"FAMILY STATUS" DISCRIMINATION: NEW TOOL FOR TRANSFORMING WORKPLACES, OR TROJAN HORSE FOR SUBVERTING GENDER EQUALITY?

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WORKING DRAFT – May 31, 2013

Prepared for the LLRN Inaugural Conference (Universitat Pompeu Fabra, Barcelona, June 13-15, 2013)

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Introduction

This paper examines a Canadian experiment in addressing work/family conflict: the use of human rights codes to prohibit discrimination in employment based on "family status".[1] Family status litigation challenges management's historic right to demand an "unencumbered worker"[2], and to organize work without regard to the family care obligations imbedded in the reality of workers' lives. The Canadian experiment has radical potential to disturb – perhaps even to shatter – the boundary between work and family that has played so fundamental a role in the organization of work and social life under industrial capitalism.

While the term "family status" has a comfortably gender-neutral ring, the nexus between work and family which it addresses in the human rights context is thoroughly gendered. As feminist and other scholars have frequently pointed out, the conventional conception of production and social reproduction as functionally separate spheres depends for both its ideological power and its

[1] This experiment may be unique. Few other jurisdictions use anti-discrimination strategies to address the work-family nexus; where they do, they use different terminology, and their codes have narrower approaches to discrimination than Canadian codes. For examples of how other states have tackled the work/family issue, see Diamond Ashiagbor, "Promoting Precariousness? The Response of EU Employment Policies to Precarious Work" in Judy Fudge & Rosemary Owens, eds.. *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (Oxford: Hart, 2006) 77; Mutsuko Asakura, "Gender and Diversification of Labour Forms in Japan" in Joanne Conaghan & Kerry Rittich, eds.. *Labour Law, Work and the Family: Critical and Comparative Perspectives* (Oxford: OUP, 2005) 177; Csilla Kollonay Lehoczky,"Work and Family Issues in the Transitional Countries of Central and Eastern Europe: The Case of Hungary" in Conaghan & Rittich, *ibid* at 289; Hiroko Hayashi, "Issues of Work and Family in Japan" in Conaghan & Rittich, *ibid* at 315.

[2] I have borrowed this term from Anna Chapman, "Work/family, Australian Labour Law, and the Normative Worker" in 79 at 81. Chapman's chapter discusses the roots of the term in feminist scholarship.

practical deployment on the gendered division of labour associated with the "male breadwinner family", in which men's (paid) work in the sphere of production supports women's (unpaid) reproductive work within the family.[3] While the male breadwinner family was never as all-pervasive as its mythology,[4] it was a fair description of many working households for many decades, and its gendered allocation of unpaid reproductive work was a commonplace even in households which did not fit its economic mould. It provided an essential foundation for the iron rule that workers' family issues should not cross the threshold of the workplace.

The male breadwinner family has now virtually disappeared, victim to global economic forces and the so-called sexual revolution of the latter part of the 20th Century.[5] At least in countries like Canada, the paid workforce is now almost evenly divided along gender lines, and the social structures which underpinned the ideology of separate spheres have largely vanished. However, employers have been slow to abandon the very profitable organizational principle that family care work remains a private matter. Gender roles within families have been equally slow to change. Family care work still needs to be done, and women still bear most of the practical responsibility for doing it. As paid workers, they have been forced to develop individual strategies to manage their care responsibilities in ways that do not impinge on their work obligations. These strategies include accepting precarious forms of work that bring lower wages, fewer promotional opportunities and fewer benefits,[6] in order to deal with routine child-care obligations, family

[3] See, for e.g. Joanne Conaghan,"Work, Family and the Discipline of Labour Law" in Conaghan & Rittich, supra note 1 at 19; Joanne Conaghan, "Time to Dream: Flexibility, Families and Working Time" in Fudge & Owens, *supra* note 1 at 101; Chapman, *supra* note 2; Kerry Rittich, "Rights, Risk and Reward: Governance Norms in the International Order and the Problem of Precarious Work" in Fudge & Owens, *ibid* at 31; Rosemary Hunter, "The Legal Production of Precarious Work" in Fudge & Owens, *ibid* 283; Susanne D. Burri, "Flexibility and Security, Working Time and Work-Family Policies" in Fudge & Owens, *ibid* at 305; Rosemary Owens, "Engendering Flexibility in a World of Precarious Work" in Fudge & Owens, *ibid* at 329; Kerry Rittich, "Equity or Efficiency: International Institutions and the Work/Family Nexus" in Conaghan & Rittich, *ibid* at 43.

[4] Drucilla K. Barker & Susan F. Feiner, *Liberating Economics: Feminist Perspectives on Families, Work and Globalisation* (Ann Arbor: U. Mich. Press, 2004)

[5] Gøsta Esping-Andersen, *Social Foundations of Post-Industrial Economics*, Oxford, 1999

[6] Angela M. O'Rand, "The Hidden Payroll: Employee Benefits and the Structure of Workplace Inequality" (1986) 1 Sociological Forum 657; Olivia Mitchell, Philip Levine & John Phillips, "The Impact of Pay Inequality, Occupational Segregation and Lifetime Work Experience on the Retirement Income of Women and Minorities" Report No.9910, Washington D.C. AARP; Ellie D. Berger & Margaret A. Denton. "The Interplay between Women's Life Course Work Patterns and Financial Planning for Later Life" (2004) 23 Canadian Journal on Aging (Supplement), S99; Freya Kodar, "Pensions and Unpaid Work: A Reflection on Four Decades of Feminist Debate" (2012) 24 CJWL 180

health crises, and the often complex management of elder-care issues.[7] The work/family divide both creates and reinforces gender inequality, and the unequal burden of family care work makes a significant contribution to women's continuing inequality inside and outside the workplace. Accordingly, the issues raised by family status litigation are linked inextricably to the broad issue of gender equality in Canadian workplaces.

In suggesting that family status litigation has the potential to challenge the impermeability of the work/family boundary, I certainly do not mean to argue that it has yet realized that potential. While the term "family status" began to make its way into Canadian human rights codes in the early 1980s, the Ontario Human Rights Commission in 2006 was still describing it as "one of the least understood grounds of the ….*Code*.[8] The case law has evolved since, but the direction of that evolution is still unclear. Some tribunals and court decisions represent meaningful steps in the direction of shifting the costs of social reproduction away from individual women and onto enterprises. But there is also evidence of "backlash" which may have negative consequences for the broad project of gender equality.

I begin my analysis in Part 1 by looking at the legislative history of Canadian prohibitions against discrimination on the basis of family status, and the early caselaw attempting to give meaning to this indeterminate term. In Part 2, I explore the current jurisprudential focus of family status litigation on family care issues, examining the conflicting efforts of legal decision-makers to provide a measure of protection for workers faced with work/family conflict without opening the floodgates to broad but plausible claims that work schedules must make room for workers' family obligations. In Part 3, I analyze the differences between and among the legal tests which have evolved to date for proving family status discrimination, arguing that these differences

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[7] Judy Fudge & Rosemary Owens, "Precarious Work, Women and the New Economy: The Challenge to Legal Norms" in Fudge & Owens, *supra* note 6 at 3; Conaghan, "Time to Dream", *supra* note 6; Sandra Fredman, "Precarious Norms for Precarious Workers" in Fudge & Owens, *supra* note 6 at 8; Leah Vosko, "Precarious Employment: Towards an Improved Understanding of Labour Market Insecurity" in Leah F. Vosko, ed.. *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal and Kingston: McGill-Queens University Press, 2006) 3; Judy Fudge & Leah Vosko. "Gender, Segmentation and the Standard Employment Relationship in Canadian Labour Law and Policy" (2001) 22 Economic and Industrial Democracy 271; Cynthia Cranford,, Leah F. Vosko & Nancy Zukewich. "The Gender of Precariousness in the Canadian Labour Force" (2003) 58 Relations Industrielles/Industrial Relations 454

[8] Ontario Human Rights Commission, *The Costs of Caring: Report on the Consultation on Discrimination on the Basis of Family Status* (November 29, 2006), 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

reflect intense pressure from employers to avoid accounting for the impact of their employment practices on employee family life under the *Meiorin* test and the duty to accommodate. I argue that the conflicts in the caselaw may prove to be a Trojan horse; pressures placed on equality rights analysis by open-textured concepts like family status may erode important jurisprudential gains in equality analysis, reversing long-standing allocations of burdens of proof that have helped rights claimants make their case. This may ultimately undermine gains already made for gender equality. I conclude by observing that the Canadian experiment is still a work in progress, reflecting both the possibilities and the limitations of litigation as a strategy for addressing work/family conflict.

PART 1 FAMILY STATUS AND HUMAN RIGHTS CODES: THE LEGAL 'BACKSTORY'

Legislative History, Adverse Impact Discrimination and the Duty to Accommodate

In the early 1980s, family status began to make its way, with remarkably little fanfare, onto the list of grounds of discrimination prohibited by Canadian human rights codes. Ontario included family status for the first time in its list of prohibited grounds of discrimination in the major revision to its code which came into effect on June 15, 1982.[9] That revision had its basis in an important report published by the Ontario Human Rights Commission in 1977, *Life Together*,[10] which flagged the issue of discrimination on the basis of family status, but discussed it almost entirely as a problem encountered by families with children seeking rental housing. The scant discussion of the new ground in the legislative debates and committee reports preceding the enactment of the 1982 code reflects a similar preoccupation with housing. Although the revised code clearly banned family status discrimination in all social areas covered by the code, including employment, there no evidence that Ontario legislators considered its potential impact on

[9] The BC Law Institute's very useful and thorough report on family status discrimination in Canada contains a chronology of the introduction of family status into Canadian human rights codes:British Columbia Law Institute, *Human Rights and Family Responsibilities: Family Status Discrimination under Human Rights Law in British Columbia and Canada*, BCLI Study Paper No. 5, September 2012, on-line: http://www.bcli.org/sites/default/files/Family_Status_Study_Paper.pdf,

[10] Ontario Human Rights Commission, *Life Together: A Report on Human Rights in Ontario* (Toronto, Queen's Printer, 1977)

employment practices.[11] An examination of the legislative history in other Canadian jurisdictions is no more illuminating on the question of "legislative intent".[12]

While other Canadian jurisdictions followed Ontario's lead in adding family status to their codes, it is far from clear that they shared a common view on its meaning or implications. Even at a basic definitional level, Canadian legislatures took different approaches. Ontario defined "family status" as "the status of being in a parent and child relationship", a definition that was subsequently adopted in three other provinces.[13] The federal code leaves the term undefined, a course also followed in other key jurisdictions.[14] When Alberta added family status as a ground in 1996, it chose a definition both broader and narrower: "the status of being related by blood, marriage or adoption".[15] These varying approaches to definition suggest some variation in legislative conceptions of "family status". None, however, are particularly helpful in applying the term in the context of employment, particularly where what is at issue – as is almost always the case in family status cases – is not direct discrimination, but adverse effect (or adverse impact) discrimination.

At least in those jurisdictions which moved early to add family status as a ground, legislators would have been unlikely to see that move as a radical challenge to received wisdom on how work/family conflict should be reconciled. As Colleen Sheppard explains in some detail in

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[11] Ontario, Legislative Assembly, *Legislatures of Ontario Debates Official Report (Hansard) Daily Edition*, 30th Parl, 4th Sess, No. 24 (28 April 1977); Ontario, Legislative Assembly, *Legislatures of Ontario Debates Official Report (Hansard) Daily Edition*, 31st Parl, 2nd Sess, No. 55 (4 May 1978); Ontario, Legislative Assembly, *Legislatures of Ontario Debates Official Report (Hansard) Daily Edition*, 31st Parl, 3rd Sess, No. 3 (9 March 1979); Ontario, Legislative Assembly, Standing Committee on Resources Development in *Legislature of Ontario Debates Official Report (Hansard) Daily Edition*, No R-20 (27 October 1977); Ontario, Legislative Assembly, Standing Committee on Resources Development in *Legislature of Ontario Debates Official Report (Hansard) Daily Edition*, No R-51 (6 December 1978) (plus Hansards from 1981 version).

[12] The legislative history in the federal jurisdiction, the second Canadian jurisdiction to add the ground, is even less suggestive of broad ambitions to change the status quo. "Family status" was introduced into the federal code simply to repair an obvious lack of symmetry between the French and English versions of the original statute. The initial French version prohibited discrimination on the ground of "situation de famille" (but not "état matrimonial"), whereas the English version prohibited discrimination on grounds of "marital status" (but not "situation de famille"). The defect was remedied by adding "état matrimonial" to the French version and "family status" to the English version: see *Mossop v Canada (Secretary of State) at* 10 CHRR D/6064 (CHRT) *paras. 43618-43622 (*also discussed in the dissenting decision of L'Heureux-Dubé, J. [1993] 1 SCR 554 at 620).

[13] OHRC, s.10(1). The provinces adopting Ontario's approach were Nova Scotia, Saskatchewan, Prince Edward Island and Newfoundland and Labrador. The BC Law Institute Study Paper sets this information out in graphic form: *supra*, note 9 at 26.

[14] Manitoba, the Yukon, British Columbia and the Northwest Territories.

[15] Nunavut also adopted the Alberta definition

Inclusive Equality,[16] legal conceptions of discrimination in Canada have evolved considerably since the early days in which codes targeted only direct and intentional practices of discrimination. The idea that adverse effect discrimination was or should be caught by the codes was gaining ground in Canada by the early 1980s; indeed, the same set of Ontario code revisions that introduced "family status" discrimination also contained an explicit prohibition against what the code labelled "constructive discrimination".[17] But it was not until 1985 that the Supreme Court of Canada, in its ground-breaking decision in *Ontario Human Rights Commission and O'Malley v Simpson-Sears Ltd. ("O'Malley")*[18], confirmed that Canadian human rights codes clearly prohibited unintentional and adverse effect discrimination. According to *O'Malley,* a *prima facie* case for adverse effect discrimination:[19]

> … 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.

Once *prima facie* adverse effect discrimination is proved, an employer is liable under the code unless it can justify its conduct.

Integral to *O'Malley*'s embrace of the concept of adverse effect discrimination was the Court's holding that an employer could justify such discrimination if it could demonstrate that it the discriminatory work rule could not have been adjusted for the affected employee without causing undue hardship for legitimate business interests.[20] This holding enshrined in Canadian law the very important "duty to accommodate" – the idea that where facially neutral rules adopted for genuine business reasons have a discriminatory impact on a worker because of characteristics linked to protected grounds, employers must try to adjust those rules to accommodate the circumstances of the individual worker. Some fifteen years later, in a decision that has become

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[16] Colleen Sheppard, *Inclusive Equality: The Relational Dimension of Systemic Discrimination in Canada* (McGill-Queen's University Press, 2010) at 15-31
[17] OHRCode s.11(1)
[18] [1985] 2 S.C.R. 536
[19] *Ibid* at para. 18
[20] Justification is usually a matter of establishing a statutory defence. In *O'Malley*, however, no statutory defence was available; the decision nevertheless makes it clear that in cases of adverse effect discrimination, an employer can avoid liability by demonstrating that is has fulfilled its duty to accommodate: *ibid* at paras. 19-23.

known as *Meiorin*,[21] the Court expanded its assault on systemic discrimination by extending the duty to accommodate to all forms of discrimination, whether direct or adverse effect, and narrowing the defenses available to an employer, holding that once a *prima facie* case has been made out that a work rule is discriminatory, the rule can stand *only* if the employer can show: [22]

(1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
(2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
(3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose.

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".[23] The legal requirement to accommodate – to adjust work rules and practices calibrated to the dominant norms to make room for workers with characteristics that depart from those norms – provided an important new tool for achieving equality in the workplace.

The Early Family Status Caselaw

The *O'Malley/ Meiorin* approach to discrimination posed a significant threat to standard approaches to organizing work and workplaces. In the context of family status discrimination, it threatened to undermine organizational principles built on the foundation of the unencumbered worker. Human rights law now dictated that employers take account of the *encumbered* worker – the worker with family responsibilities – in designing institutional workplace policies and practices. It had the potential to require employers to arrange work requirements to enable employees to meet their family obligations, rather than vice versa. Until relatively recently, however, this potential had not been seriously tested, since most cases did not touch upon family care or the work/family conflict issue. The earliest case to reach the Supreme Court of Canada on the meaning of "family status" was *Canadian Human Rights Commission v Canada*

[21] *British Columbia (Public Service Employee Relations Commission v British Columbia Government Employees' Union*, [1999] 3 SCR 3[*Meiorin*]
[22] *Ibid* at para. 54
[23] *Ibid*.

(Mossop),[24] decided in 1993. *Mossop* is an important legal milestone on Canada's rocky road to human rights protection on the basis of sexual orientation, [25] but tells us little about the meaning of "family status" at the interface between work and family. *Mossop* challenged a provision in a collective agreement granting paid bereavement leave to employees for the death of family members, but denying that leave to employees whose claims had their basis in same-sex family bonds. The federal code, which applied in Mossop's case, did not prohibit discrimination on the basis of sexual orientation at the relevant time,[26] and the discrimination claim was therefore grounded on family status. In a split decision, the majority of the Court dismissed the claim, concluding that since the legislature had expressly declined to protect against discrimination on the basis of sexual orientation, it could not have intended to extend family status protection to same-sex families. Beyond determining that "family status" did not encompass same-sex relationships, the *Mossop* decision makes no comprehensive attempt to define the term.[27]

Most other early employment cases had an even narrower focus, largely addressing forms of direct discrimination based on specific family relationships.[28] In *B. v. Ontario (Human Rights Commission),*[29] the Supreme Court of Canada addressed the issue of whether "family status" (and "marital status") protected only against discrimination based "absolute status" (e.g. blanket rules against hiring married people or parents) or whether they also protected against discrimination based on "relative status" (e.g. a decision not to hire an individual because he was the spouse or father of a particular person). The case dealt with an employee's complaint that he was terminated because his daughter had accused his employer of sexually abusing her when she was a child. The employee claimed discrimination on grounds of both family and marital status.[30]

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[24] *Canadian Human Rights Commission v Canada (Mossop)*, [1993] 1 SCR 554, aff'ing (1990), 12 CHRR D/355 (FCA) sub nom *Canada (Attorney General) v Mossop, rev'ing* (1989), 10 CHRR D/6064 (CHRT) sub nom *Mossop v Canada (Secretary of State)*

[25] Sexual orientation made its way slowly into Canadian human rights statutes, starting in Québec in the late 1970s: see Brian Howe & David Johnson, *Restraining Equality: Human Rights Commissions in Canada* (Toronto: University of Toronto Press, 2000) at 23.

[26] Mossop was a federal government employee. The decision emphasizes that the parties had raised no constitutional challenge to the omission of sexual orientation from grounds protected by the federal code.

[27] *Mossop, supra* note 24 at 580-582 (Lamer CJC)

[28] Forms of nepotism logically falls under the rubric of family status, but Canadian public policy has taken a highly variable approach to this issue, with some jurisdictions, like Ontario, excluding both nepotism and anti-nepotism from the reach of its human rights code, while others have banned both.

[29] 2002 SCC 66

[30] The case involved several linked family relationships; the employer was the young woman's uncle, and brother to her mother, who supported the daughter's complaint. The father had not yet taken a position on the daughter's complaint. This agnosticism seems to be the basis on which the court upheld his complaint; the court appeared to

The employer countered that the human rights code was intended to protect disadvantaged *groups*, not particular individuals, and therefore only group-based discrimination was prohibited. The Court disagreed.[31] It emphasized that the rights-bearers under the codes are individuals, not groups[32]; to prove discrimination, "[i]t 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".[33] The case is unhelpful on the broader question of family care issues.

PART 2 FAMILY STATUS AND FAMILY CARE WORK

The individualistic focus of the *B* decision lays no groundwork for family status litigation as a tool for systemic attack on entrenched and gendered understandings of the relationship between work and family. Both *Mossop* and *B* were brought by male complainants, and neither decision suggests any link between family status and family care work. Despite this unpromising beginning, the work/family nexus is the primary subject matter of the next key phase of family status litigation in Canada, in which claims challenge standard workplace rules and practices as obstacles to the fulfillment of family care obligations. Gender/sex is rarely invoked as an additional ground of discrimination, and intersectional analysis is not a feature of the decisions. Nevertheless, the gendered nature of family care responsibilities is very much at the heart both of the dilemmas faced by the complainants in these cases, and of the responses of their employers to requests that workplace norms be adjusted to accommodate their family obligations.

The controversy in the family care cases focuses largely on defining the elements of the *prima facie* case. This problem circulates around three distinct analytical issues: what the term "family status" means (particularly in jurisdictions in which it is not statutorily defined); what aspects of work/family conflict (or to put it in human rights language, what types of adverse effects) can reasonably be linked to workplace rules and practices for code purposes, and what aspects are more properly attributed to personal preferences/choices for which the employer has no responsibility; and finally, what *degree* of adverse impact will suffice to establish a *prima facie*

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accept that if the father had clearly sided with the daughter, the foundation of trust essential to an employment relationship would have been undermined sufficiently to justify the termination.

[31] *B, supra* note 29 at para. 39.

[32] *Ibid* at para. 57

[33] *Ibid* at para. 57. Ironically, the Court rationalizes its decision by invoking the principle that human rights codes should be given a broad and generous interpretation; in fact the result in *B* pushes in the opposite direction, individualizing the issue and moving away from the substantive notion that human rights codes are designed to secure equality for members of disadvantaged groups.

case and trigger an employer obligation to justify its practices. The caselaw recognizes two separate "tests" for making out a prima facie case, a liberal test generated in federal jurisdiction, which I will call the federal test,[34] and a more conservative test, known as the *Campbell River test*, binding only in British Columbia but freely adapted from time to time elsewhere in Canada.[35] As we shall see, these tests vary little in their fundamental conception of the relationship between work and family. But they do vary in how they allocate burdens of proof, with the more liberal test unquestionably moving more quickly and more often to the duty to accommodate. This is a difference that matters.

Brown

The earliest of the family care cases is *Brown v Department of National Revenue (Customs and Excise*).[36] That case dealt with combined sex and family status discrimination claims filed by Donna Brown, a customs inspector who normally worked a rotating shift schedule, but who sought a fixed day shift, first to accommodate a difficult pregnancy and subsequently to accommodate her child care obligations, since she was unable to find third-party child care flexible enough to adjust to both her own rotating shifts, and those of her husband, a police officer.[37] The employer turned down both her requests for accommodation. Her human rights complaint made a general claim of failure to accommodate, but also raised the more specific claim that the employer's accommodation policy treated requests based on disability more favourably than those based on pregnancy or child care needs.[38] There was considerable background evidence before the Canadian Human Rights Tribunal [CHRT] of gender-based animosity from Brown's supervisor, which also pervaded her dealings with other supervisors. Within this climate, the CHRT readily found sex/pregnancy discrimination. It also, applying very basic post-*O'Malley* adverse effect analysis, found a prima facie case of family status discrimination based on the disparate impact of the employer's 'neutral' rule that required employees to work rotating shifts. The CHRT stated the test for a *prima facie* family status claim this way:[39]

[34] It is been variously labelled the *Brown* test, the *Hoyt* test and the *Johnstone* test.
[35] The content of both these tests will be described more fully below.
[36] (1993) CanLii 683 (CHRT)
[37] *Ibid* at 6
[38] *Ibid* at 3
[39] *Ibid* at 15

> … the evidence must demonstrate that family status includes the status of being a parent and includes the duties and obligations as a member of society and further that the Complainant was a parent incurring those duties and obligations. As a consequence of those duties and obligations, combined with an employer rule, the Complainant was unable to participate equally and fully in employment with her employer.

Although it acknowledged that the issue was both novel and difficult, [40] it readily (if inelegantly) concluded:[41]

> …the purposive interpretation to be affixed to s.2 of the [code] is a clear recognition within the context of "family status" of a parent's right and duty to strike [the balance between family needs and employment requirements] coupled with a clear duty on the part of an employer to facilitate and accommodate that balance within the criteria set out in the *Alberta Dairy Pool* case.

Gender was not a formal ground for the complaint about failure to accommodate Brown's family care obligations. The CHRT acknowledged, however, that although child care obligations are family obligations, women are more likely than men to take on the responsibility for meeting them: "More often than not, we find the natural nurturing demands upon the female parent place her invariably in the position wherein she is required to strike this fine balance between family needs and employment requirements".[42] Once it found *prima facie* discrimination, the CHRT had no trouble determining that the employer had failed to accommodate, since the supervisor had "elected to allow his own personal dislike of the Complainant to cloud his judgment." [43] Among other remedies, the employer was ordered to submit proof to the Commission that it had "an appropriate policy of accommodation for employee transfer".[44]

Campbell River **and the** ***Campbell River*** **Test**

A decade later, *Brown's* approach to family care issues did not find favour with the British Columbia Court of Appeal in *H.S.A.B.C. v. Campbell River & North Island Transition Society [Campbell River]*.[45] That case, which came to the court through the labour arbitration stream

[40] *Ibid* at 16
[41] *Ibid* at 20
[42] *Ibid* at 20
[43] *Ibid* at 21
[44] *Ibid* at 22-23
[45] [2004] B.C.J. No. 922, 2004 BCCA 260, 240 D.L.R. (4th) 479 *[Campbell River CA]*

rather than the human rights tribunal stream,[46] involved an employee of a non-profit organization which ran programs aimed at countering family violence. The employee, Shelley Howard, held a part-time position as a youth counselor. She worked from 8:30 to 3 PM four days a week, a schedule which permitted her to meet the after-school care needs of a son whose serious behavioral difficulties, related to ADHD and Tourette's Syndrome, posed a threat both to himself and others. For bona fide program-related reasons, Howard's employer transferred her to a 11:30 to 6 PM schedule, which prevented her from providing her son's after-school care on work days. She was unable to find family members to cover her child care needs. Her union filed a grievance claiming that the employer owed a duty to accommodate her child care obligations.

The arbitrator concluded that "family status", although undefined under the BC code, protected parent-child relationships.[47] He also accepted that care obligations are fundamental to the parent-child relationship; indeed, they are imposed by law. As he saw it, however, such obligations were duties of the parent, not duties of the employer;[48] he did not see the addition of family status to the human rights code as changing that assignment of responsibility in any way. He declined to follow *Brown*. In his view, the code protected parents only from employment decisions based on stereotypical *assumptions* that family obligations may interfere with meeting workplace obligations; it therefore protected only against discrimination based on the mere existence of a parent-child relationship. When that relationship created *real,* as opposed to merely assumed difficulties with meeting work obligations, however, employers had no code-mandated obligation to accommodate them.[49] Balancing family obligations and work obligations remains the responsibility of individual parents.[50] He dismissed the grievance.

The Court of Appeal took a considerably more expansive view of the employer's code obligations. It explicitly rejected the arbitrator's proposition that family status encompassed only the bare fact of a parent-child relationship. Like the arbitrator, however it was not attracted to the *Brown* approach, accusing the CHRT in *Brown* of moving much too quickly to the issue of

[46] For a discussion of the jurisdictional division between labour arbitrators and human rights tribunals on workplace human rights issues see Elizabeth Shilton, 'Choice, but no Choice: Adjudicating Human Rights Claims in Unionized Workplaces in Canada" (2013) 38 QLJ 461.
[47] *Re Campbell River & North Island Transition Society and Health Sciences Association of B.C.* (2002), 110 L.A.C. (4th) 289 at 299 *[Campbell River Arbitration]*
[48] *Ibid* at 300
[49] *Ibid at* 301
[50] *Ibid* at 300-301

whether the employer had accommodated, and failing to focus hard enough on whether a *prima facie* case of discrimination has first been made out. As the court saw it, the CHRT "conflated the issues of *prima facie* discrimination and accommodation. They seem to hold that there is *prima facie* discrimination whenever there is a conflict between a job requirement and a family obligation". [51] For the BC court, this was an "overly broad definition of the scope of family status" that is essentially "unworkable". The court therefore created its own, presumably more workable test, holding that absent bad faith or some over-riding 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".[52] It found that Howard's case had passed this onerous test. Concerned that its test not be seen as a tool for adjusting routine problems of work-family conflict, however, it emphasized its limiting nature: "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."[53]

The Railway Cases

The *Campbell River* court's recognition that the code has at least some purchase in cases of real (as opposed to stereotypically assumed) work/family conflict was a substantial step beyond the arbitrator's categoric dismissal of any employer obligation to address family care concerns. But it sets a deliberately high threshold for triggering an employer obligation, requiring both employer-initiated change in existing conditions of work, and an adverse effect that interferes "seriously" with a "substantial" parental obligation." This is not the language of *O'Malley*, which requires only a neutral rule and an adverse effect *tout court*. When next faced with a family care issue, in *Hoyt v. Canadian National Railway*, the CHRT rejected *Campbell River* as creating an inappropriate double standard for family status cases. [54] Instead, it reverted to its original approach in *Brown.*

Hoyt was the first of a series of family status cases in which the respondent was CN Rail, one of Canada's oldest and largest national rail transportation companies. These cases did not spring up

[51] *Campbell River CA, supra* note 45 at para. 35
[52] *Ibid*, para. 39
[53] *Ibid*.
[54] 2006 CHRT 33 at para. 120.

from unplowed ground. To understand their context, it is important to review some legal history. In the 1980s, CN was the respondent in a major sex discrimination case, *Action Travail des Femmes v Canadian National Railway Company*.[55] In *Action Travail* the Supreme Court of Canada upheld a path-breaking decision of the CHRT finding the railway liable for systemic sex discrimination in its hiring and promotion practices. In the face of statistics which established that women were seriously under-represented in blue collar jobs at CN – 0.7 percent of CN's blue-collar workforce, compared to a national average of 13 percent[56] – the CHRT had made an unprecedented remedial order requiring CN to fill at least one out of every four "non-traditional" vacancies with a woman until female representation reached the 13% national average.[57] The Court upheld that "affirmative action" order, finding it fully justified in the face of the evidence of pervasive systemic discrimination. The order was valid, held the Court, because, "[t]o render future discrimination pointless, to destroy discriminatory stereotyping and to create the required 'critical mass' of target group participation in the work force, it is essential to combat the effects of past systemic discrimination".[58]

Fast forward to 2002, and to Catherine Hoyt's complaint of discrimination based on sex and family status. Hoyt had been hired by CN in 1991 as a welder's helper. While *Action Travail* is not referred to in the *Hoyt* decision, it is a reasonable inference that she was hired pursuant to *Action Travail*'s quota order. When the events at issue arose, Hoyt was classified as a yard conductor at the Edmonton terminal, an arduous job with responsibility for marshalling out-of-service trains. Yard conductors were required to wear an important piece of safety equipment called a beltpack. When Hoyt became pregnant, she began to experience pain performing her job, and her doctor certified that she should work regular hours, avoid strenuous activities, and not wear a beltpack.[59] CN responded to her request for a modified assignment meeting these conditions with an offer of regular hours, but at a job that was arguably more strenuous than her current assignment, and also required a beltpack. When she refused this "accommodation", CN told her that she should go on paid leave.[60] Pressed to do better, CN offered to permit her to

[55] [1987] 1 SCR 1114
[56] *Ibid* at 1123. Women in general were seriously under-represented at CN in any capacity, at 6.11 percent of the entire workforce, compared to 40.7 percent in Canada as a whole (1981 figures): *ibid*.
[57] *Ibid* at 1127
[58] *Ibid* at 1145
[59] *Hoyt, supra* note 54 at para. 25
[60] *Ibid* at para. 27

perform the yard work without the mandatory safety equipment, on a shift for which she did not have the requisite seniority.[61] This proposal exposed her to safety hazards, and to potential harassment and reprisals from unhappy co-workers concerned about "special treatment" for women.[62] The union, which supported her position, turned down that accommodation offer on her behalf, and made a series of counter-proposals which the employer rejected apparently without analysis.[63] CN then placed her on unpaid leave, where she remained for three and a half months until she was eventually offered a position driving the crew van. She alleged that CN's failure to accommodate her pregnancy constituted discrimination on the basis of sex.

Hoyt's saga then continued.[64] As crew van driver, she was assigned to work Saturdays, which created a problem for the care of her older child. Prior to her pregnancy, she had arranged child care from other family members on an ad-hoc basis, since her shifts were variable. When she put in her request for a fixed shift, she had booked a space in a home-based child care centre, but had cancelled that arrangement when she was not accommodated but was instead placed on leave. By the time she was recalled to the crew van assignment, the space was gone. While that particular centre had unusually flexible hours catering to railway employees, other child care centres did not offer Saturday coverage. Hoyt was able to cobble together family assistance for all except three Saturdays in the period leading up to her maternity leave, and sought a Monday-to-Friday schedule for those three weeks in order not to lose income. The employer refused on the ground that the Saturday schedule better met its business needs, although it did offer her unpaid Saturday leave. She alleged that the refusal to accommodate her scheduling request constituted family status discrimination.

The CHRT sustained both of Hoyt's complaints. On the sex discrimination complaint, it found a *prima facie* case based on the fact that CN had treated Hoyt's request for pregnancy accommodation less favourably than it treated requests for accommodation on other grounds.[65] In addressing CN's justification defense, it gave the employer a failing grade on the *Meiorin* test,

[61] *Ibid* at para. 30
[62] Hoyt testified that when a female co-worker had previously been accorded "super seniority" as an accommodation, she had been harassed by workers and her car had been vandalized: para. 32.
[63] *Hoyt, supra* note 54 at para. 98
[64] The facts grounding Hoyt's family status claim are discussed paras. 122-129, *ibid*. The CHRT emphasized that the family status discrimination facts were to be understood as part of a continuous narrative with the pregnancy discrimination facts.
[65]It also found a *prima facie* case based generally on CN's failure of offer reasonable accommodation: *ibid* at para.127.

not only because it could not establish that it could not have accommodated (the third branch of the test), but also because it found that CN did not have "an honest and good faith belief" that its conduct was necessary to fulfill a legitimate business objective (the second branch of the test).[66] In other words, although it does not expressly say so, it found that CN's treatment of Hoyt's pregnancy accommodation was, in effect, intentional discrimination.

Against this backdrop, the CHRT then considered the family status issue. It rejected the *Campbell River* test for reasons already discussed.[67] It was unimpressed with CN's claim that it had treated Hoyt exactly as it treated all employees with child care accommodation requests, emphasizing that CN had made no serious effort to accommodate a child care problem which its prior discriminatory conduct had helped to create.[68] The CHRT's finding of prima facie discrimination tracks the *Brown* test:[69]

> Ms. Hoyt demonstrated on the evidence that she was a parent and that she was incurring the duties and obligations of parenthood. ….CN's direction that she could stay home those Saturdays, but that she would not be paid, meant that she was unable to participate equally and fully in employment with her employer.

It found that CN could have adjusted Hoyt's schedule to meet her needs without undue hardship.[70] Accordingly, CN was liable for family status discrimination.[71]

The *Brown* test was applied again in 2010 a trilogy of railway cases alleging family status discrimination, *Seeley v. Canadian National Railway*,[72] *Richards v. Canadian National Railway*, [73] and *Whyte v. Canadian National Railway.*[74] Denise Seeley, Cindy Richards and Kasha Whyte were all employed by CN as conductors, a job that fell within the general category known as the "running trades". Like Hoyt, they presumably owed their jobs to *Action Travail*, since they were hired between 1989 and 1992. The evidence in their cases[75] made it clear, however, that while *Action Travail* may have accounted for their hiring, its quota order had not otherwise done its job,

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[66] *Ibid* at para. 86-90.
[67] *Ibid* at para. 119-120
[68] *Ibid* at para. 126-127
[69] *Ibid* at paras. 127-129
[70] The Tribunal pointedly observes that her predecessor as crew-van driver had a Monday-to-Friday shift: *ibid* at para.128
[71] *Ibid* at para. 132
[72] 2010 CHRT 23 [*Seeley CHRT*]; aff'd sub nom *Canadian National Railway v. Seeley*, 2013 FC 117 [*Seeley FC*].
[73] 2010 CHRT 24 [*Richards*]
[74] 2010 CHRT 22[*Whyte*]
[75] Although the facts in all three cases were similar, *Seeley* was heard separately from *Richards* and *Whyte*. The latter two cases were heard together. Three separate decisions were issued.

since the percentage of women in blue collar jobs at CN still fell far short of its 13 percent target: although it had increased from the 0.7 percent reflected in that case, women in 1996 still accounted for only 3 percent of employees in the running trades, a figure that had increased to 3.7 per cent by 2006, but had fallen again to 3.1 percent by 2010.[76]

The three complaints arose out of a mass recall in 2005. To understand the circumstances of the recall and its impact on the lives of Seeley, Richards and Whyte, it is necessary to understand some of the post-*Action Travail* economic and labour relations history at CN. In 1992, five years after the Supreme Court upheld the *Action Travail* order, CN eliminated cabooses from its freight trains, and with them the need for brakemen. This technological change threatened significant job loss. Through collective bargaining, CN negotiated a complex adjustment program. The details are complex; simplified, the program created two classes of employees, those hired before and after 1990. The complainants all fell into the second category.[77] Employees hired before 1990 had greater job security and more control over where they worked. Employees hired after 1990 were more vulnerable to layoff and were subject to a type of recall (labelled "protecting" or "covering a shortage") that required them to move on short notice for temporary but indefinite periods from their home base to other bases in the region where their services were required. Failure to report to "protect a shortage" would result in termination. Seeley, Richards and Whyte had all been caught in a major layoff in 1997 which had resulted from a general economic downturn. By 2005, they had still not been recalled, although all were continuing to take short casual assignments out of their home bases. In February of 2005, they received a recall notice advising that they were required to report to Vancouver within fifteen days to protect a shortage. Vancouver is in British Columbia, several hundred kilometres (and a major mountain range) away from their home base in Jasper, Alberta.

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[76] *Seeley CHRT*, *supra* note 72 at para. 11. For a discussion of implementation problems surrounding the CHRT order in *Action Travail*, see Rachel Cox (for Action Travail des Femmes), *The Human Rights Tribunal Order in Action travail des femmes v. Canadian National: A Path Littered with Obstacles*, a research report prepared for the Canadian Human Rights Review Panel, Canada, Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Department of Justice, 2000). See also Dianne Pothier, "Adjudicating Systemic Equality Issues: The Unfulfilled Promise of *Action Travail des Femmes*", forthcoming, CLELJ

[77] Cindy Richards had in fact been hired in 1989 and would have been in the protected class, except that she had transferred from the eastern region to the western region in 1992, which resulted in her being treated as a 1992 hire. Her evidence was that when she made the transfer, at CN's suggestions, she was unaware of the impact the transfer would have on her job security and working conditions; in fact, the two-class system was still under negotiation at that time: *Richards*, *supra* note 73 at para. 44.

All three were parents of young children. Denise Seeley lived in hamlet outside of Jasper with her husband, a CN locomotive engineer who also did shift work. The family had two small children, a six-year old and a 21-month old, both born during the period when Seeley was on lay-off. Local day care centres operated only during standard business hours, there was no family available to fill in, and Seeley was unable to make suitable arrangements for child care if she accepted an indefinite transfer to Vancouver. Cindy Richards, a single parent, lived in Jasper with her two school-age children, ages 10 and 11. Their father also lived in Jasper and Richards' custody order did not permit her to move the children without notice to their father. She testified that he was active in the children's lives and would have gone to court to oppose attempt to move them away from Jasper.[78] Kasha Whyte was also a single parent living in Jasper. Her only child, a son, suffered from ADHD and respiratory difficulties. Previous absences to cover shortages, during which her son had been cared for by grandparents,[79] had led to considerable emotional difficulties for a child whose medical issues required structure in his life.

All three women approached CN requesting to be relieved from the obligation to report to Vancouver, explaining their child care difficulties in detail. CN had a very comprehensive accommodation policy, which it applied to other requests related to this recall not involving child care issues. It also dealt satisfactorily but informally with a variety of miscellaneous requests for relief from the consequences of failing to report. CN did not, however, apply its accommodation policy to the requests of Seeley, Richards and Whyte. Instead, CN first ignored and then subsequently refused their requests for accommodation, taking the position that the accommodation policy did not apply to child care issues, which were "personal" and strictly the responsibility of the employee. As CN saw it, if employees could not sort out their child care problems, they could not remain in the workforce. When the women refused the recall, they were terminated.

The union grieved the terminations. Two of those grievances went to arbitration.[80] The arbitrator entirely vindicated CN's position:[81]

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[78] *Richards, supra* note 73 at para. 105.
[79] The children's father took tourists on wilderness camping trips: *Whyte, supra* note 74 at para. 48
[80] There is no explanation for why the third grievance was not arbitrated; presumably after losing the first two, the union decided that it was pointless to proceed with the third.
[81] Whyte's decision is reported as *Canadian National Railway Co. and U.T.U. (Whyte)(Re)* (2006), 151 L.A.C. (4th) 328. It can also be found at *Canadian Railway Office of Arbitration & Dispute Resolution, Case No. 3549* (April 12,

> A railway is, by its nature, a twenty-four hour, seven day a week enterprise. Persons who hire on to work, particularly in the running trades, know or reasonably should know that their hours of work will be irregular and that they will, on occasion, be compelled to change location to protect work as needed. In exchange for meeting those onerous obligations railway employees have gained the benefit of relatively generous wage and benefit protections. On what basis can a board of arbitration, charged with interpreting and applying the terms of the collective agreement, conclude that the conditions of single parenthood can effectively trump the obligations of employment negotiated by the parties within the terms of their collective agreement? In a world where single parenthood is not uncommon that is not an inconsiderable question. As a general matter, boards of arbitration, including this Office, have confirmed that with 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.

The grievances were dismissed.

The arbitrator made it clear in his decision that he had not been asked to consider whether CN's approach to accommodating child care issues violated the code. That issue made its way to the CHRT, which, fortunately for the complainants, took a very different view of the employer's obligations at the nexus of work and family.[82] It rejected CN's argument that the "Complainant's situation [was] a personal choice not to abide by her professional obligations in order to prioritize other aspects of her life".[83] Instead, it took the same approach it had taken in *Hoyt*:[84]

> The evidence demonstrates that the Complainant was a parent and that her status included the duties and obligations generally incurred by parents. As a consequence of those duties and obligations, the Complainant, because of CN's rules and practices,[85] was unable to participate equally and fully in employment with CN. This being the case, the onus now shifts to CN to demonstrate that the *prima facie* discriminatory standard or action it adopted is a bona fide occupational requirement.

Inevitably, in light of CN's position throughout, the CHRT concluded that CN had failed meet the *Meiorin* test. It did not find bad faith in CN's refusal to apply its accommodation policy, but it had little difficulty concluding that CN had failed entirely to consider the complainants'

2006), available online at http://www.croacases.com/. This part of the decision is quoted in *Whyte*, *supra* note 74 at para. 136.

[82] Under current law in most Canadian jurisdictions, the complainants would not have been permitted to take their complainants to a human rights tribunal once they were dismissed at arbitration, whether or not the human rights issues were directly raised before the arbitrator: see Shilton, "Choice, but no Choice", *supra* note 46.

[83] Seeley *CHRT*, *supra* note 72 at para. 124

[84] *Ibid* at para. 126. The same finding was made with respect to the other two cases.

[85] Specifically, the CHRT found that "CN's practice of requiring the Complainant to protect the shortage in Vancouver has an adverse impact on her because of her family status": *ibid* at para. 174

individual circumstances, and had made no effort to address their requests for accommodation. Since the CHRT found that providing them the relief they sought from the requirement to accept the transfer would not have imposed undue hardship, liability followed.

CN applied for judicial review of the CHRT's decision in *Seeley*.[86] In its submissions the court, CN framed 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".[87] The Federal Court dismissed the application. The Court readily concluded that "family status" included child care obligations.[88] It did not opt clearly for either the broader or narrower test for family status discrimination, since it concluded that "by any standard", CN had violated Seeley's right to be free of discrimination on the basis of family status.[89] CN has now appealed this decision to the Federal Court of Appeal. [90].

Johnstone v Canadian Border Services Agency

A version of the federal test was also applied in *Johnstone v Canadian Border Services*. [91] Fiona Johnstone was a full-time Customs Inspector employed by the Canada Border Services Agency ("CBSA"). Full-time inspectors are required to work on a rotating shift schedule. Johnstone was married, with two young children. Her husband also worked for CBSA on rotating shifts, and commercial child care centres could not provide the flexible child care they required.[92] On her return from both maternity leaves, Johnstone requested full-time hours on a fixed shift to accommodate for her child care needs. Both times, she ran up against an unwritten but rigid CBSA rule that requests for accommodation on the basis of child care requirements would not be processed as human rights accommodations, but would instead be dealt with under different CBSA policy: that employees who wanted fixed shifts could have them only on a part-time basis, with a consequent loss of wages, benefits (including pension benefits) and poorer promotional

[86] *Seeley FC*, *supra* note 72. It does not appear to have filed for review of *Richards* or *Whyte*.
[87] *Ibid* at para. 55.
[88] *Ibid* at para. 71
[89] Ibid at para. 90.
[90] http://cas-ncr-nter03.cas-satj.gc.ca/IndexingQueries/infp_RE_info_e.php?court_no=A-90-13
[91] *Johnstone v Canada*, 2007 FCC 36 [*Johnstone 2007 FC*]; *Canada v Johnstone*, 2008 FCA 101[*Johnstone 2008 FCA*]; *Johnstone v Canadian Border Services*, 2010 CHRT 20 [*Johnstone CHRT*]; *Canada (Attorney General) v. Johnstone*, 2013 FC 113[*Johnstone 2013 FC*]
[92] Martha Friendly, a noted Canadian expert on child care, testified at the hearing to the lack of availability of commercial child care for parents with atypical and unpredictable work schedules.

prospects. [93] Johnstone accepted the part-time work that was offered, but filed a human rights complaint on grounds of family status.

Employees like Johnstone who work in federal jurisdiction in Canada do not have direct access to a hearing before a human rights tribunal; their complaints are screened by the Canadian Human Rights Commission, and may proceed to the CHRT only if the Commission chooses to send them there. The Commission initially rejected Johnstone's complaint, on grounds that were factually questionable and without reference to *Brown*; indeed, the Commission appeared to have applied a version of the *Campbell River* test.[94] The CHRT's failure to apply *Brown* is puzzling, since the CBSA was a successor employer to the respondent in *Brown*, having taken over many of the same customs and inspection services at points of entry to Canada.[95] On judicial review, Barnes J. quashed the Commission's decision to reject the complaint. While his decision did not explicitly endorse the test in *Brown*, he was clearly disturbed by the Commission's omission to take any account of that decision. He criticized the *Campbell River* test, observing that "[w]hile family status claims can raise unique problems that may not arise in other human rights contexts, there is no obvious justification for relegating this type of discrimination to a secondary or less compelling status".[96] The Federal Court of Appeal concurred with Barnes J.'s decision to quash, finding the Commission's failure to acknowledge the unsettled state of the law unreasonable, although the court itself was explicitly agnostic as to the proper test to be applied.[97] On reconsideration, the Commission sent the matter to the CHRT.

Johnstone's claim attacked the work/family divide at a level arguably more fundamental than the claims raised in the railway cases, since she sought not just temporary relief, but an indefinite accommodation from a rotating shift schedule. The CBSA countered with an attempt to reargue the *Brown* approach from first principles. It acknowledged that family status protected parent-child relationships, but argued that the protection applied only to "pure status" (i.e. the fact of the

[93] The purpose of this policy was to discourage employees from seeking fixed shifts. Barnes J. suggested that applying a policy with that purpose to employees seeking human rights accommodation might be intentional discrimination: *Johnstone 2007 FC, supra* note 91 at para.34.This intriguing argument was not pursued by the CHRT in its decision, although there was evidence to support it: see *Johnstone CHRT, supra* note 91at para. 278.
[94] The Commission's decision is quoted in *Johnstone 2007 FC, ibid* at para.10.
[95] The relationship between the respondent in *Brown* and CBSA and the employer's resistance to implementing *Brown*'s systemic orders is elaborated upon in *Johnstone CHRT, supra* note 91at paras. 53-77.
[96] *Johnstone 2007 FC, ibid* at para. 29
[97] *Johnstone 2008 FCA, supra* note 91at para. 2

relationship)[98] and did not encompass family care obligations. In the alternative, it argued that there was no *prima facie* case here on the facts. Child-care problems were personal problems, it argued, not the result of CBSA's scheduling practices but the result of Johnstone's own life-choices: to have children, to partner with a man who worked shifts, to save money by not hiring a nanny.[99] As the employer saw it, "People make their own choices"; employees whose life choices impair their ability to work rotating shifts disqualify themselves from full-time assignments, leaving them with the options of part-time, leave of absence or quitting.[100] Since their situations are of their own making, the employer has no obligation to relieve employees of the consequences of their choices. The CHRT was not persuaded by the employer arguments. Consistent with the federal test, it found that: [101]

> CBSA engaged in a discriminatory practice by establishing and pursuing an unwritten policy communicated to and followed by management that affected Ms. Johnstone's employment opportunities including, but not limited to promotion, training, transfer, and benefits on the prohibited ground of family status.

Since the CBSA had taken no steps to accommodate Ms Johnstone's request for full-time work, a finding of failure to accommodate inevitably followed.

This time it was the CBSA that sought the intervention of the Federal Court. That court upheld the CHRT's decision.[102] It found reasonable the CHRT's holdings that term family status includes the parent-child relationship and that it encompasses the child care obligations that come with that relationship.[103] The court formally rejected the *Campbell River* test: [104]

> Requiring a higher threshold, a serious interference, for the ground of family status is to lessen the protection on that ground as compared with other protected grounds. I agree that the requirement for a higher threshold for proof of prima facie discrimination for one ground as opposed to the other grounds for which discrimination is prohibited in section 3 would be contrary to the remedial purpose and objective of the *Act.*

Troublingly, however, the court does not unequivocally adopt the straightforward "adverse effect" test implicit in the CHRT's formulation of the test. Instead, its language suggests that there may be parental obligations which are not "substantial" enough to trigger a duty to

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[98] This was essentially the argument accepted by the arbitrator in *Campbell River* but subsequently rejected by the court.
[99] *Johnstone CHRT, supra* note 91at para. 88
[100] *Ibid* at para. 268
[101] *Ibid* at para. 242
[102] *Johnstone 2013 FC, supra* note 91at para. 6
[103] *Ibid* at para. 112
[104] *Ibid* at para. 123

accommodate. It stated its own "bottom line" as follows: "It is when an employment rule or condition interferes with an employee's ability to meet a substantial parental obligation in any realistic way that the case for prima facie discrimination based on family status is made out". [105] It provides no concrete examples, leaving us in a situation in which we know that Johnstone's problem falls within the protected category, but without much guidance as to where practical lines might be drawn. Predictably, CBSA has appealed to the FCA.[106]

PART 3 TROJAN HORSES

The federal test has one clear difference from the *Campbell River* test; it rejects the requirement that the employer *change* existing conditions of work before a duty to accommodate will be triggered on family status grounds. This difference is important. The requirement for change implies that employees must take existing conditions as they find them no matter how inimical they may be to the fulfillment of parental obligations, a proposition that would be recognized as completely unacceptable if applied to any other ground of discrimination protected by the code. The federal test, at least in principle, permits challenges to the "ground rules". In other respects, however, the federal test is clearly merging with the *Campbell River* test. The Federal Court's rejection of *Campbell River*'s requirement that interference be "serious" is arguably more semantic than substantive. Material differences between *Campbell River'*s "serious interference with a substantial parental obligation" and *Johnstone*'s "interfer[ence] with an employee's ability to meet a substantial parental obligation in any realistic way" are difficult to detect, particularly in light of *Johnstone*'s embrace of the related proposition that "any significant interference with a substantial parental obligation is serious". [107] Both tests fundamentally accept the conventional organizational pillars of the world of work: management rights and the unencumbered worker. Both seek meanings for family status that will disrupt existing boundaries between work and family, and existing power relations between workers and employers, as little as possible. Both show serious judicial resistance to taking seriously the possibility that family status should be treated like other grounds under the codes in accordance with the *O'Malley* test.

[105] *Ibid* at para. 125
[106] http://cas-ncr-nter03.cas-satj.gc.ca/IndexingQueries/infp_RE_info_e.php?court_no=A-89-13
[107] *Johnstone 2013 FC, supra* note 86 at para. 125.

The reasons behind this resistance are clearly visible in the decisions discussed in Part 2 – in the evidence, in the employer arguments and in how adjudicators have responded to those arguments. It is the pervasiveness of the family status problem that poses the threat. As one adjudicator acknowledged, "On a basic level, attendance at work interferes with family obligations."[108] For him, that led inexorably to the conclusion that "…accepting the proposition that any employer action, which has a negative impact on a family or parental obligation, is *prima facie* discriminatory is untenable".[109] Another adjudicator put it this way: "To 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". [110] The arbitrator who dismissed the *Campbell River* grievance asked rhetorically, "can the Legislature have intended that the word, "family status" in the *Human Rights Code*, be read to shift some significant part of th[e] fundamental obligation [for the care of children] from parents to employers?"[111] For him, the answer was self-evidently and unequivocally no. The reviewing court which reversed his decision was equally unwilling to embrace an approach to family status that left employers vulnerable to broad claims for accommodation; as the court put it, family status "cannot be an open-ended concept as urged by the appellant for that would have the potential to cause disruption and great mischief in the workplace".[112]

The concern, of course, is that the floodgates will open if family status were treated like other grounds under the code, and employers were seriously put to the proof that the workplace practices that interfere with family life were truly necessary to the running of their businesses. [113] The narrower approaches embraced by the courts permits them to position workers who need accommodation as deviants from the norm. The *Campbell River* court emphasized with some

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[108] *Siemens Milltronics Process Instruments Inc v Employees Association of Milltronics*, 2012 CanLII 67542 (ON LA) at para. 64.
[109] *Ibid*.
[110] *International Brotherhood of Electrical Workers, Local 636 v. Power Stream Inc. (Bender Grievance)*[110], [2009] O.L.A.A. No. 447, 186 LAC (4th) 180 at para. 56
[111] *Campbell River Arbitration, supra* note 47 at 300.
[112] *Campbell River CA, supra* note 45 at para. 38.
[113] CBSA called expert evidence in *Johnstone* attempting to demonstrate that if it offered accommodation to parents it would be swamped with requests: *Johnstone CHRT, supra* note 91 at paras. 330-347. The CHRT rejected this evidence as establishing a legitimate "floodgates" problem for a number of reasons including that it merely established how many CN employees were parents, and not how many would experience clashes between their work schedules and family obligations: *ibid.*

pride the fact that its test would make no major inroads on management's rights to structure workplaces as it saw fit.[114] The clear assumption is that the "normal worker" does not experience work-family conflict in the "normal workplace".

In constructing the idea of the "normal workplace", adjudicators do not seriously question the employer's right to establish workplace rules and structures that are deeply hostile to family life. In the railway trilogy, the following description of work life in the running trades is offered without comment: "Due to the nature of CN's operations, running trades employees must be able to work where and when required, subject to restrictions imposed by law and by the collective agreement". [115] The job description for conductors, the position held by Seeley, Whyte and Richards, is treated as a fact of life for railway employees:[116]

> The work schedule of a Conductor is very unpredictable. Depending on which board the Conductor is set on, he or she may know more or less about the kind of work he or she may be called upon to execute. Therefore, all working assignments on road service have totally unpredictable schedules. A Conductor is expected to be available to report to work within two hours of receiving a call from CMC. Once a Conductor reports for duty, he or she will have no idea of when exactly they will return home. They may be gone for a few hours up to almost two days.

The employer's "reality" is accepted as part of the wallpaper of the workplace.

The employer position in these cases reflects an unshakeable conviction that employees must shape their family lives around the exigencies of work. As CN put is in its communications to the three complainants in the railway trilogy:[117]

> While the Company recognizes that your child care is an important personal responsibility, you must also acknowledge that your obligation to CN is to manage these personal obligations in such a way that you are also able to fulfill your employment and collective agreement obligations.

The employer arguments hammered on the themes that frame the employer perspective in these cases – personal responsibility, and employee preference and choices:[118]

> … CN's counsel argued that the Complainant's position was based on an incorrect premise. He qualified the complaint as a request that the employer accommodate the Complainant's "parental preferences and lifestyle choices." … Counsel …submitted that

[114] *Campbell River CA, supra* note 45 at para. 39.
[115] *Seeley CHRT, supra* note 72 at para. 25
[116] *Richards, supra* note 73 para. 26. The same is true of the description of the nature of the work in *Johnstone*: see *Johnstone CHRT, supra* note 91 at paras. 118-119.
[117] *Seeley CHRT, ibid* at para. 74
[118] *Ibid* at para. 110

> requiring an employee who is a parent to comply with his or her responsibility to report to work as required by the collective agreement does not amount to discrimination *prima facie.* Rather, he argued that the refusal by an employee to comply with his or her responsibilities in this regard amounts to a choice which is exclusively personal in nature and which, absent exceptional circumstances, no employer is obligated to accommodate. Accordingly, he concluded that upholding the complaint in this case would amount to adding "parental preferences" to the list of prohibited grounds of discrimination set out in the *CHRA* under the guise of an expansion of the notion of "family status".

Ultimately, as we know, the CHRT did not accept this argument on the facts of the case. But its reasons for doing so were quite narrow. There is no challenge to the notion that the working conditions established for the running trades in general and the conductor job in particular are natural and immutable; the decision challenges only the extraordinary requirement that *in addition to* the ordinary exigencies of the work, mothers of young children were required to accept indefinite transfers under conditions that make it enormously difficult if not impossible to parent their children, on pain of losing their jobs.

The gendered nature of the work/family conflict within the "normal workplace" is obvious, yet the caselaw is almost completely silent on the gender issue. Neither the arbitration decision nor the court decision in *Campbell River* acknowledges any gender dimension to the employee's dilemma. In the railway cases, gender is more difficult to ignore because of the clear nexus between the family status claims made in those cases and the history of gender discrimination in railway employment. In *Hoyt*, a sex discrimination claim is explicitly linked to the family status claim, and the findings of discrimination, which come close to findings of intentional discrimination, are clearly influenced by the hostile gendered environment within which Hoyt worked. In the trilogy, the evidence suggests strong and systemic links between the employer's resistance to accommodating child care issues and its traditional attitudes to women in non-traditional work; if women are going to insist on taking jobs in the railway, they need to sort out their child care issues before coming to work, and should not expect "special treatment". In *Action Travail*, the Supreme Court clearly recognized the self-perpetuating nature of gender discrimination in the workplace, of which hostile working conditions like these would be very much a part. There is no discussion in any of the cases, however, of the links between the normalization of working conditions which place extraordinary pressures on family life, and the systemic discrimination revealed so starkly in *Action Travail*.

"Personal" solutions to the ordinary problems of harmonizing work and family are still regarded as necessary; it is only the exceptional problems that will attract the assistance of human rights law. These personal solutions will almost inevitably burden women. The casual acceptance of burdening women with the costs of resolving work/family conflicts is starkly illustrated by an arbitration decision, *International Brotherhood of Electrical Workers, Local 636 v. Power Stream Inc. (Bender Grievance)*[119], addressing four grievances challenging a change in shift scheduling, alleging that the change constituted discrimination on the basis of family status. Under the work schedule previously in place, employees could choose between working four 10 hour shifts per week, or five 8 hour shifts. Under a new regime agreed to in collective bargaining,[120] that choice was eliminated and employees were assigned to a work week consisting of four 10 hour shifts. All four grievors has previously opted for the five day week, where the shorter day permitted better integration of their work and family obligations. All claimed that the new regime created serious child care issues for them. The employer acknowledged that its evidence did not support an "undue hardship" defence if the grievors had been permitted to maintain their prior schedule.[121] It nevertheless resisted their requests for accommodation, arguing that it had a right to schedule work and no obligation to be flexible under the circumstances.

Powerstream is unique among the family care cases discussed here for its entirely male cast of characters.[122] The individual situations of the grievors were complex, and I provide only a brief summary here. Grievor A had two children aged six and ten years old. His wife, from whom he was separated, also worked for the employer. He and his wife had a joint custody agreement under which the children alternated between them week-by-week. His 8 hour schedule had permitted him to take the children to day care before work, and pick them up after work, which was no longer possible on the new schedule. The custody agreement could have been changed to give him the children only on weekends, but both parents testified that would be unsatisfactory. Grievor B was married with two children aged eight and ten. His wife held a position with a large retailer, and worked from 9 am until 6 pm, with frequent travel outside Ontario. When he

[119] [2009] O.L.A.A. No. 447, 186 LAC (4th) 180
[120] The arbitrator found that "The Union initially resisted the Employer's proposal to standardize hours for the linemen. However, in order to reach an agreement, the Union ultimately accepted the proposal": *ibid* at para. 5.
[121] *Ibid* at para. 8
[122] The lawyers and the arbitrator were also male.

worked 8-hour shifts, he could pick the children up from school.[123] On 10-hour shifts, he could no longer do this. In the midst of the hearing, his situation changed; the arbitrator recited that "[a]t some point during the hearing I was informed that [Grievor B's wife] was no longer employed and was now able to assume additional child care responsibilities."[124] Grievor C was married with two children aged four and eight. Under the 8 hour shift schedule, his wife took the children to day care and he picked them up. Under the 10-hour schedule, he could no longer do this. He testified that his wife had to take on this role, which "limited [her] opportunity for advancement with her employer". He also testified that "the burden of domestic duties now fell unevenly on his wife".[125] Grievor D was a single father of two young children aged thirteen and sixteen. The change in his shift schedule prevented him from getting home on time to coach his sons' sporting events.[126] In addition, he testified that the new 10-hour days made it difficult and exhausting for him to manage his household responsibilities as a single parent, such as "grocery shopping, making dinner and keeping the house clean".[127]

In the decision, Grievor A got sympathetic treatment from the arbitrator because his precarious domestic balancing act was subject to a custody agreement, which the arbitrator described as "in the best interest of not only [the separated spouses], but their children as well".[128] The employer had argued that Grievor A could have dealt with his work/life conflict by making different choices: for example, moving closer to his work or hiring a nanny. In the context of a custody agreement, the arbitrator rejected those submissions: [129]

> I do not think it is an answer to the allegation of discrimination in these circumstances to suggest that the grievor should have moved to Vaughan or hired private nanny care. He 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.

For the other three grievors, however, the arbitrator saw things quite differently. He dismissed the grievances of Grievors B, C and D. With respect to Grievors B and C, who had intact

[123] *Powerstream, supra* note 119 at para. 11.
[124] *Ibid* at para. 14
[125] *Ibid* at para. 18
[126] *Ibid* at para. 21
[127] *Ibid* at para. 23
[128] *Ibid* at para. 68
[129] *Ibid* at para. 69.

marriages, he found that they had, in effect, solved their own problems with what he called "self-accommodation"; they had "been able to fulfill their parental obligations by rearranging duties with their spouses. That is what families do every day".[130] With respect to the problems Grievor B's children in adjusting to the changes in his schedule, the arbitrator observed that "one would expect that these problems would be alleviated once [his wife] was able to pick the children up at an earlier time". He went on to observe: "I do not think it is reasonable to expect that workplace obligations would not require one spouse to work together with the other to split their parental duties so as to be able to accommodate their workplace duties".[131] He makes no comment about the costs of the self-accommodation solution for the women involved, costs readily apparent in the evidence; the grievor's wives sacrificed work opportunities in order to fill in the gaps created by onerous work rules, almost certainly because their work commands less in the labour market than their husbands'. Grievor D had no spouse onto whom he could conveniently offload his burdens, but the arbitrator nevertheless dismissed his work/family conflict as simply a "fact of life".[132] As a single father, the increased burden placed upon him by the change in work rules did not distinguish him from anyone other worker putting in a "double day"; he had no right to call on his employer for accommodation, even though it was conceded by the employer that accommodation would not have imposed undue hardship. The approach taken in *Powerstream*, which appears to be gender neutral, but its impact clearly is not. [133]

All grievors had been vigorously cross-examined about why they had made the choices they had about housing, schooling and child care arrangements, with the clear (but not very specific) suggestion that different personal choices would have enabled them to fulfill both their employer's requirements and their parental obligations. The "nanny" solution was high on the list; since these grievors could afford it, the clear implication was that they should have chosen it.[134] The arbitrator did not directly endorse the nanny option. He did, however, clearly endorse

[130] *Powerstream, supra* note 119 at para.64
[131] *Ibid* at para. 64
[132] *Ibid* at para. 65
[133] In its judicial review of *Seeley*, the Federal Court praised *Powerstream* for its individualized assessment of each grievor's claim: *Seeley FC, supra* note 72 at para. 81.
[134] The discussion of child care options in the decision, including the arbitrator's recital of the cross-examinations of the grievor reflect both stereotypes and a serious lack of information about 'division of labour' negotiations within families, the market for child care, the hiring of nannies and so-called private day care, reflecting normative judgments about different family choices, and class biases about the necessity of compromise to "earn" the right to participate in the workforce. This is not unique to *Powerstream*; it is in fact quite typical of family status case. In *Johnstone*, some of this misinformation was countered calling experts witnesses on work/family conflict and the

the idea that employees should first pursue "self-accommodation" before calling upon the employer for workplace accommodation. It is also clear from his consideration of the claims of Grievors B,C and D that employees who are able to "self accommodate" – to find solutions simply to survive – may thereby eliminate the factual foundation for a human rights claim.

The employer argument here and in the other cases is essentially framed as one of causation: clashes between work and family are caused by employee choices, not employer work rules and decisions. The argument asks us to accept that the conventional organization of work is natural and immutable. If the status quo in a workplace is a given, then it seems fair and reasonable – even inevitable – that those who seek to work there must shape their lives to meet its exigencies. If they do not "fit" the culture of a particular job or a particular workplace, they must seek work – if they wish to work – which is a better fit for the choices they have made: choices to become or stay partnered, to have children (and how many), to send their children to commercial day-care rather than home day care (or family care if it is available), to opt against hiring a live-in nanny, to live in a small town rather than a big city. On the other hand, if we understood the conditions of the workplace as contingent, framed by employers with the unencumbered worker in mind,[135] we would see the issue of causation and the role of personal choice quite differently. We would certainly be much quicker to interrogate working conditions like those that prevail in the railways and the CBSA, to ask whether ways of organizing work which assume that workers are unencumbered are really necessary, now that that we know most workers do not come that way.

We do ask that question, of course, when we apply the *Meiorin* test, requiring employers to justify their employment decisions and practices, and to demonstrate that even where onerous practices can meet a business necessity test, employers have genuinely explored whether flexibility is possible for those disadvantaged by those practices because of family care responsibilities. Within the conventional framework of code analysis, however, employers are not put to the *Meiorin* test unless the claimant can make out a *prima facie* case. For employers, the *prima facie* case is a crucial bulwark against a free-standing duty to accommodate clashes between work and family obligations. It is a crucial bulwark against the erosion of the boundary

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limited options for child care available on the Canadian market: see *Johnstone*, CHRT, *supra* note 91at paras. 138-195.

[135] In unionized workplace, of course, collective bargaining modifies the employer's ability to establish working conditions. In *Seeley*, CN sought to off-load the responsibility for much of what occurred in those cases onto the union, a strategy that was unsuccessful both before the CHRT and the Federal Court.

between work and family. It is for that reason that its nature and content have been so hotly contested, and employers have fought so hard for narrow definitions of family status, and high thresholds. It is also why its nature and content is so important to workers. As both adjudicators and employers have recognized, many routine work rules taken for granted as "facts of life" in the workplace create severe problems for workers in meeting their family obligations. If standard human rights tests were applied to these rules, employers might find themselves litigating in a climate in which the only real issue was the *Meiorin* test and the duty to accommodate.

Much of the debate about the proper test for family status discrimination has been focused on the proper allocation of burdens of proof, although it has not necessarily been described that way. As we have seen, the *Campbell River* Court accused *Brown* of conflating the *prima facie* case and the defenses, imposing a duty to accommodate without first identifying a *prima facie* violation.[136] The CHRT in *Hoyt* makes the counter-accusation against the *Campbell River* test, explicitly criticizing the BC Court of Appeal for taking into account at the *prima facie* case stage of the analysis issues of impact that are properly considered only at the justification stage. It points to *Campbell River*'s preoccupation with "the potential to cause `disruption and great mischief' in the workplace"[137] if the parameters of family status discrimination are too broadly drawn. Such concerns, in the CHRT's view, are proper concerns only under the third branch of the *Meiorin* test: "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".[138]

As we have seen, even within the *O'Malley* framework the *prima facie* bar has been placed higher for family status than for other grounds of discrimination, under both the *Campbell River* and the federal test. Without the *O'Malley* framework, it could become even harder to establish a *prima facie* case. The *O'Malley* framework is itself under siege from recent cases which have increased the legal burden on human rights complainants by importing *Charter*-based modes of analysis into the concept of the *prima facie* case for discrimination under the codes. Of particular concern in Ontario is a 2010 decision in *Ontario (Disability Support Program) v.*

[136] *Campbell River CA*, supra note 45 at para. 35
[137] *Hoyt*, *supra* note 54 at para. 119
[138] *Ibid* at para. 121

Tranchemontagne,[139] in which the Ontario Court of Appeal explicitly held that *Charter* and code tests for discrimination should be harmonized. In a recent article, "Defending the Human Rights Codes from the Charter",[140] Denise Réaume discussed the implications of *Tranchemontagne* for code jurisprudence. As she explained it, the *O'Malley* framework and the *Charter* framework may ultimately share a common conception of discrimination, but they distribute the burdens of proof and justification quite differently in litigating whether or not discrimination exists in a particular case.

O'Malley, Réaume argues, deliberately imposes a relatively light burden on a rights claimant to make out a *prima facie* case, requiring only that, in the case of adverse effects discrimination, she prove that she has have been affected by "a neutral rule …. that has a tendency to affect members of a group identified by one of the grounds more harshly than others".[141] The harder work of sorting out what rules with adverse effects are genuinely and unfairly discriminatory is done in exploring whether the rule is justified, including whether it can be modified to accommodate group and individual needs without undue hardship, an exercise in which the onus falls on the respondent. *Charter* jurisprudence, by contrast, has always required rights claimants to prove "something more" than mere adverse effect before the burden shifts to the respondent to justify its conduct. Exactly what that "something more" consists of has been a matter of some controversy in the Supreme Court of Canada since that Court first decided that s.15 of the Charter protected substantive, and not merely formal equality.[142] At the time Réaume was writing, "something more" appeared to be proof that the impugned distinction was linked to stereotypical notions about the affected group.[143] The subsequent Supreme Court of Canada decision in *Quebec (Attorney General) v. A*[144] shows a bench deeply split over the content of that "something more", with formal notions of equality based on stereotyping and prejudice competing with more substantive notions based on social disadvantage. A reversion to the concept of stereotyping and prejudice spells real trouble for human rights claimants, since it contains strong echoes of the "intent" requirement rejected since *O'Malley*. Whatever its precise content, however, a

[139] 2010 ONCA 593 (CanLII)
[140] Denise Réaume, "Defending the Human Rights Codes from the Charter" (2012) 9 J.L. & Equal. 67
[141] *Ibid* at 72
[142] The Supreme Court came to this conclusion in *Andrews v Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 SCR 143, the first decision it made under s.15 of the *Charter*.
[143] See Réaume, *supra* note 139 at 81.
[144] 2013 SCC 5 (CanLII). This case has become known by the pseudonyms *Eric v Lola*.

requirement for "something more" clearly has the effect of increasing the burdens of the complainant and lightening those of the respondent.

The "something more" test has not made an explicit appearance in family status cases before human rights tribunals. It was squarely raised, however, in CN's argument in its application for judicial review in *Seeley*, and not squarely rejected by the Federal Court.[145] It will almost certainly resurface in CN's appeal. Moreover, it has begun to inform labour arbitration decisions applying the family status provisions of human rights codes, to unfortunate effect. An example is *Siemens Milltronics Process Instruments Inc v Employees Association of Milltronics,*[146] which dealt with a grievance from an employee who had been denied holiday pay over the Christmas break because she had stayed home on the qualifying day[147] to look after the emergency needs of a severely ill child. The union argued that she had been discriminated against based on family status. [148] The employer conceded that if it had a duty to accommodate, it could have done so without undue hardship. The arbitrator found, however, that the employer had no such duty. He applied *Tranchemontagne* to conclude that while the "qualifying day" rule clearly had an adverse impact on the grievor on the basis of family status, the adverse impact on the employee was not "arbitrary" and "did not perpetuate prejudice or stereotyping"[149]. Accordingly, it did not constitute *prima facie* discrimination on the basis of family status.

The *Siemens* case illustrates clearly why employers care about the allocation of burdens of proof. In that case, as in other key cases we have examined, employers conceded or adjudicators found that employer could have provided the accommodations sought without undue hardship; they simply chose not to do so. These employers could not meet the *Meiorin* test if forced to justify their workplace practices against that test. On the various issues that engage the debate about the impact of human rights codes on the work-family nexus, it is clear that burdens of proof may make all the difference.

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[145] *Seeley FC, supra* note 72 at paras. 72-74
[146] 2012 CanLII 67542 (ON LA).
[147] Canadian collective agreements, sanctioned by employment standards statutes, frequently deny pay for statutory holidays to employees who do not work before or after the holiday "without reasonable cause", with the purpose of preventing them from using such absences to informally extend the holiday.
[148] This line of argument may have been unwise. The stronger argument would appear to have been that her absence had "reasonable cause".
[149] *Siemens, supra* note 144 at para. 79

CONCLUSION

The Canadian caselaw on family status discrimination illustrates both the degree of continuing entrenchment of the work/family divide in workplace and gender relations in Canada, and the high stakes for women's equality in breaking down that divide. In light of the powerful nerves that family status claims touch upon, the practical results reflected in the Canadian cases have been remarkably positive. They go at least some distance down the road of forcing employers to acknowledge that social reproduction is in fact a cost of production, and insisting that employer internalize some of that cost instead of externalizing it to individual workers.[150] They have begun to chip away at the boundary between work and family. But that boundary still holds, and the gains are fragile. The legal standards governing family status litigation are far from clear and far from settled. Both *Seeley* and *Johnstone* are on their way to the Federal Court of Appeal, and quite possibly to the Supreme Court of Canada, with the threshold for proving a *prima facie* case and the issue of whether family status includes family care obligations both still very much on the table.

The individual victories are important, particularly those at the federal level. But the claims that were made, while enormously challenging to management rights, were relatively modest within the overall context of family-unfriendly working conditions prevailing in the industries in which those women worked. The railway trilogy preserved good, unionized jobs for women in which they had built up substantial valuable seniority. Fiona Johnstone fought for and won the right to keep her full-time job status in government employment, and the promotional opportunities and benefits that go with that. But their claims did not result in a wholesale review of whether the working conditions in their industries are *Meiorin*-compliant on the basis of family status. And within the context of the current caselaw, such a review will not be called for without a systemic *prima facie* showing that the workplace rules and practices violate rights protected by the code. Employers will continue to resist with vigour any approach to defining family status which will allow them to be put to the proof that historic patterns of organizing work and family responsibilities are truly effective and necessary, as measured by the *Meiorin* test.

[150] 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

Until employers are put to the proof, however, women will continue to be forced to "self-accommodate", which means they will compromise income, benefits and promotional opportunities in order to make sure that their family obligations are met. They will indeed make choices. But the choices currently available to women impose a high price, not just on the women the paid workforce, but also on their (mostly female) family members who are expected to step in to deal with child care problems, and the women of the global south who constitute the "nanny solution" for middle-class Canadian women. In her thoughtful article, "Women are Themselves to Blame: Choice as a Justification for Unequal Treatment", Diana Majury captures the double-edged quality of women's choices within the social and economic constraints of an unequal society: [151]

> 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 not 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.

Relying on "choice" leads to solutions that reinforce traditional sex roles, and leave women "self-accommodated" in substandard labour market roles for which they will pay in future in lost promotional opportunities and benefits, including pension benefits, as well as in current and future salary.

The Trojan horse I have focused on in this paper is the potential jeopardy to the integrity of the *O'Malley* test posed by the addition of so threatening a ground as family status to the list of grounds of discrimination protected by human rights codes. The Trojan horse metaphor inevitably raises the broader question of whether gender equality would be better served by other strategies for addressing the family care issue. We need to ask whether framing family care issues as family status claims has obscured the gendered nature of the work/family issue and perhaps even undermined gains that have been or could be made if family care claims were grounded more directly on the basis of gender. Answering such a question will require empirical, comparative and cross-disciplinary research. We also need to ask whether litigation can ever be an effective mechanism for regulating such deeply imbedded forms of discrimination as family status. On this issue, the jury is still out in Canada.

[151] In Fay Faraday, Margaret Denike & M.Kate Stephenson, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Irwin Law, 2006) 209 at 218

What is crystal clear from the case law, however, is that employers can do much better at accommodating workers' family obligations than they are doing, and that workers and their families pay a heavy financial and emotional/social price when they do not. In the cases discussed in this paper, employers could not establish that it would have imposed undue hardship for them to have met their employees' requests for accommodation. Their failure to accommodate clearly imposed hardship on their employees. Rather than debating the precise legal threshold for triggering an employer duty to accommodate, we might consider going directly to the heart of the problem, and imposing a free-standing duty to accommodate which does not depend on proof that the internal work rules have damaged individual women, but starts from the premise that family care is a "cost of production" for which employers as well as employees have responsibility. It's a solution worth considering.