykowsky) (*Central Alberta Dairy Pool* factors must be considered).

[40] *Renaud*, supra note 33.

For example, an employer's duty to accommodate likely would not require an employer to tolerate excessive absenteeism if reasonable measures have been put in place to accommodate an employee. In this respect, the Supreme Court of Canada's decision in the *Hydro Quebec* case involving accommodation of disability would apply equally to family status accommodation.[41] In that case, the Court ruled as follows:

> If a business can, without undue hardship, offer the employee a variable work schedule or lighten his or her duties – or even authorize staff transfers – to ensure that the employee can do his or her work, it must do so to accommodate the employee.[42]

However, the Court stressed that this duty is not unlimited:

> ...in a case involving chronic absenteeism, if the employer shows that, despite measures taken to accommodate the employee, the employee will be unable to resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship.[43]

Therefore, while the employer's duty to accommodate is extensive, it is not unlimited. Family status accommodation cases which may present the most difficult problems are those that involve an impact on other employees.

C. Accommodations That Impact Other Employees

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41 *Hydro Québec v. Syndicat des employé-e-s de techniques professionelles et de bureau d'Hydro Québec, section locale 2000*, 2008 SCC 43.

42 *Ibid*. at para. 17.

43 *Ibid*.

Some forms of family status accommodation would have an impact on other employees: for example, relieving an employee of the need to work overtime or to do shift work that, under the collective agreement is required to be shared by all employees. Such accommodations would interfere with other employees who may be required to work additional overtime, evening shifts, etc.

The *Rennie v. Peaches and Cream* case discussed above provides an example of a situation where the proposed family status accommodation would have had an impact on other employees. The employee in the case, a new mother, requested that she not be required to work evening shifts. The human rights panel held that such an accommodation would amount to undue hardship. The evidence in the case showed that the employer's business suffered significantly when the employee was on maternity leave due to her specific skills and her popularity with clients. The complainant was the only staff member who could perform certain salon services. The employer had attempted and failed to find other employees who could take her place during her maternity leave. The employer's clientele was also unhappy with their inability to schedule evening appointments with the complainant. On the basis of the *Central Alberta Dairy Pool* factors, the panel found that exempting the complainant from working evening shifts in the particular circumstances of that case would amount to undue hardship.[44]

As the *Rennie* case demonstrates, the assessment of how and when the impact on other employees may contribute to a finding of undue hardship is highly fact specific. Analogies can be made to the caselaw involving employees who cannot work particular days of the week on religious grounds. Factors such as interchangeability fo the workforce and employee morale may be particularly relevant in such cases. It is unclear whether such factors will be taken into account in provinces with legislation that lists other factors that

[44] The irony in the case, of course, is that the proposed accommodation may not have been foudn to amount to undue hardship if the claimant had not been as popular with clients and did not have the unique skills she possessed that her co-workers did not.

must be considered in the undue hardship analysis.[45]

Other forms of accommodation that have not so far been addressed in the case law on family status discrimination are transfers to other positions (e.g. a vacant position or outside of the bargaining unit). Such forms of accommodation are accepted in the caselaw on the accommodation of disability. Arbitrators have required employers, as part of their accommodation duties, to consider placing persons with disabilities into vacant positions even if it is necessary to waive the posting/seniority provisions of the collective agreement to do so. It is also now beyond dispute in the disability accommodation caselaw that employers have an obligation to consider transferring disabled employees outside their bargaining unit and even consider displacing other employees.[46] However, arbitrators have only required such accommodations if certain conditions exist: the need for accommodation must be clear, this need must outweigh the rights of other employees, and – most importantly – there must be no other reasonable alternative available to accommodate the employee.[47] This obligation to consider transfer outside the bargaining unit has been extended beyond to immediate employer to include related employers.[48] Unions also face a corresponding duty to waive certain collective agreement provisions if necessary to fulfil the duty to accommodate.

In appropriate cases, adjudicators may require employers to consider such measures for to accommodate employees with family responsibilities. However, consideration of such accommodations is most likely to be required only in cases which involve ongoing family responsibilities that require long term accommodation. As well, employers would likely only

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[45] See supra note 35 and accompanying text.

[46] See for e.g. *Queens Regional authority and I.U.O.E. Local 942* (Snow) (1999), 78 L.A.C. (4th) 269 (Christie).

[47] See for e.g. *Essex Police Services Board and Essex Police Assn (Horoky)* (2002), 105 L.A.C. (4th) 193 (Goodfellow); *Hamilton Police Assn v. Hamilton Police Services Board* (2005), 141 L.A.C. (4th) 25 (Ont. Div. Ct.)

[48] See for e.g. *Crane v. British Columbia (Ministry of Health Services)*, [2005] B.C.H.R.T.D. No. 361.

be required to consider employee transfers if there exists no other reasonable accommodation alternative.

D. Seniority Issues

It is clear that parties to a collective agreement are not permitted to contract out of human rights legislation. As such, both unions and employers will have a duty to waive certain collective agreement provisions, such as seniority provisions, if necessary to meet their duty to accommodate employees under human rights legislation.[49] However, due to the importance of seniority in a unionized environment, arbitrators and courts have been reluctant to uphold an accommodation that would have a significant impact on the seniority rights of other employees.[50]

The conflict between seniority rights and family responsibilities has arisen in at least one case. The arbitrator in *United Transportation Union v. Canadian National Railway Co.* upheld the dismissal of a single mother who had refused to accept recall from lay off to a position in another province because of child care and custody concerns.[51] The case was decided on the basis of the wording of the collective agreement as no family status discrimination claim was advanced in the case. However, the decision illustrates the reluctance of arbitrators to waive collective agreement seniority rights provisions. The grievor feared a custody battle with her son's father if she moved to another province. She also did not want to disturb her young son's living and schooling arrangements. The union did not advance a discrimination argument in the case, but instead took the position that the grievor had a "satisfactory reason", within the meaning of the collective agreement, for refusing recall to another province. The union argued that the employer had acted

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49 *Renaud, supra* note 33.

50 See for e.g. *Westfair Foods Ltd. v. United Food and Commercial Workers, Local 1400*, [2007] S.J. No. 95 (C.A.)

51 *Supra* note 19.

arbitrarily by failing to turn its mind to the grievor's situation.

The arbitrator dismissed the grievance. He commented that what the union was seeking for the employee was a kind of "super seniority" which would allow her, unlike other employees, to remain laid off in her home province while continuing to receive periodic calls to work from the emergency list in her home province, as she had previously done. The arbitrator commented:

> The grievor in the case at hand was not asking for an adjustment or accommodation in her work schedule. She was asking, in effect, for relief against one of the most fundamental obligations of the collective agreement, namely the obligation to protect work on her seniority territory in the event of a shortage of employees at any location.[52]

The arbitrator ruled that with issues such as childcare, the onus is on the employee, not the employer, to ensure that family responsibilities do not interfere with work duties. In doing so, he used the same reasoning used in the *Campbell River* series of cases to dismiss claims at the *prima facie* discrimination step of the discrimination analysis. As this case demonstrates, many of the same factors may be raised at the accommodation step of the analysis as are considered in applying the higher threshold set in the *Campbell River* series of cases. This overlap provides support for the critiques of *Campbell River* in the caselaw discussed above.

As the Supreme Court made clear in *Renaud*, employers and unions may be required to waive collective agreement provisions if necessary to accommodate employees under human rights legislation. However, adjudicators are likely to follow the approach in the caselaw on disability accommodation and require such measures only in the most exceptional cases when no other accommodation alternatives exist.

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[52] *Ibid*. at para. 19.

VI. Conclusion

The conflict between family and work responsibilities raises many difficult questions for employees, employers, unions and even governments. The analysis in the caselaw on family status is still unsettled in several respects. As discussed above, the following issues will likely be at the centre of disputes in the future:

- Should adjudicators continue to set a relatively high threshold at the *prima facie* discrimination step as set out in the *Campbell River* series of cases?;

- Will adjudicators in future cases address the critiques of the *Campbell River* approach raised in cases such as *Hoyt v. CNR* and *Johnstone v. Canada*?;

- What efforts can an employer reasonably require an employee to make to avail themselves of outside resources to resolve their work/family conflict?

- How much flexibility is required of an employer in modifying work rules and scheduling arrangements?

- When will interference with other employees and/or disruption of a collective agreement amount to undue hardship?