

HUMAN RIGHTS & THE FAMILY IN ONTARIO

Discussion Paper

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INTRODUCTION

The Ontario Human Rights Commission (“the Commission”) believes that this is an opportune moment to reflect on, and raise awareness about, human rights issues surrounding relationships, particularly family status.

Relatively little attention has been paid in recent years to human rights protections related to family status under the Ontario *Human Rights Code* (“the Code”).¹ Indeed, issues related to family status are often not conceptualized as human rights issues at all. This ground raises issues of how society values, includes and accommodates our relationships, and of the systemic disadvantage that may accrue to them. An examination of family status reveals the far-reaching implications of our relationships on access to housing, employment, and services.

Much public attention has been given in recent years to the intensifying “struggle to juggle” as individuals strive to meet their commitments to both their employers and their families. “Work-life balance” and “the flexible workplace” have become common catchphrases, and governments have begun to take some steps to protect employees with caregiving responsibilities. Despite the extensive discussion of these issues, they have generally not been perceived as human rights issues. The Commission’s attention was drawn again to this issue by its public consultations on age discrimination in 2000. At that time, the Commission heard about the growing need for elder care, much of the responsibility for which is falling to family members, and the implications for both those receiving and those providing such care. As a result, the Commission committed to develop a policy statement on elder care that identified related human rights issues, as well as to consider complaints where employees who are caring for aging or ailing

¹ R.S.O. 1990, c. H.9

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parents, spouses or same-sex partners² face discrimination on the grounds of family, marital or same-sex partnership status.³

Recently, caselaw on pregnancy and breastfeeding, as well as the Commission's policy and public education work in this area, has highlighted the implications for women of their roles as caregivers, and the responsibility of employers, landlords and service providers to respect the importance of the mother and child relationship.⁴ A consideration of the ground of family status is a logical extension of this work.

Recent years have seen increasing diversity in the nature of the Canadian family. The numbers of single parent and blended families continue to grow. It has become increasingly rare for families to include a member who is a full-time caregiver: in most families with children, all adults are working outside the home. As well, it is only in recent years that any recognition has been given to families headed by same-sex parents. Employers, landlords and service providers have not necessarily adjusted their policies, programs and practices to deal with these new realities. Persons belonging to non-traditional families may find themselves excluded or disadvantaged in seeking employment, housing or services.

The Commission is concerned by reports of widespread discrimination in access to rental housing. The Commission continues to be concerned that families with young children may be marginalized in the rental housing market, particularly where family status intersects with marital status, receipt of public assistance, or the race-related grounds of the *Code*. The consequences of this marginalization may be dire, and constitute a serious human rights issue.

There may be other issues related to family status that the Commission has not yet identified. The Commission views this Discussion Paper as a first step in its examination of human rights and family status and as an opportunity to expand

² The terms "same-sex partners" and "same-sex partnership status" have recently been removed from the *Code*. Until recently, the *Code* defined "spouse" as "the person to whom a person of the opposite sex is married or with whom the person is living in a conjugal relationship outside marriage", and the definition of "marital status" was "the status of being married, single, widowed, divorced or separated and includes the status of living with a person of the opposite sex in a conjugal relationship outside of marriage" (s. 10(1)). Following the 1999 decision of the Supreme Court of Canada in *M. v. H.* [1999] 2 S.C.R. 3, which struck down the opposite sex definition of "spouse" in the *Family Law Act* as unconstitutional, the *Code* was amended to add protection for "same-sex partnership status". The *Code* defined a "same-sex partner" as "the person with whom a person of the same sex is living in a conjugal relationship outside of marriage". In 2005, the *Code* was again amended by Bill 171 (S.O. 2005, c.5). The terms "same-sex partnership status" and "same-sex partner" were struck from the *Code*. The definitions of "marital status" and "spouse" were amended by striking out the phrase "a person of the opposite sex" and replacing it with "a person". Except where noted, this Paper uses the current definitions of "marital status" and "spouse".

³ Ontario Human Rights Commission, *A Time for Action: Advancing Human Rights for Older Ontarians* (2001) online: Ontario Human Rights Commission <www.ohrc.on.ca>.

⁴ Ontario Human Rights Commission, *Policy on Discrimination Because of Pregnancy and Breastfeeding* (2001), online: Ontario Human Rights Commission <www.ohrc.on.ca>.

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awareness of human rights protections based on family status. The Commission wishes to open discussion and explore directions for strengthening human rights protections based on family status, and welcomes feedback and discussion on these issues from the community. The Commission intends to develop a policy statement on discrimination based on family status. Commission policy statements set standards for how individuals, employers, service providers and policy makers should act to ensure compliance with the *Code*. They are important because they provide information about the Commission's interpretation of the *Code* at the time of publication. While they are not binding on the human rights tribunal or the courts, they are often given great deference, applied to the facts of the case before the court or tribunal, and quoted in the decisions of these bodies.

THE CHANGING FACE OF CANADIAN FAMILIES

The last two decades have seen rapid change in Canadian families, with a trend towards increasing diversity of family structures. The “traditional” family consisting of a father in the paid labour force, married to a woman who is a full-time caregiver for their children, is only one of a wide variety of family types. Some family forms are frequently overlooked. For example, the families formed by gays, lesbians and bisexuals are sometimes not recognized to be families at all. Adoptive and foster family relationships have at times been considered less valuable than other family forms.⁵ As well, it is sometimes forgotten that there is a significant cultural component to the definition of the family. With the increasing diversity of Canada’s population, there are a variety of definitions of what constitutes a family beyond the nuclear family. There are, for example, a growing number of Canadian families where three generations live under one roof, a trend substantially linked to contemporary immigration patterns.⁶

Some major trends in family structure are outlined below.

Common-law unions: Common-law unions have increased dramatically over the past 20 years, and have become a significant feature of conjugal relationships in Canada. In 1981, six percent of all couples were in a common-law union. By 2001, this number had almost tripled, to 16 percent of all couples.⁷ Forty-six percent of these common-law unions include children, whether born in the current union, or in a previous relationship.

Divorce: In 1997, there were 2.4 marriages for each divorce. The divorce rate peaked in the late 1980s, and gradually declined through the 1990s. Of couples who married in 1996, 37 percent could be expected to divorce. With higher rates of divorce have come higher rates of re-marriage: in 1996, at least one-third of all marriages involved at least one partner who had previously been married.⁸ This means that an increasing number of children are growing up in blended families.

⁵ In 1994, approximately one percent of Canada’s children were living in adoptive or foster families: Statistics Canada, “Canadian Children in the 1990’s: Selected Findings of the National Longitudinal Study on Children and Youth”, *Canadian Social Trends* (Spring 1997).

⁶ Janet Che-Alford and Brian Hamm, “Under One Roof: Three Generations Living Together”, *Canadian Social Trends* (Summer 1999) 6. The number of three-generation households increased 39% between 1986 and 1996. Nearly half of these households are headed by immigrants.

⁷ Statistics Canada, “Update on Families”, *Canadian Social Trends* (Summer 2003) 11

⁸ Vanier Institute of the Family, *Profiling Canada’s Families II*, online: Vanier Institute of the Family <www.vifamily.ca>.

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In 1994, nine percent of Canadian children under the age of 12 were living in a stepfamily.⁹

Single parent families: There are also a growing number of single parent families: in 2001, almost one-quarter of families with children were single parent families, as compared with 16.6 percent in 1981.¹⁰ These families are predominantly female-headed: in 1996, 83 percent of single parent families were headed by women.¹¹ Female-headed single parent families tend to be the most economically vulnerable of all families: in 1997, 56 percent of such families were poor, compared to 14 percent of all families.¹² Furthermore, while very young families are generally relatively vulnerable financially, most will be in straitened financial circumstances for a relatively short period of time: female-led single parent families, however, are by far the most likely of all family types to suffer persistent low income.¹³ Female-led single parent families from racialized communities tend to face even greater disadvantage in accessing housing, employment, and services.

Same-Sex Couples: The 2001 census collected information about same-sex couples for the first time. According to this census, approximately 0.5 percent of all couples sharing a household are same-sex ones. Fifteen percent of households headed by lesbian couples had children; three percent of male same-sex couples reported having children.¹⁴ Given that this was the first time that information was collected on same-sex couples, it is likely that these figures are low.

Women in the paid labour force: Nearly 70 percent of mothers with pre-school children and more than three-quarters of mothers with school-aged children are employed or looking actively for work; most of these are employed full-time.¹⁵ One result of this increased employment has been growing levels of stress as parents struggle to juggle their multiple responsibilities. Fifty percent of working mothers, and 36 percent of working fathers report having difficulty managing their work and family responsibilities.¹⁶

⁹ Statistics Canada, "Canadian Children in the 1990's: Selected Findings of the National Longitudinal Study on Children and Youth", *Canadian Social Trends* (Spring 1997).

¹⁰ J. Jenson, *A Decade of Challenges; A Decade of Choices: Consequences for Canadian Women*, (Canadian Policy Research Network, Family Network, February 16, 2004) online: Canadian Policy Research Network <www.cprn.org>.

¹¹ Vanier Institute of the Family, *Family Facts* (2004), online: Vanier Institute of the Family <www.vifamily.ca>.

¹² *Ibid*

¹³ R. Morissette "On the Edge: Financially Vulnerable Families", *Canadian Social Trends*, (Winter 2002) 13.

¹⁴ Vanier Institute of the Family *Same-Sex Couples and Same-Sex Parent Families: Relationships, Parenting and Issues of Marriage* (2004), online: Vanier Institute of the Family <www.vifamily.ca>.

¹⁵ *Supra*, note 8

¹⁶ J. Jenson, *Catching Up to Reality: Building the Case for a New Social Model*, (Canadian Policy Research Network, January 2004), online: Canadian Policy Research Network, <www.cprn.org>.

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Despite their responsibilities in the paid labour force, women still tend to be the primary caregivers for their families, including caring for children, elders, people who are ill, and those with disabilities. In 1998, almost two-thirds of all informal caregiving hours (64 percent) were carried out by women. This is due largely to their disproportionate share of responsibility for unpaid child care work.¹⁷ Even with respect to elder care, not only do women represent over three-fifths of informal caregivers, they also spend more time on care-related tasks.¹⁸ Women also maintain primary responsibility for most household tasks. Married mothers with children reported working an average of 10.1 hours per day in paid and unpaid work, more than any other group. About a third of these women report extreme time-stress, about twice as many as men.¹⁹

As is discussed later in this paper, these responsibilities have consequences for women's status in the labour force. Women, for example, are more likely to take on part-time or casual labour, as a way to balance work and family responsibilities. U.S. studies have found that women providing care to parents consistently reduce their working hours. One result, however, is that women are more likely to find themselves in precarious, or dead-end employment. Women are also more likely than men to require time off work to respond to family needs: on average, women lose 6.9 work days per year to family responsibilities as compared to 0.9 days for men.²⁰

Ageing Population: In 1999, 12.5 percent of Ontario's population was 65 years of age or older. Over the next four decades, it is estimated that the number of Ontarians aged 65 and over will double. The ratio of seniors to working-age Canadians is expected to rise sharply after 2005, when the "baby-boom" generation (those born between 1945 and 1965) begins to reach age 65.²¹ This has significant implications in terms of elder care, which has already been identified as a growing need. Forty-one percent of Canadians over 65 receive informal care for a long-term health problem.²² 1996 figures on elder care reported that more than two-thirds of informal caregivers are between the ages of 30 and 59, and over two-thirds were employed outside the home. One-quarter of informal caregivers are also caring for children under the age of 15.²³

¹⁷ N. Zukewich, "Unpaid Informal Caregiving" *Canadian Social Trends* (Autumn 2003) 14

¹⁸ J.A. Frederick and J.E. Fast, "Eldercare in Canada: Who Does How Much?", *Canadian Social Trends* (Autumn 1999) 26.

¹⁹ D. Cheal, M. Luxton and F. Woolley, *How Families Cope and Why Policy-Makers Need to Know* (Canadian Policy Research Network, 1998) at 30.

²⁰ *Ibid*, at 34

²¹ Ontario Human Rights Commission, *Discrimination and Age: Human Rights Issues Facing Older Persons in Ontario*, (2000) at 10, online: Ontario Human Rights Commission <www.ohrc.on.ca>.

²² *Supra*, note 16

²³ *Supra*, note 18

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The Commission receives relatively few complaints citing family status as a ground of discrimination. In the fiscal year ending 2003/2004, 120 complaints citing family status were filed with Commission, just under five percent of the 2450 complaints filed that year. This is similar to numbers from previous years. In 2002/2003, 102 complaints related to family status were filed, at just under six percent of the total complaints filed, and in 2001/2002, 112 complaints related to family status were filed, at five percent of the total complaints. The reason for this relatively low number of family status complaints is unclear: possibly it may be related to the general lack of awareness of human rights protections related to family status or to the Commission's lack of a formal policy framework for responding to these complaints.

As is true of all *Code* grounds, the majority of the family status complaints filed are in the social area of employment. Over the past four years, around two-thirds of all family status complaints have been in the area of employment. However, family status complaints related to employment generally make up less than five percent of all employment related complaints. Issues raised include the duty of employers to accommodate family responsibilities, policies and practices that may create systemic barriers to individuals with caregiving responsibilities, bias on the basis of family status, and nepotism and anti-nepotism policies.

On average, about 30 percent of family status complaints relate to housing. Complaints citing family status have historically made up a very significant number of the complaints received in the area of housing. For example, in 2002/2003, of the 82 complaints related to housing, 32, or almost 40 percent, cited family status. Family status has generally been the 2nd or 3rd most commonly cited ground in the area of housing. The number of family status complaints related to housing appears to have dropped dramatically in 2003/2004, but it is not clear whether this is a statistical anomaly or a trend. Most of the complaints received related to family status and housing allege a direct refusal to rent to families with children. The Commission has also received complaints related to occupancy guidelines, harassment because of childrens' noise, and unequal access to facilities.

What are the roles of the Commission, government, and other actors in resolving the issues raised in this Paper?

²⁴ The Commission is required by statute to produce an Annual Report to government on its activities. These reports are a valuable source of information on complaints to the Commission. They are available online at www.ohrc.on.ca.

What can the Commission do to raise public awareness about human rights issues related to family status and to more effectively combat discrimination based on family status?

FAMILY STATUS AND HUMAN RIGHTS IN CANADA

Protection against discrimination on the basis of family status is relatively new in Canada. Provisions prohibiting discrimination on the basis of family status were added to a number of human rights statutes in the late 1970s and early 1980s. Discrimination on the basis of family status is not prohibited in all parts of Canada.²⁵ For example, the human rights statutes of Newfoundland and New Brunswick do not contain prohibitions on discrimination on the basis of family status, although in some cases the prohibitions against age and marital status discrimination have been interpreted to cover issues that might in other jurisdictions be considered under the ground of family status.

Where human rights bodies have considered family status issues, the focus has often been on access to housing. 'Adult only' or 'adult lifestyle' housing is a common concern. In the area of employment, the bulk of the caselaw has focussed on nepotism and anti-nepotism policies, and on discrimination based on the particular identity of a family member. There is a paucity of material on discrimination on the basis of family status in the area of services.

In general, the Canadian caselaw on family status has focussed on direct discrimination. Little attention has been given to programs and policies that have an adverse impact²⁶ on families with children or with elder care responsibilities.²⁷ There has also been very little consideration given to what the duty to accommodate might mean in the context of family status. It may therefore be fair to say that Canadian human rights policy and caselaw on family status is somewhat underdeveloped.

²⁵ While Quebec does not prohibit discrimination on the basis of family status, the protections against discrimination based on "civil status" have been consistently interpreted to include family status.

²⁶ This Paper contains at the end a Glossary of legal terms related to human rights, such as forms of discrimination.

²⁷ The most important exception to this generalization is *Kearney v. Bramalea* (1998), 34 C.H.R.R. D/1 (Ont. Bd. Inq.), in which a Board of Inquiry found that rent to income ratios discriminated against tenants identified by family status, among other grounds.

INTERNATIONAL DOCUMENTS

Article 25 of the *Universal Declaration of Human Rights*²⁸ states that "Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection". Article 16 further states that "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State". This is further affirmed by Article 23 of the *International Covenant on Civil and Political Rights*.²⁹

The *International Covenant on Economic, Social and Cultural Rights*³⁰ states that "The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children" (Article 10).

The *Convention on the Elimination of all Forms of Discrimination Against Women*³¹ requires States Parties to take all appropriate measures to ensure "a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children" (Article 5) and to "encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life" (Article 11).³²

The *Convention on the Rights of the Child*³³ requires states parties to render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and to ensure the development of institutions, facilities and services for the care of children.

The 1994 *Programme of Action* of the International Conference on Population and Development³⁴ recognized the family as the basic unit of society, and that traditional notions of parental and domestic functions do not reflect current realities and aspirations. The Programme of Action called upon governments to cooperate with employers to provide and promote means to make participation in

²⁸ 10 December 1948, General Assembly resolution 217A (III), UN Doc. A/810

²⁹ 16 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 (entered into force 23 March 1976, accession by Canada 19 May 1976).

³⁰ 16 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 (entered into force 03 January 1976, accession by Canada 19 August 1976).

³¹ 18 December 1979, GA Res. 34/180 (entered into force 03 September 1981) accession by Canada 09 January 1982).

³² The Optional Protocol to this Convention permits the Committee on the Elimination of Discrimination against Women to receive complaints; G.A. Res. A/54/4 (entered into force 22 December 2000), accession by Canada 18 January 2003.

³³ 20 November 1989, GA Res. 44/25 (entered into force 02 September 1990) accession by Canada 12 January 1992, Article 18.

³⁴ United Nations *International Conference on Population and Development* (September 1994)

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the labour force more compatible with parental responsibilities, especially for single-parent households with young children, and to take effective action to eliminate all forms of coercion and discrimination in policies and practices. The 1995 *Beijing Declaration and Platform for Action*³⁵ recognized that the lack of a family-friendly workplace was a significant obstacle to women achieving their full potential, and set as a strategic objective the promotion of harmonization of work and family responsibilities for women and men.

U.N. treaty bodies have expressed concerns about Canada's implementation of these rights, particularly with respect to sole-support mothers.

The January 1997 *Report on Canada* of the United Nations Committee on the Elimination of Discrimination Against Women expressed deep concern about the deepening poverty among single mothers, aggravated by the withdrawal, modification, or weakening of social assistance programmes. It suggested that the Government address urgently the factors that are responsible for increasing poverty among women and especially women single parents and that the Government develop programmes and policies to combat this poverty. It recommended that social assistance programmes directed at women be restored to an adequate level.³⁶

Similarly, the United Nations Committee on Economic, Social and Cultural Rights, in its 1998 observations on Canada's implementation of the Covenant, stated that it was gravely concerned that the repeal of the Canada Assistance Program³⁷ and cuts to social assistance rates, social services and programmes had had a particularly harsh impact on women, particularly single mothers, who are the majority of the poor, the majority of adults receiving social assistance, and the majority among users of social programmes. The Committee expressed concern that cuts to social assistance programmes, the unavailability of affordable and appropriate housing, and widespread discrimination with respect to housing create obstacles to escaping domestic violence, such that many women are forced to choose between returning to or staying in a violent situation or homelessness, and inadequate food and clothing for themselves and their children. The Committee urged Canada to implement a national strategy for the reduction of homelessness and poverty, including dealing with issues

³⁵ United Nations *Report of the Fourth World Conference on Women* (17 October 1995) A/CONF.177/20

³⁶ United Nations Committee on the Elimination of Discrimination Against Women *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Canada*, 12 August 1997, A/52/38/Rev.1, paras.306-343.

³⁷ "The Government informed the Committee in its 1993 report that CAP set national standards for social welfare, required that work by welfare recipients be freely chosen, guaranteed the right to an adequate standard of living, and facilitated court challenges to federally-funded provincial social assistance programs. In contrast the CHST [the Canada Health and Social Transfer, which replaced it] has eliminated each of these features and significantly reduced the amount of cash transfer payments provided to the provinces to cover social assistance", *ibid*, para. 19.

surrounding social assistance and housing, and improving and properly enforcing anti-discrimination legislation.³⁸

These concerns were reinforced by the Committee on the Rights of the Child, in its 2003 Concluding Observations on Canada's Report under the Convention. The Committee reiterated concerns regarding child poverty, and noted the impact of the deepening poverty among single mothers and other vulnerable groups on children. The Committee recommended that the Canadian government develop programmes and policies to ensure that all families have adequate resources and facilities, paying due attention to the situation of single mothers and other vulnerable groups.³⁹

FAMILY STATUS AND THE ONTARIO *HUMAN RIGHTS CODE*

Protection against discrimination on the basis of family status was added to the *Code* in 1982, following the recommendations made in the 1977 report on the *Code's* mandate, *Life Together*.⁴⁰ Initially, the *Code* contained an exception permitting residential buildings or parts of residential buildings to be designated as adult only. This provision was repealed in December 1986, following extensive hearings before a Legislative Committee.

The *Code* currently prohibits discrimination on the basis of family status in the areas of employment, housing, contracts, vocational and professional associations, and services, goods and facilities.

Defining Family Status

Family may mean many things to different people. The *Code*, however, provides protection for only a limited number of the relationships that might be considered "familial". Some types of relationships are protected under the ground of marital status, and in recent years, developments through this ground have added protections for common-law and same-sex couples,⁴¹ reflecting an evolving understanding of the nature of the family. The *Code* also provides protections for some relationships under the ground of family status. The *Code* definition of

³⁸ United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant (Concluding Observations – Canada)*, 10 December 1998, E/C/12/1/Add.31.

³⁹ United Nations Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Section 44 of the Convention: Concluding Observations on Canada*, 27 October 2003, CRC/C/15/Add.215

⁴⁰ Ontario Human Rights Commission, *Life Together: A Report on Human Rights in Ontario* (1977) at 72

⁴¹ See footnote 2 for a brief summary of some developments related to same-sex couples.

family status is narrow, however, including only “the status of being in a parent-child relationship”. This is narrower than in some other jurisdictions: Alberta’s legislation, for example, defines family status as “the status of being related to another person by blood, marriage or adoption”.

There are therefore many types of relationships, which are commonly understood as “familial”, that are not protected under the *Code*. For example, the *Code* provides no protection for an individual who is providing long-term care for an adult sibling who is living with a disability, or is providing elder care for an aging aunt or grandparent. Nor is there any protection for dependency relationships that are not based on blood ties. Some have argued that laws should be expanded to protect a greater range of dependency relationships.⁴² As well, the focus of the *Code* on the nuclear family might be considered ethno-centric, given the importance of the extended family in some cultures.⁴³ The question may then be raised as to whether the definition of family status in the *Code* should be expanded to cover a broader range of dependency relationships.

The trend in the caselaw is to interpret the ground broadly, within its limits. An Ontario Board of Inquiry has made the following statement about the scope of the protection for family status:

In our view, the definition looks to a “status” arising from being in a parent and child type of “relationship”. That is, someone acting in the position of a parent to a child is, in our view, embraced by this definition; for example, a legal guardian or even an adult functioning in fact as parent. Occasionally, for example, due to death or illness of a relative or friend, someone will step in and act as parent to a child of the deceased or incapacitated adult. Thus, if a nephew were to reside with an aunt for an indefinite period, in our view their relationship would fall within the meaning of “family status”
...⁴⁴

The ground of family status has been found to protect adoptive families, foster-family relationships, and gay or lesbian parents.⁴⁵

⁴² For a comprehensive discussion of law and policy issues around the protection of dependency relationships, see the Discussion Paper of the Law Commission of Canada, *Recognizing and Supporting Close Personal Relationships Between Adults* (May 2000), online: Law Commission of Canada <www.lcc.gc.ca>.

⁴³ See for example, Marlene Brant Castellano, *Aboriginal Family Trends: Extended Families, Nuclear Families, Families of the Heart*, (Vanier Institute of the Family, 2002), online: Vanier Institute of the Family www.vifamily.ca; Derrick Thomas, “Evolving Family Living Arrangements of Canada’s Immigrants”, *Canadian Social Trends* (Statistics Canada, Summer 2001); Janet Che-Alford and Brian Hamm, “Under One Roof: Three Generations Living Together”, *Canadian Social Trends* (Statistics Canada, Summer 1999).

⁴⁴ *Dudnik v. York Condominium Corp. No. 216*, (1990), 12 C.H.R.R. D/325 (Ont. Bd. Inq.).

⁴⁵ *Moffatt v. Kinark Child and Family Services*, (1998), 35 C.H.R.R. D/205 (Ont. Bd. Inq.).

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Protections against discrimination on the basis of family status have been used to challenge unequal treatment among various forms of families. For example, a Canadian Human Rights Tribunal found that citizenship rules that distinguished between biological and adoptive children discriminated on the basis of family status.⁴⁶ A British Columbia Human Rights Tribunal found that the refusal of the B.C. Vital Statistics Agency to register the same-sex partner of a birth mother as a parent of a child discriminated on the basis of sex, sexual orientation and family status.⁴⁷

In *Canada (Attorney General) v. Canada (Human Rights Comm.) and Gonzalez*⁴⁸ a distinction based on the age of the child was found to discriminate on the basis of family status. The complainant challenged the requirement in the *Unemployment Insurance Act* whereby extended benefits for adoptive parents could only be provided where the child was six months of age or older at the time of arrival at the adoptive parent's home or actual placement for the purposes of adoption. The Federal Court ruled that the age at which a child enters the home was a characteristic of the family that received the child, since its effect was to entitle or disentitle the family to extended benefits based on the age at which the child entered the home.

The question of whether the ground of family status can be applied to protect individuals who claim they are discriminated against because they are *not* in a parent-child relationship has not been examined in the caselaw. The wording of the definition of family status, as the status of *being in* a parent-child relationship would seem to argue against it, particularly when compared to the much more expansive definition of the ground of marital status.⁴⁹ As well, the legislative history of the protection, which evolved to deal with the continuing disadvantage experienced by persons who have parental responsibilities, would also seem counter-indicative. It would seem clear, at minimum, that the family status provisions of the *Code* could not be used to privilege those who are not in a parent-child relationship over those who are. For example, it would seem to run counter to the intent of the provision if it were used to strike down programs intended to accommodate persons in a parent-child relationship, on the basis that they discriminated against persons who are not in a parent-child relationship. On the other hand, it may be inappropriate to close the door to situations where, for example, negative assumptions or stereotypes about persons who do not have children operate to deprive individuals of a significant right or benefit – for example, if an employer decided to give preference during a layoff to employees who had children, on the basis that those without children did not need their jobs as much. It may be most appropriate to consider such complaints in the light of the test enunciated by the Supreme Court of Canada in *Law v. Canada (Minister*

⁴⁶ *McKenna v. Canada (Secretary of State)*, (1993), 22 C.H.R.R. D/486 (Can. Trib)

⁴⁷ *Gill v. British Columbia (Ministry of Health) (No. 1)*, (2001), 40 C.H.R.R. D/321 (BCHRT)

⁴⁸ (1997), 32 C.H.R.R. D/89 (F.C.T.D.)

⁴⁹ Section 10(1): "marital status" means the status of being married, single, divorced or separated, and includes the status of living with a person in a conjugal relationship outside of marriage.

of Employment and Immigration)⁵⁰ and consider whether the differential treatment complained of reflects a stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value.

It has been a matter of considerable debate in the case law as to whether or not human rights protections for family and marital status includes protection against discrimination based on the particular identity of a spouse or family member, or whether it is restricted to discrimination based on the status of, for example, being a parent. This issue has been settled by the Supreme Court of Canada in the recent decision of *B. v. Ontario (Human Rights Commission)*.⁵¹ This decision involved a complainant, Mr. A, whose employment was terminated following a confrontation between Mr. B (Mr. A's boss) and Mr. A's wife and daughter over allegations that Mr. B had sexually abused Mr. A's daughter.

The Supreme Court of Canada endorsed the Court of Appeal's approach, finding that adverse treatment based on the identity of one's spouse, child or parent is prohibited under the *Code*. The Court also applied a broad, remedial and purposive interpretation to family status in the *Code*. The majority also expressed approval for an analytical approach that considered discrimination claims from a "particular identity" perspective rather than from a "group identity" perspective.⁵² The majority noted "...the proper inquiry is not whether the respondent belongs to an identifiable group but whether he was arbitrarily disadvantaged on the basis of his marital or family status."⁵³ For example, the imputing of stereotypical assumptions or the development of personal animosity towards an individual on account of the behaviour, actions or reputation of his or her spouse, child or parent, is a prohibited form of discrimination.⁵⁴

The Court ruled that spousal identity was indeed protected under the ground of marital status. The Court stated that:

We have concluded that the words of the *Code* support the view that the enumerated grounds of family and marital status are broad enough to encompass circumstances where the discrimination results from the particular identity of the complainant's spouse or family member. Although the jurisprudence on the scope of marital status in the context of human rights legislation is uneven at best, the weight of judicial consideration also favours an approach that focuses on the harm suffered by an individual,

⁵⁰ [1999] 1 S.C.R. 497

⁵¹ [2002] 3 S.C.R. 403

⁵² *Ibid* at para. 52. Also see paras. 56 –58.

⁵³ *Ibid* at para. 58

⁵⁴ *Ibid* at para. 60. The majority expressly rejected the Appellant's argument that personal animosity towards Mr. A was the sole reason for his termination. It found that even if this were true, the animosity arose from stereotypical assumptions about Mr. A. due to the behaviour of his wife and daughter, and not on account of his capabilities or individual merit.

regardless of whether that individual fits neatly into an identifiable category of persons similarly affected.

Is the definition of “family status” in section 10 of the Code overly narrow? Should the Commission consider advocating for a definition that covers other kinds of dependency relationships? If so, what kinds of relationships should the definition be expanded to cover?

Should the Code provide protection for persons who are not in a parent-child relationship? If so, under what circumstances?

Exceptions

The *Code* sets out a number of exceptions to the protections against discrimination based on family status. The most significant of these are briefly described below.

Section 15: the *Code* permits the age of sixty-five years or over as a requirement, qualification, or consideration for preferential treatment. This, along with the **section 14** special program defence, may allow, for example, housing that is targeted to the needs of older persons and thereby excludes families with young children.

Section 18: special interest organizations that are primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination are permitted to restrict membership or participation to persons similarly identified.

Section 24: while nepotism and anti-nepotism policies clearly make distinctions based on marital and family status, the *Code* specifically permits such policies in the context of employment. Section 24 permits an employer to either grant or withhold employment or advancement in employment to a person who is the spouse, child or parent of the employer or of an employee. The Commission has taken the position that such a denial or preference must be based on a policy, rather than occurring on an *ad hoc* basis.⁵⁵ The *Code* does not require an employer to show that its nepotism or anti-nepotism policy is a *bona fide*⁵⁶ occupational requirement. The policy may relate to hiring or promotion of employees. For example, an employer may give preference in summer employment to children of employees. However, it is important to note that this exception does not allow for the dismissal of employees once they are hired. Nor

⁵⁵ Ontario Human Rights Commission and Human Resources Professionals Association of Ontario, *Human Rights at Work*, (Toronto: Human Resources Professionals Association of Ontario, 2004), at 46.

⁵⁶ This Paper contains at its end a Glossary of legal terms related to human rights, such as *bona fide* requirement.

does it appear to allow for different employment conditions outside of hiring or promotion. For example, family members could not be paid more than others in the same job.⁵⁷

In an interesting twist on this issue, the British Columbia Human Rights Tribunal has recently ruled that the British Columbia Ministry of Health's refusal to fund family members as paid caregivers under its "Choices in Supports for Independent Living" program discriminated on the basis of family status and disability.⁵⁸ The complainant had sought to hire her father to provide her with the 24-hour intimate care that she needed in order to live independently. The Tribunal stated that given the nature of the employment, the choice of the caregiver was particularly important, and that trust was essential to such an employment relationship. It also stated that the blanket prohibition on the hiring of relatives differentiated expressly on the basis of family status, and was precisely the type of discrimination that the B.C. *Human Rights Code* aimed at addressing, since the father was denied the employment solely on the basis of his family status, and without consideration of his personal attributes and skills.⁵⁹

THE INTERSECTION OF FAMILY STATUS WITH OTHER CODE GROUNDS

It is important to take into account the ways in which parents and children are affected by their membership in other historically disadvantaged groups. Individuals may be subjected to discrimination based on more than one *Code* ground, and these grounds may "intersect", producing unique experiences of disadvantage and discrimination.

Family status is essentially about relationships. Because relationship roles and responsibilities, especially when they extend to caregiving, have historically been divided along gender lines, the ground of family status is closely related to that of sex. The experience of being in a parent-child relationship will often differ for men and women, because of the different expectations, assumptions and stereotypes about mothering and fathering. It is often assumed, for example, that women will naturally be the primary caregivers in any family. These assumptions can have significant consequences for women and men in the areas of employment, housing and services. As is discussed elsewhere, it remains the case that women generally continue to bear a disproportionate share of responsibility for

⁵⁷ *Mark v. Porcupine General Hospital*, (1984), 6 C.H.R.R. D/2538 (Ont. Bd. Inq.)

⁵⁸ *Hutchinson v. British Columbia (Ministry of Health)(No. 4)* (2004) 49 C.H.R.R. D/348 (BCHRT).

⁵⁹ Section 24(1)(c) of the Ontario *Code* makes specific provision for the employment of caregivers, permitting individuals to refuse to employ individuals on the basis of any prohibited ground where the primary duty is to attend to their medical or personal needs or those of their spouses, child, or relative. There is no analogous provision in the British Columbia *Human Rights Code*, RSBC 1996, c.210.

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caring for aging parents, young children, or family members who are ill or have disabilities, and so may have greater needs for accommodation in employment, housing or services. On the other hand, men with caregiving responsibilities may have difficulty obtaining the accommodations they require.

One's marital status will also have a powerful effect on the experience of being in a parent-child relationship. Marital status is broadly defined in the *Code* as the status of "being married, single, widowed, divorced or separated and includes the status of living with a person in a conjugal relationship outside marriage". In the case of *Miron v. Trudel*,⁶⁰ the Supreme Court of Canada had this to say about the situation of unmarried persons in relationships:

Persons involved in an unmarried relationship constitute an historically disadvantaged group. There is ample evidence that unmarried partners have often suffered social disadvantage and prejudice. Historically, in our society, the unmarried partner has been regarded as less worthy than the married partner. The disadvantages inflicted on the unmarried partner have ranged from social ostracism through denial of status and benefits.

A parent who is single or divorced will often experience compounded disadvantage because of the continuing social stigma associated with being a single parent, as well as the added financial, practical and emotional responsibilities of solo parenting. As is noted earlier in this paper, single mothers are disproportionately likely to experience poverty and to find themselves shut out of the housing market.

The particular vulnerability of sole-support mothers in receipt of public assistance was recognized by the Ontario Court of Appeal in *Falkiner v. Director, Income Maintenance Branch*.⁶¹ The Court found that there was significant evidence of historic disadvantage and continuing prejudice against this group, noting the resentment and anger they face from others in society who see them as "freeloading and lazy", and the history of stigmatization, stereotyping and offensive restrictions on their personal lives.

The experience of same-sex couples (whether married or living together outside of marriage) or single gays and lesbians who are parents is also unique. These parents may find themselves bearing the brunt of negative stereotypes, and may struggle to fit into structures that were not designed to include them. Gays, lesbians and bisexuals providing care for their aging parents may face unique issues in this area as well: an interesting American survey found that members of

⁶⁰ [1995] 2 S.C.R. 418

⁶¹ (13 May 2002) C35052/C34983, (Ont. C.A.). This decision under section 15 of the *Canadian Charter of Rights and Freedoms* struck down the definition of "spouse" under the *Family Benefits Act*, which presumed a spousal relationship as soon as a couple began living together. The definition meant that many people in receipt of social assistance were no longer entitled to receive it. The Court found that the definition discriminated on the basis of marital status, sex, and the receipt of social assistance.

this community felt that they were expected to provide a disproportionate amount of family care because they were viewed as “single” (presumably because of the non-recognition of their partners).⁶² Gays, lesbians and bisexuals may therefore find themselves in a double-bind where they need significant accommodation for their caregiving responsibilities, but have more difficulty obtaining recognition of these needs.

With the aging demographic, there is an increase in older persons with significant caregiving obligations, whether this means caring for an ailing partner, a grown child who has a disability, or providing primary care for grandchildren.⁶³ These caregivers may face unique challenges.

It is important to consider the complex ways in which family status intersects with the race-related grounds of the *Code*. Negative stereotypes about families take specific forms for various racialized groups. Research that has been done in the area of access to affordable housing suggests that sole-support families from racialized and Aboriginal communities may be the most disadvantaged of all families seeking shelter.⁶⁴ As well, some studies suggest that parents from racialized communities may be less likely to have access to the types of flexible workplace practices that are intended to assist parents in meeting both their employment and their family responsibilities.⁶⁵ The Commission has also heard of situations where stereotypes regarding single mothers from racialized communities have affected the nature and quality of the educational services their children have received.

It is also important to keep in mind the characteristics of those cared for, as well as of caregivers. For example, parents providing care for children with disabilities can face challenges above and beyond those faced by other parents, often with few appropriate, ongoing supports. These parents may have difficulty finding and retaining employment that allows them to meet their responsibilities to their children.⁶⁶

⁶² For a helpful and comprehensive discussion of these issues from an American perspective, see S. Cahill, M. Ellen, and S. Tobias, *Family Policy: Issues Affecting Gay, Lesbian, Bisexual and Transgender Families*, (New York: The National Gay and Lesbian Task Force Policy Institute, 2002)

⁶³ In 2001, over 25,000 Canadian children between the ages of 0 and 14 were living in “skip-generation” households – that is, their grandparents were their primary caregivers. See A. Milan and B. Hamm, “Across the Generations: Grandparents and Grandchildren”, *Canadian Social Trends* (Winter 2003) 2.

⁶⁴ P. Khosla, *If Low Income Women of Colour Counted in Toronto* (Toronto: Community Social Planning Council of Toronto, 2003) at 23 and following.

⁶⁵ Debra B. Schwartz, *An Examination of the Impact of Family-Friendly Policies on the Glass Ceiling*, Report Prepared for the U.S. Department of Labor, Glass Ceiling Commission (New York: Families and Work Institute, 1994)

⁶⁶ Fraser Valentine, *Enabling Citizenship: Full Inclusion of Children with Disabilities and Their Parents* (Canadian Policy Research Networks, June 2001).

How do gender, race, sexual orientation, and other Code grounds impact on discrimination because of family status? Are there situations not identified in this Paper where discrimination based on family status is compounded by other Code-related factors?

EMPLOYMENT

Combining paid work with motherhood and accommodating the childbearing needs of working women are ever-increasing imperatives. That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious.
-Chief Justice Dickson in *Brooks v. Canada Safeway Limited*⁶⁷

Employment and family often entail competing responsibilities: spouses or partners fall sick, daycare arrangements fall through, an aging parent needs help in making a transition to assisted living arrangements. For many workers, daily life involves a complicated juggling act between the demands, deadlines and responsibilities of the workplace, and the needs of their families.

Many commentators have noted an increasingly problematic relationship between work and family life as both average work hours⁶⁸ and the number of dual-income and sole support families have increased at the same time. Fewer families have a member who can attend full-time to family responsibilities. The aging of the population, with the attendant increase in elder care needs, also plays into this trend. More and more families appear to be struggling to manage the competing demands of the workplace and caregiving responsibilities. For example, according to a Conference Board of Canada study, in 1999, just over 46 percent of Canadian workers felt moderate to high levels of stress in balancing work and life responsibilities, up from approximately 27 percent in 1989.⁶⁹

This juggling act has a price for both employees and employers. Recent estimates suggest that work and family conflicts cost employers at least \$2.7 billion per year because of family-related absences from work. Stressed employees took an average of 13.2 days off to deal with family-related problems in comparison to the 5.9 days typical of those who report low levels of work and family conflict. Health impacts related to work/life stress cost the Canadian health

⁶⁷ [1989] 1 S.C.R. 1219

⁶⁸ According to L. Duxbury and C. Higgins in *Workplace Balance in the New Millenium* (Canadian Policy Research Network, 2001) the average employee surveyed spent 42 hours a week in paid employment in 1991, and 45 hours in 2001. A 2001 EKOS study found that 43 percent of workers surveyed indicated that their workload had increased between 1999 and 2001 (*Survey on Canadians' Attitudes Regarding Their Workload* (Ottawa: 2001)).

⁶⁹ Conference Board of Canada, *Solutions for the Stressed Out Worker* (August 1999).

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care system approximately \$425.8 billion per year.⁷⁰ According to another study, as a result of work/life conflict, 14 percent of working Canadians have left a job; 32 percent have refused a promotion or decided not to apply for one; and 24 percent have turned down a transfer or decided not to apply for one.⁷¹

The burden of this juggling act falls disproportionately on women, since women, in addition to their work in the paid labour force, continue to assume the primary responsibility for providing care for children and aging parents.⁷² Studies have shown that women are almost twice as likely as men to report high levels of time stress, and have higher rates of absenteeism at work.⁷³

On the other hand, the caregiving responsibilities of fathers or same-sex couples may not be recognized because of stereotypes and assumptions about appropriate family structures, and so these employees may have difficulty in having their *Code*-related needs recognized and appropriately dealt with by their employers. For example, it may be assumed that fathers will not or should not take parental leave, and those that do may be perceived as not being serious about their careers.

The issue has been widely recognized, and governments have taken some steps to assist employees in balancing their work and family lives. Parental leave entitlements have recently been expanded under both employment standards and employment insurance legislation. Since 2000, Ontario's *Employment Standards Act* requires employers of over 50 employees to provide up to 10 days of unpaid leave for employees to attend to the death, illness, injury, medical emergency or other urgent matter related to a broad spectrum of family members, including spouses⁷⁴, children (including step-children and foster children), parents (again including step-parents and foster parents), grandparents, siblings, or spouses of their children, and any other relatives who are dependent on them for care and assistance.⁷⁵ Recently passed amendments to the *Employment Standards Act* entitle employees to up to eight weeks of leave to provide care or support to seriously ill family members. Family members include spouses, parents, and children, including step and foster relationships.⁷⁶ The federal government has recently amended the *Employment*

⁷⁰ L. Duxbury et al., *An Examination of the Implications and Costs of Work-Life Conflict in Canada* (Ottawa: Health Canada, June 1999).

⁷¹ Conference Board of Canada, *Survey of Canadian Workers on Work/Life Balance* (1999).

⁷² See L. Duxbury and C. Higgins, *2001 National Work-Life Conflict Study: Report One* (Ottawa: Health Canada, March 2002).

⁷³ *Supra*, note 69: 24 percent of women reported a lot of work/life stress, while only 10 percent of men did so.

⁷⁴ Bill 171, S.O. 2005, c. 5, amended the definition of "spouse" in the *Employment Standards Act* so as to include same-sex couples.

⁷⁵ *Employment Standards Act*, S.O. 2000, c. 41, s. 50

⁷⁶ *Employment Standards Amendment Act (Family Medical Leave) 2004* S.O. 2004, c. 15.

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Insurance Act to provide up to six weeks of benefits for persons who are not working because they are caring for spouses, partners, children or parents.⁷⁷

What more could or should be done by government, employers or others to assist employees to balance their work and family responsibilities?

Are there other aspects or effects of the conflict between work and family that you would like to tell us about?

⁷⁷ *Employment Insurance Act*, S.C. 1996, c. 23 ss. 12, 23

Universal Design

Current workplace policies, procedures and programs do not always take into account the demographic changes discussed earlier, and may therefore have the effect of disadvantaging individuals on the basis of family status. As a common example, while most employers offer a certain amount of paid sick days, it is less common to find employer policies that recognize that employees may also need to take time off when their children are sick and need care. Workplace programs, policies, and assumptions may therefore need to be re-examined.

The Supreme Court of Canada has made it clear that employers, when designing their workplace standards, programs and policies, must be aware of the differences between individuals and between groups of individuals, and must build in conceptions of equality. The standards governing the workplace, including those for recruitment, training, promotional opportunities and the way in which work is performed, should be designed to reflect all members of society, in so far as this is reasonably possible. To the extent that a standard unnecessarily fails to reflect the differences among individuals, it may run afoul of human rights protections, and may need to be replaced, unless it would cause undue hardship⁷⁸ to do so.⁷⁹ Applying this to the ground of family status, it is not acceptable to structure systems in a way that assumes that only one family structure is valid or normal, and then to try to accommodate those who do not fit this assumption. Rather, the diversity of today's families should be reflected when workplace policies and programs are designed, so that barriers are not created. Existing policies and programs should be actively reviewed to ensure that barriers based on family status are removed.

This includes all aspects of the workplace, whether formal or informal. For example, informal policies and assumptions that base promotion opportunities on after-hours socializing and networking may have the effect of excluding persons with caregiving responsibilities. Formal policies regarding attendance at work-related events outside of standard work hours may have a similar effect.

In recent years, many employers have been implementing "family-friendly" or "flexible workplace" policies. These include policies and programs related to, for example, flexible hours, telecommuting, job-sharing, part-time work, leaves of absence, and cafeteria-style benefits.⁸⁰ In some cases, these programs have

⁷⁸ This Paper contains at its end a Glossary of legal terms related to human rights, such as "undue hardship".

⁷⁹ *British Columbia (Public Service Employees Relations Commission) v. BCGSEU* [1999] 3 S.C.R. 3, at para 68.

⁸⁰ Cafeteria-style benefit plans allow employees to choose from a selection of available benefits, up to a maximum value or number of choices defined by the plan. This permits employees to select those benefits that are of greatest value to them.

been implemented to address specific equity issues. In other cases, the programs are based on the principle that flexibility benefits all employees.⁸¹

These programs are laudable attempts to make the workplace more flexible and accommodating, and the Commission believes that such programs are a positive example of how employers can promote the equality of persons with caregiving responsibilities, and move towards compliance with the requirements of the *Code*, as well as improve employee retention, performance, and morale.

Despite the acknowledged benefits of these programs, some concerns have been noted with regards to their operation. Depending on how such programs are designed, accessing them may have long-term consequences in terms of pensions and benefits. As well, some studies have shown that workers may be reluctant to take advantage of these “family-friendly” programs because they believe that their use will trigger negative perceptions about their commitments to their jobs and their careers, and that there would be long-term repercussions for their careers.⁸² This may be one explanation as to why the uptake for such programs is sometimes surprisingly low. This suggests that these programs will only be effective where care is taken to avoid negative repercussions for using them, and where the workplace culture is positive and supportive.

As well, some commentators have noted that flexible workplace programs are most often offered in the higher echelons of employment – that is, to those in the most prestigious and highest-paid positions. Those in low-paying, entry-level positions more rarely have access, although arguably their need for such flexibility may be even greater. As well, some American studies have shown that persons from racialized communities are less likely to benefit from “family-friendly” workplace policies.⁸³

What programs or policies should employers put in place to ensure that their workplaces do not disadvantage individuals on the basis of family status?

Duty to Accommodate

Section 11 of the *Code* requires that, where a requirement, qualification or factor results in the exclusion, restriction or preference of a group of persons identified

⁸¹ Some of these policies are reviewed in Derrick Comfort et. al, *Part-time Work and Family Friendly Practices in Canadian Workplaces* (Ottawa: Statistics Canada and Human Resources Development Canada, 2003).

⁸² See, for example, Kelly Ward and Lisa Wolf-Wendel, “Fear Factor: How Safe is it to Make Time for Family?” *Academe*, (November-December 2004), and Schwartz, *supra*, note 65.

⁸³ *Supra*, note 65

by a prohibited ground, this requirement will violate the *Code* unless it can be shown that it is reasonable and *bona fide* in the circumstances in that the needs of the group cannot be accommodated without undue hardship. Where workplace policies and procedures such as, for example, rigid working hours, have a negative effect on persons identified by their family status, the employer would be required to show that it had attempted to accommodate, to the point of undue hardship. As discussed above, conceptions of equality must be built into workplace standards. Accommodation must first examine whether the rule itself can be modified to become more inclusive. Where this is impossible without undue hardship, the employer should consider accommodation of individual needs.

Accommodation may involve short-term or one-off arrangements to deal with temporary needs (such as helping an aging parent to make the transition into assisted living), emergencies (such as when a spouse, partner, parent or child becomes gravely ill), or recurring family responsibilities (such as attending parent-teacher interviews). It may also involve more long-term accommodations, such as flexible or reduced hours, scheduling changes, or leaves.

The Commission's policies have recognized, and the caselaw has supported, the duty of employers to accommodate some types of needs related to the family, such as pregnancy and breastfeeding. The Commission's *Policy on Discrimination Because of Pregnancy and Breastfeeding* emphasizes the right of women to make choices in the best interests of their children, and not to be disadvantaged as a result. Employment accommodations for breastfeeding may include scheduling changes, the provision of breaks, the creation of a supportive environment, and, in some special cases, permitting a leave of absence. Accommodations should be provided in a way that most nominally affects the employee's rights.⁸⁴

There is, however, very little case law dealing with the duty to accommodate needs related to family status *per se*. In *Brown v. M.N.R., Customs and Excise*,⁸⁵ the Canadian Human Rights Tribunal ruled that employers have a duty to accommodate needs related to family status. The work of the complainant involved rotating shifts. After her child was born, the complainant asked to work straight day shifts because she could not find a babysitter to look after her child overnight, and her husband, a police officer, also worked rotating shifts. The employer denied her request, and the complainant instead went on an unpaid care and nurturing leave. The Tribunal ruled that the employer had a duty to accommodate the needs of the complainant related to her family status. The Tribunal found that the complainant could have been accommodated, but that the employer did not pursue accommodation possibilities. The Tribunal stated:

⁸⁴ *Supra*, note 4.

⁸⁵ (1993), 19 C.H.R.R. D/39

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We can therefore understand the obvious dilemma facing the modern family wherein the present socio-economic trends find both parents in the work environment, often with different rules and requirements. 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.

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

An Ontario Human Rights Board of Inquiry took a very different approach to the ground of family status in *Wight v. Ontario (No. 2)*.⁸⁶ In this case, the complainant was expected to return from maternity leave in July, but informed her supervisor that she was unable to secure adequate daycare until October, as she was attempting to find a licensed daycare provider for her child and no such space was available prior to that time. When she did not return to work, her employment was terminated, as she was held to have abandoned her position. The Board of Inquiry ruled that the complainant was not discriminated against on the basis of family status; rather she was denied a final extension of her maternity leave because she refused to return to work until she satisfied her own personal preference for daycare. The Tribunal ruled that:

[A]n employer is not unreasonable for requiring an employee on a leave of absence to return to work when the leave expires. There is a reasonable expectation that an employee on a leave of absence will take whatever steps are necessary to do so. In this case, the complainant steadfastly refused to consider the respondent's rights in this regard This was not a case of someone who, despite her best efforts, could not find daycare for her child and had to make a choice between her child or her job. The complainant had decided that the only acceptable daycare was provided through a regulated daycare facility. She was unwilling to accept less. While that was her choice, it does not follow that the right to be accommodated arises simply on the basis of what was best for her child.

A very recent decision by the British Columbia Court of Appeal takes a different approach from either of these.⁸⁷ This was an appeal from the decision of an

⁸⁶ (1998), 33 C.H.R.R. D/191; leave to appeal denied (June 26, 2000) [2000] O.J. No 2924 (Ont. Sup. Ct.)

⁸⁷ *Health Sciences Association of British Columbia v. Campbell River and North Island Transition Society* 2004 BCCA 260, May 10, 2004

arbitrator. The employee in this case is married with four children, the youngest of whom has very severe behavioural problems requiring specific parental and professional attention. She worked for the respondent on a part-time basis, from 8:30 a.m. to 3:00 p.m. Because of program changes, the respondent decided to change her shift to 11:00 a.m. to 6:00 p.m. The grievor was concerned because she needed to attend to her son after school hours. A medical report stated that her son was best served by having his mother care for him after school, noting that he had a major psychiatric disorder, and that his mother's after-school care was "extraordinarily important" to his prognosis. This information was provided to the employer; however, it did not adjust the grievor's schedule. The grievor attempted to work the schedule, but went off work after a few weeks, and was diagnosed with post-traumatic stress disorder.

The arbitrator concluded that the ground of family status was not intended to capture such "varying circumstances of employment and varying degrees of difficulty in child care arrangements". He explicitly declined to follow the Tribunal decision in *Brown*, and rejected the claim of the grievor.

The Court of Appeal overturned the decision of the arbitrator. It considered the decisions noted above, and stated that it found previous decisions on family status unhelpful, that their definitions of the scope of family status were over broad, and they conflated the issues of *prima facie* discrimination⁸⁸ and accommodation. The Court went on to state as follows:

[The parameters of the concept of 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; nor, in the context of the present case, can it be limited to "the status of being a parent per se" as found by the arbitrator ... for that would not address serious negative impacts that some decisions of employers might have on the parental and other family obligations of all, some or one of the employees affected by such decisions.

If the term "family status" is not elusive of definition, the definition lies somewhere between the two extremes urged by the parties. Whether particular conduct does or does not amount to *prima facie* discrimination on the basis of family status will depend on the circumstances of each case. In the usual case where there is no bad faith on the part of the employer and no governing provision in the applicable collective agreement or employment contract, it seems to me that 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. I think that in the vast majority of situations in which there is a conflict

⁸⁸ This Paper contains at its end a Glossary of legal terms related to human rights, such as *prima facie* discrimination.

between a work requirement and a family obligation it would be difficult to make out a *prima facie* case.

In this case, given the major psychiatric disorder suffered by the grievor's son, and the serious interference with the grievor's substantial parental obligations that resulted from the change in working hours, the arbitrator erred in not finding a *prima facie* case of discrimination on the basis of family status.

The caselaw on this issue is still at a very early stage of development, and does not appear to have yet integrated the kinds of approaches being applied to other human rights grounds. However, the trend to this point appears to be to recognize that the ground of family status is intended to include, to some extent, consideration of the caregiving needs of parents. Further, the majority of the cases recognize that there is, in some circumstances, a duty on an employer to accommodate the caregiving needs of employees. The duty appears to clearly exist where there is a significant clash between employment and familial responsibilities. However, the scope of that duty has not been fully fleshed out. There are, for example, no cases at all related to elder care. The caselaw to this point appears to have given little consideration to systemic issues related to gender and family status, and to the duty to design standards inclusively, as enunciated by the Supreme Court of Canada in *Meiorin*.⁸⁹

Nor has any consideration been given to the nature of appropriate accommodation for needs related to family status, and the balance of responsibilities between the parties to accommodation. For example, is an employer required to provide paid or unpaid time off for a parent who needs to tend to the medical needs of a child or parent? Should employees who are required to take time off work to care for a sick parent or child be subject to attendance monitoring programs? Is an employer required to schedule shifts that are compatible with child care arrangements? May an employee refuse to travel where child care arrangements cannot be made, or travel would conflict with parental obligations? Is an employer required to permit full-time employees with children to adopt part-time or modified work schedules or take leaves of absence, and if so, under what circumstances? Given the significant impact of these issues on both employees and employers, these questions require careful consideration.

Recognizing the necessity to balance the needs of both employers and employees, what is the extent of an employer's duty to accommodate needs related to an employee's family status? What are the respective responsibilities of the employer and the employee? What types of accommodation are appropriate in this context?

⁸⁹ *Supra*, note 79.

Systemic Barriers

Although the literature has identified a number of systemic barriers related to work and family, there has been little examination of such issues in human rights caselaw or policy.

For example, persons with significant caregiving responsibilities are more likely to seek part-time, casual or contract work. The vast majority of part-time workers are women. Statistics Canada figures for 2004 indicate that 27.5 percent of all part-time workers aged 25-44 have chosen part-time work in order to care for children. When this figure is broken down by sex, it reveals that 33.7 percent of female part-time workers aged 25-44 have chosen this as a means of balancing work and child care responsibilities; this is true for only 3.2 percent of men in the same age group. Only 4.7 percent of men in this age group are working part-time; while 20.6 percent of women in this age group are working part-time.⁹⁰ Over the past 30 years, women have consistently represented 70 percent of the part-time workforce.

This type of non-standard work has its costs, however. Research indicates that those who work part-time may be viewed as less committed, and therefore have lesser access to promotional opportunities. Part-timers are unlikely to have senior or supervisory positions. There is also an association between part-time work and lower wages. Access to pension and health-related benefits is very low for part-time workers.⁹¹ The lack of opportunities and benefits for part-time workers may have an adverse impact on employees with family responsibilities. As well, where an employee chooses a part-time arrangement in order to balance work and family responsibilities, he or she may find that the workload has not been reduced: it is expected that the same amount of work will be completed in fewer hours, but for less pay and recognition.

Some workplace cultures require employees to put in extensive 'face time', regardless of productivity or achievements: in workplaces where long working hours are valued in and of themselves, persons with caregiving responsibilities will have difficulty in having their achievements recognized.⁹² In *Woiden v. Dan Lynn*⁹³, the employer insisted that the complainant, a single mother of three young children, take on extensive extended hours, including evenings and

⁹⁰ Statistics Canada, CANSIM Table 282-0014 and 282-0001.

⁹¹ *Supra*, note 81

⁹² See for example, the report on the Australian finance industry prepared for the Human Rights and Equal Opportunity Commission, Leonie V. Still, *Glass Ceilings and Sticky Floors: Barriers to the Careers of Women in the Australian Finance Industry*, (1997); and Sharon L. Harlan and Catherine Waite Berheide, *Barriers to Workplace Advancement Experienced by Women in Low-Paying Occupations* (Centre for Women in Government, State University at Albany, January 1994) at 34.

⁹³ (2002), 43 C.H.R.R. D/296 (C.H.R.T.O)

weekends. When the complainant indicated that this would be difficult for her because of her child care obligations, and suggested a modified schedule, the employer refused to consider it, and made it clear that she would be dismissed if she did not work the new hours. The Tribunal ruled that the complainant had been discriminated against on the basis of her family status.

Similarly, in workplaces where training, development or promotional opportunities are allocated informally, and are influenced by after-hours socializing, individuals with significant caregiving opportunities may find themselves at a disadvantage.

As well, individuals who take significant time away from the paid work force to attend to caregiving responsibilities may find that their education, skills and work experience are accorded little weight when they seek to rejoin the paid work force, and that their career mobility and financial security have suffered long-term consequences.

Studies of various professions have indicated that rigid schedules for “making partner” or achieving tenure, for example, may have a negative impact on women who are at the peak of their child-bearing and child-rearing responsibilities at the same time that they are expected to be providing a full focus on their careers.⁹⁴ The Law Society of Upper Canada has noted the following negative consequences for women in the legal profession who have children: loss of income, limitations in advancement, delay in promotion/admission to partnership, segregation into less remunerative and ‘low profile’ areas of practice, difficulty in obtaining access to higher profile files, unwillingness on the part of employers and colleagues to accommodate the demands of family responsibilities, and questioning and testing of commitment to work.⁹⁵

**Are there other systemic issues in employment related to family status?
How can these barriers be addressed?**

Negative Attitudes and Stereotypes

While we often think of work and family as very separate spheres, every employee is also a member of a family, and the two aspects of life inevitably overlap. Employees commonly display pictures of their spouses, partners, children and other family members on their desks, bring their partners or spouses to work-related social events, and discuss their families with their co-workers

⁹⁴ See for example, Fiona M. Kay, *Transitions and Turning Points, Women's Careers in the Legal Profession, A Report to the Law Society of Upper Canada* (September 2004), and Joan C. Williams, “Hitting the Maternal Wall” *Academe* (November-December 2004).

⁹⁵ Law Society of Upper Canada, *Guide to Developing a Policy Regarding Flexible Work Arrangements*, March 2003.

over lunches and coffee breaks. Some sharing of one's personal life is a normal part of a supportive work environment.

Negative attitudes and stereotypes regarding family status can therefore have a significant impact on an employee's experience of his or her workplace. The employee who finds that her status as a divorced single parent has been the subject of negative office gossip may feel no longer truly part of the workplace. In the case of *Moffat v. Kinark Child and Family Services*,⁹⁶ a gay man who was a foster parent to an adolescent boy was falsely rumoured to be abusing the child, was harassed because of his sexual orientation, and was falsely accused of misconduct to the Children's Aid Society. The Board found that Moffat had been discriminated against in a number of ways, including on the basis of his family status.

As well, individuals may find that they are subtly excluded from the office social environment because of their family status. For example, many workplaces formally or informally celebrate weddings, births, or other important events in the lives of employees. However, the milestone events of persons who do not belong to 'typical' families may not be recognized in the same way – for example, the arrival of an adopted child may not be celebrated in the same way as the milestone events of other families.

Negative attitudes and stereotypes can also have an impact on access to workplace opportunities. A number of studies have suggested that mothers are perceived to be less committed and less competent in the workplace than either childless persons of either sex, or than fathers.⁹⁷ Employers may assume, for example, that women with small children are no longer dedicated to their careers⁹⁸ or are unable to work longer hours, do overtime or take on complex or challenging projects, and unthinkingly place them on the "mommy track".⁹⁹ Or employers may feel that women *should* give primacy to her caregiving responsibilities, and try to enforce such roles. Negative assumptions and stereotypes may also affect fathers: for example, an employer may assume that

⁹⁶ (1998), 35 C.H.R.R. D/205 (Ont. Bd. of Inq.)

⁹⁷ See Kathleen Fuegen et al., "Mothers and Fathers in the Workplace: How Gender and Parental Status Influence Judgments of Job-Related Competence" *Journal of Social Issues*, Volume 60, Issue 4, page 737, December 2004. Subjects were asked to evaluate job applicants who were either male or female and either single, or married with two children. Results showed that parents were judged less competent and committed than non-parents. Interestingly, it appeared that fathers were held to lower standards than either mothers or childless men. Another study indicated that when female employees become mothers they are perceived as less competent, although the same effect does not occur when men become parents. People also reported less interest in hiring, promoting and educating mothers, relative to fathers or childless employees. (Cuddy et al. "When Professionals Become Mothers, Warmth Doesn't Cut the Ice", *Journal of Social Issues*, Volume 60, Issue 4, Page 701, December 2004).

⁹⁸ For example, see *Broere v. W.P. London and Associates Ltd.*(1987), 8 C.H.R.R. D/4189 (Ont. Bd. of Inq.)

⁹⁹ For a discussion of this phenomenon in an academic context, see Joan C. Williams, "Hitting the Maternal Wall" , *supra*, note 94.

a father with children will be unwilling to undertake extensive travel as part of his job.

Women in the paid workforce frequently report perceptions of this type of stereotyping. Many women feel that, once they have children, they are no longer taken seriously at work, and that their opportunities for career advancement are limited by perceptions about their family status. Women report taking extensive steps to avoid such bias. For example, studies have shown that there may be a stigma associated with accessing “family-friendly” workplace policies, and that women are therefore hesitant to make use of programs and policies that are designed to assist those in their circumstances.¹⁰⁰ Women, and to a lesser extent men, have reported having fewer or no children because of the perceived impact on their careers, delaying having children, timing births around workplace obligations, minimizing maternity or parental leaves, avoiding accessing “family-friendly” policies, and missing important family events so as not to appear uncommitted to their jobs.¹⁰¹

Are there other negative attitudes and stereotypes based on family status? How do these attitudes and stereotypes affect employees?

Benefit Plans

Many employers provide a variety of benefits for their employees, including:

- Leaves of absence, such as bereavement, emergency, maternal and parental leave. Minimum standards for such leaves are set out under the *Employment Standards Act 2000*, S.O. 2000, c. 41
- Medical and dental benefits
- Group life and disability insurance
- Pension benefits, including survivor benefits.

Section 25(2) of the *Code* provides that benefit and pension plans that make distinctions based on family status do not discriminate so long as they are in compliance with the *Employment Standards Act*. Regulation 286/01 under the *Employment Standards Act* does not create any exceptions for distinctions based on family status.

As noted above, the limitations on or lack of access to benefits and pensions for part-time employees raise systemic issues connected to family status, in that women, especially those with caregiving responsibilities, are more likely to be in

¹⁰⁰ See Ward and Wolf-Wendel, *supra*, note 82 and Schwartz, *supra*, note 65

¹⁰¹ Mary Dee Wenniger, “Most Faculty Caregivers Strategize to Avoid Discrimination”, *Women in Higher Education* (June 2003).

part-time employment, and are therefore less likely to have access to benefits. Arguably, the lack of access to benefits for part-time employees may have an adverse impact on the basis of family status.

An individual's family status is a personal characteristic that may not be known to others. An employer who legitimately requires and collects personal information that directly or indirectly identifies a person's status must ensure the maximum degree of privacy and confidentiality of the information. This includes information that enables an employee to claim or register for benefits.

Are you aware of instances in which pension or benefit plans have a discriminatory effect based on family status? Are there instances where differences in access to pensions and benefits are based on *bona fide* requirements? Are there steps that could be taken to make pension and benefit plans more inclusive of persons with caregiving responsibilities?

HOUSING

International human rights instruments have recognized adequate housing as a human right. The *International Covenant on Economic, Social and Cultural Rights*,¹⁰² ratified by Canada in 1976, states in Article 11(1) that:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.

The *General Comment on the Right to Adequate Housing* by the Committee on Economic, Social and Cultural Rights¹⁰³ emphasizes that the enjoyment of the right to adequate housing must not be subject to any form of discrimination. As well, it clarifies that the right is to *adequate* housing, including considerations of security of tenure, accessibility, habitability, and affordability, among others. Financial costs associated with housing should not be at a level where the attainment and satisfaction of other basic needs are compromised or threatened. The right to adequate housing has also been affirmed in the *Convention on the Elimination of All Forms of Discrimination Against Women*,¹⁰⁴ and the *Convention on the Rights of the Child*,¹⁰⁵ which Canada has also ratified.

¹⁰² *Supra*, note 30

¹⁰³ CESCR General Comment 4 on Article 11(1), 13/12/91.

¹⁰⁴ *Supra*, note 31

¹⁰⁵ *Supra*, note 33

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The 1977 report on the Commission's mandate, *Life Together*, expressed concerns about the lack of protection in the *Human Rights Code* against discrimination in housing based on marital and family status. At that time, the *Code* prohibited discrimination based on marital status only in employment, and did not prohibit discrimination based on family status at all. The report noted that the Commission was receiving many reports of discrimination in housing against persons who were single, divorced, or separated. It also noted the extreme difficulty that families with children were having accessing housing in some communities. The report recommended expanding the protections of the *Code* to deal with these issues, stating that:

The crucial question ... is whether or not enough suitable housing accommodation for families with children is available within a particular area or community. If the answer is "no", the "adults only" policies which discriminate against families with children should not be allowed.¹⁰⁶

The ground of family status was added to the *Code* in 1982. Until 1986, the *Code* contained an exception permitting residential buildings or parts of residential buildings to be designated as adult only.

Unlike in the areas of employment and services, there has been significant litigation regarding family status issues in the area of housing, particularly in the Ontario context. As a result, the case law in Ontario generally recognizes broad protection in housing context for the parent-child relationship. Beginning with *Fakhoury v. Las Brisas Ltd.*¹⁰⁷, tribunals have recognized the rights and importance of families and of the need to protect housing rights. The caselaw has steadily expanded the scope of the family-status protection to include denial of housing to a woman because she is pregnant, to combat animus against single parent families, and to provide protection to families where the parents are not legally married.¹⁰⁸ A range of issues related to family status has been successfully addressed in the caselaw. Tribunals have found that the stipulation of a minimum number of bedrooms based upon the number and gender of the children may have the result of impeding the access of single-parent families to

¹⁰⁶ *Supra*, note 40.

¹⁰⁷ (1987) 8 C.H.R.R. D/4028 (Ont. Bd. of Inq.). This case is also important for its express consideration of public policy debates and international human rights documents, such as the *Universal Declaration of Rights*.

¹⁰⁸ For example, in *Thurston v. Lu* (1993), 23 CHHR D/253, the tribunal held that denying to a woman the right to apply for the apartment and rejecting her outright because she had a child resulted in *prima facie* discrimination. In *Cunanan v. Boolean Developments Ltd.* (2003), 47 CHHR D/236, the tribunal found a breach of the *Code* where the landlord refused to rent to a complainant because her family, which included three teenage children, was not the "ideal" size according to "Canadian" standards and was not suitable. In *Peterson v. Anderson* (1991), 15 C.H.R.R. D/1, the tribunal held that the eviction of a pregnant tenant was discrimination on the ground of family status, as well as sex. The tribunal found evidence of stereotypes and disapproval of single parenthood and unmarried conjugal relationships, even though there was no general restriction on children in the building.

housing.¹⁰⁹ Tribunals have also found against restrictions in apartment buildings to “families” where that designation excludes single parent families or common-law couples.¹¹⁰ Restrictions on children in condominiums have been declared contrary to the *Code*,¹¹¹ as have restrictions on the use of condominium facilities by children.¹¹²

However, more than 20 years after the inclusion of family status in the *Code*, family status is still among the most commonly cited grounds of discrimination in complaints regarding housing.

Numerous reports detail the lack of access to safe, affordable, adequate housing for families with children, particularly female-headed single parent families. According to the Canada Mortgage and Housing Corporation (“CMHC”), 42 percent of single parents are in core housing need.¹¹³ The City of Toronto Report on Homelessness stated that families represented 46 percent of the people using hostels in Toronto in 1996. At that time, 19 percent of the homeless population in Toronto, or 5,300 homeless people were children. Of the 100,000 people on the waiting list for subsidized housing, 31,000 were children.¹¹⁴

The problem is especially grave for families from racialized communities. Of Aboriginal single parent households in urban centres, 70 percent are in core housing need. While over 30 percent of female single parents who identify as ethno-racially European are homeowners, only 4.5 percent of female single parents who identify as African, Black or Caribbean are.¹¹⁵ Single parent recent immigrant families also experience significantly higher levels of core housing need.

There has been, for a number of years, scant new supply of affordable rental housing. When vacancy rates are low, landlords can rent to households that are perceived to be “less risky”, with the result that low-income households are marginalized in the search for housing and are forced to accept housing that is

¹⁰⁹ *Supra*, note 107. In this case, there was a policy whereby a four-person family, composed of one parent and three children, were required to rent at least a 3-bedroom unit. The tribunal held that there was no reasonable justification for this unequal treatment.

¹¹⁰ *Booker v. Floriri Village Investments Inc.* (1989) 11 C.H.R.R. D/44 (Ont. Bd. of Inq.)

¹¹¹ This important decision was affirmed on appeal. (*Dudnik v. York Condominium Corp. No 216 (No. 2)*) 12 C.H.H.R. D/325, affirmed (1991) 14 C.H.H.R. D/406 (Ont. Div. Ct.)

¹¹² *Leonis v. Metropolitan Toronto Condominium Corp. No. 741* (1998), 33 C.H.R.R. D/479 (Ont. Bd. of Inq.)

¹¹³ Canada Mortgage and Housing Corporation *2001 Census Housing Series*. Research Highlight Socio-Economic Series 4-002. (Ottawa: 2004). In Canada, a household is considered to be in core need if: they are paying 30 per cent or more of their before tax income on mortgage payments, taxes, utilities and rent; the dwelling is in need of major repairs; or, parents and children, or children of different genders over the age of five have to share a bedroom.

¹¹⁴ *Report of the Mayor's Homelessness Action Task Force: Taking Responsibility for Homelessness* (Anne Golden, Chair), (January 1999).

¹¹⁵ *Supra*, note 64

less affordable, or is of poorer quality.¹¹⁶ One Aboriginal single mother, responding to a survey on child poverty, said:

I was looking for apartments and [found out] nobody wants you. Nobody wants you if you are on assistance. Nobody wants you if you have kids. Nobody wants you if you are young.¹¹⁷

While the OHRC has most often heard reports of discrimination with respect to the private rental market, concerns have also been raised regarding allocation of social housing.¹¹⁸ Frequently, social housing providers lack adequate internal complaint mechanisms for responding to issues of discrimination in the selection of tenants.

In addition to experiencing direct refusals of rental accommodation, families with young children are marginalized in the rental housing market by their low income. In Toronto, families of four who use food banks spend 70 percent of their income on rent, leaving only \$3.65 per person per day to spend on clothing, food, transportation, personal care, and other expenses.¹¹⁹ A survey on Aboriginal child poverty found that in Toronto, Aboriginal families with children are often paying between 50 and 75 percent of their income in rent.¹²⁰

In the most extreme circumstances, families find themselves living in shelters. Shelter surveys indicate a dramatic increase in usage by women with children, particularly Aboriginal and Black women.¹²¹ Single parent families enter the shelter system at twice the rate of two-parent families.¹²²

Safety is an important concern when women are looking for housing. The constant struggle to find adequate, affordable housing is particularly disruptive for women and children. Many women return to abusive relationships because they have no other place to go.¹²³ The jury in the Coroner's Inquest into the murder of Gillian Hadley by her former husband recognized the key role of the lack of affordable housing alternatives in the ongoing exposure of Gillian Hadley to her ex-husband and made a number of recommendations aimed at increasing the access of women and children to affordable housing.¹²⁴

¹¹⁶ Tom Carter and Chesnya Polevychok, *Housing is Good Social Policy*, Canadian Policy Research Networks (December 2004) at 8

¹¹⁷ Ontario Federation of Indian Friendship Centres, *Aboriginal Child Poverty: A Status Report on Aboriginal Children and Their Families* (October 2000).

¹¹⁸ Centre for Equality Rights in Accommodation, *Women and Housing in Canada: Barriers to Equality*, (Toronto: March 2002).

¹¹⁹ Jane Jacobs, *Dark Age Ahead*, Toronto: Random House of Canada, 2004

¹²⁰ *Supra*, note 117

¹²¹ *Supra*, note 118

¹²² *Supra*, note 114

¹²³ *Supra*, note 116

¹²⁴ The February 20, 2002 Recommendations are available online at www.owjn.org/issues/w-abuse/hadley2.htm.

Lack of access to adequate, affordable housing has long-term consequences. For example, children in families spending the majority of their income on rent are at a higher risk of malnutrition and respiratory and other diseases.¹²⁵ Links have also been made between housing and neighbourhood characteristics and children's educational achievements. Children's socio-emotional health is strongly associated with housing quality.¹²⁶ A recent study found that the deteriorating housing circumstances in Toronto are a significant factor in the admission of children to the care of the Children's Aid Society: families and children who are clients of the CAS in Toronto face substantial obstacles to obtaining adequate and appropriate housing, and for some this affects their ability to care for their children.¹²⁷

What are the barriers to adequate, affordable housing for individuals with caregiving responsibilities?

What can be done to improve access to adequate, affordable housing for families?

Access to Housing

Refusal to Rent to Families with Children

A number of reports have indicated that discrimination plays a substantial role in determining who gets and is able to keep adequate, affordable housing. The City of Toronto Report on Homelessness¹²⁸ states that:

[I]t is not uncommon for families that are staying in shelters or in motels, families with good credit histories and good references, to be refused an apartment by many different landlords. Discrimination can make the housing market impenetrable for those most in need of housing.

This is corroborated by the consistent pattern of complaints to the OHRC on housing issues. As one report stated, "focussing on the supply of rental housing will not solve the housing crisis if those that most need housing are still turned away by the unchecked discrimination of landlords".¹²⁹

¹²⁵ *Supra*, note 116 at 15

¹²⁶ Canada Mortgage and Housing Corporation, *Housing Canada's Children* (2000)

¹²⁷ S. Chau at al., *One in Five ... Housing as a Factor in the Admission of Children to Care* (Toronto: Centre for Urban and Community Studies, November 2001).

¹²⁸ *Supra*, note 114

¹²⁹ *Supra*, note 64

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In a recent decision, the Ontario Human Rights Tribunal found that a single mother was denied the opportunity to rent an apartment after the landlord discovered that she had a child. The landlord stated that he would not rent the apartment to a family with children, and further refused to return the complainant's deposit. The complainant testified that it took her five months to find another suitable apartment: on approximately five occasions she was turned down by landlords who stated that they did not rent to people with children.¹³⁰

Other cases have involved negative stereotypes about teenage children. In *Bushek v. Registered Owners of Lot SL 1*, a complaint that a family was forced to leave their apartment because it included two teenage children was ultimately dismissed. However, the Tribunal expressed concerns about the negative attitudes towards teenagers expressed by building management:

Some of the evidence did suggest that in attempting to balance the interests of its residents, the strata council did not adequately concern itself with the interests of teenagers. Though teenagers were able to use the facilities and participate in events, the security problems appear to have cast a shadow of suspicion over teenagers. The suggestion that they put off prospective buyers and upset the elderly would understandably be offensive. Though these comments may have arisen out of the very real problems the building had experienced with some teenagers, they reflect the type of stereotyping that human rights legislation is designed to prevent.¹³¹

A variety of negative attitudes and stereotypes may be at play behind a refusal to rent to families with children. For example, landlords may refuse to rent to families with small children on the basis that small children are “noisy” and will disturb other tenants. The insistence that a criteria for tenants is that they have a “quiet lifestyle” or that the building is “not soundproof” is a common theme in the rejection of rental applicants with small children.¹³²

The practice of landlords of asking the ages of prospective tenants on application forms has been found by the Tribunal to be a *prima facie* act of discrimination on the basis of family status. Where landlords ask such questions, the onus will shift to them to demonstrate that there was in fact no such discrimination:

[T]here is great merit in the argument of the Commission that a landlord only asks the question as to the age of the prospective co-occupant so he can deny the application if the answer discloses the prospective co-tenant to be a child or perhaps an elderly person. While it might be argued a

¹³⁰ *St. Hill v. VRM Investments Ltd* (2004) CHRR Doc. 04-023. 2004 HRT0 1

¹³¹ (1997) CHRR Doc. 97-224, (B.C.H.R.T.) at para. 48. See also *Watkins and Cypihot*, (2000) CHRR Doc. 00-0036 2000 BCHRT 13, and *Cunanan v. Boolean Developments Limited*, *supra*, note 108

¹³² See for example *Huot v. Chow* (1996) C.H.R.R. Doc 96-178 (BCCHR)

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landlord needs to know the ages of co-occupants in his building in case of fire and for numerous other reasons, such information can be acquired by the landlord after apartment units have been rented.¹³³

The Commission has also received complaints where the actions of the landlord are based, not on the presence of children *per se*, but on the number of children in the family. The Commission has considered such complaints to fall within the ground of family status.

As well, discrimination may be based on specific stereotypes or negative attitudes about single mothers, families on social assistance, or families from racialized communities.

The Commission is concerned about the widespread practice of designating rental apartments, condominiums, or other housing as “adult lifestyle communities”. It is common to see rental housing or condominium developments advertised as “adult lifestyle”, and the Commission has referred for Tribunal hearings a number of complaints where applicants with children have been refused tenancy in such housing. Such landlords or property managers are in effect advertising their intent to discriminate against families with children.

The practice of barring occupancy by minors was considered in the important case of *York Condominium v. Dudnik*.¹³⁴ That case involved a condominium by-law barring families with children younger than 16 or 14 years of age from occupying condominium units. The Ontario Divisional Court concluded that such policies had the effect of discriminating on the basis of family status, since “Such restrictions and policies are aimed at preventing children under the specified age from residing with their parent or parents in the latter’s choice of accommodation”.

The Commission has recognized that older persons benefit from the support, community and security offered by seniors’ housing projects, and the importance of “aging in place”. There are circumstances where housing aimed at the needs of older Ontarians will promote the objectives of the *Code*. Section 15 of the *Code* permits preferential treatment for persons aged 65 and older, and therefore permits housing that is limited to persons over the age of 64. Section 14 of the *Code* permits special programs to alleviate hardship and disadvantage, such as specially designed barrier-free housing projects aimed at older persons with disabilities. Section 18 creates a defence for religious, philanthropic, educational, fraternal or social institutions or organizations that primarily serve the interests of older persons and that provide housing as part of their services. However, there

¹³³ *Supra*, note 130 at para 29

¹³⁴ *Supra*, note 111

is no defence that permits “adult lifestyle” housing that results in the exclusion of children or persons under a certain age.¹³⁵

Are there other ways in which discrimination against families with children is manifested in the housing market?

Occupancy Policies

Landlords or property managers may also have occupancy policies that, while they do not directly exclude families with children, have a negative effect on such families, or on some such families. Some such requirements may be *bona fide*.

For example, in *Ward v. Godina*,¹³⁶ the landlord had adopted a “no-transfer” policy. While external applicants with children were not denied tenancies, existing tenants whose families were growing were disadvantaged. A human rights Tribunal found that this policy constructively discriminated on the basis of family status:

This policy is neutral on its face in that it applies to all existing tenants, whether the existing tenant family has children or not. However, the policy has a disproportionate effect or adverse impact on families with children. They are generally the ones who need more living space and who are more likely to seek transfers. Being unsuccessful, they are the families who must then either suffer the disadvantage of limited living space or seek external accommodation to meet their needs, with the consequential inconvenience and upsettedness. Families placed in such a situation are inevitably under additional stress through the disruption, which has a deleterious impact upon all members of the family.

The Tribunal found that the landlord could have accommodated the needs of the complainant and of other families in her situation, without undue hardship.

Policies regarding the number of occupants per number of rooms or bedrooms may also have an adverse impact on families with children. In *Desroches v. Quebec (Commission des droits de la personne)*,¹³⁷ the complainant was denied the opportunity to rent the apartment of her choice when the landlord discovered that the complainant was in the process of a divorce, and that her two daughters would be visiting her every Sunday. The landlord had a standing policy not to rent any of his four and a half room apartments to more than two occupants. The

¹³⁵ For a detailed discussion of housing and older persons, refer to the Commission’s *Policy on Discrimination Against Older Persons Because of Age* (Ontario Human Rights Commission, March 2002), online: Ontario Human Rights Commission <www.ohrc.on.ca>.

¹³⁶ (1994) CHRR Doc. 94-130 (Ont. Bd. Inq.)

¹³⁷ (1997), 30 C.H.R.R. D/345 (C.A. Que.)

Quebec Court of Appeal found that this policy constituted “ a very effective anti-child barrier”, since the policy had the effect of excluding all children who live with two parents, as well as all single parent families with more than one child. The policy therefore violated the Quebec *Charter of Human Rights and Freedoms*.

In a more recent case,¹³⁸ a landlord had an informal policy of renting one-bedroom apartments only to couples or singles; two bedrooms to a couple with one child; and three bedrooms to couples with two children. Although he might rent a three bedroom apartment to a person or a couple with three children, he would only do so if the children were very young, and even so the family would have to move to a bigger unit fairly soon. The complainant in this case was a single mother of three children, who was seeking (and was denied) a three-bedroom apartment. This policy was found to have a discriminatory effect on the basis of family status. Concerns have also been raised with respect to policies that place restrictions on sharing of rooms by opposite sex siblings, on the basis that such policies may reduce the ability of families with children to access affordable housing. These types of policies may have a significant impact on the social and economic rights of families, as they effectively deny access to the type of housing that is affordable for them.

Larger families may be similarly disadvantaged in the allocation of social housing. For example, in subsidized units, larger families may be required to apply only for larger units that are difficult to obtain, and may be disqualified altogether for eligibility for subsidy by their family size if there are no subsidized units large enough.¹³⁹

The method of allocating social housing may also have an impact on families. As waiting lists for subsidized housing are often of many years duration, a chronological waiting list effectively bars families with young children from accessing housing in a timely fashion.¹⁴⁰

Are there other occupancy policies that may have a negative effect on families with children? In what circumstances are occupancy policies that may have a negative effect on families with children justifiable?

Requirements Related to Income

Given the disproportionate levels of poverty among some types of families, particularly female-led single parent families, requirements related to income may have an adverse impact on these families. In a Quebec case, *Drouin v. Wittan*

¹³⁸ *Cunanan v. Boolean Developments Limited*, supra note 108. See also *Fakhoury v. Las Brisas Ltd.*, supra note 107

¹³⁹ *Supra*, note 110

¹⁴⁰ *Ibid* at 18

and *Lavalee*,¹⁴¹ a landlord refused to rent to the complainant because she was poor and her source of income was social assistance, without considering whether or not she was a reliable tenant. The landlord in fact stated that poor people cannot pay their rent. The Tribunal found that exclusions based on low income may constitute indirect discrimination against single parent families, and the respondents were found to have violated the Quebec *Charter*.

Persons with low incomes have been particularly affected by the application of minimum income criteria. For example, landlords may apply a standard guideline that a tenant applicant should be spending no more than 25-35 percent of his or her income on rent. Those who fall short of this ratio are rejected. While this is rationalized as a necessary means of assessing an applicant's ability to pay the rent, its use results in the denial of access to rental units to members of disadvantaged groups protected by the *Code*, including those identified by family status, who typically have lower incomes. There is no evidence that individuals from disadvantaged or low income groups, when spending more of their income on housing than a rent-to-income ratio would allow, are more likely to default on rent payments.

Research indicates that approximately one-third of Ontarians pay in excess of 30 percent of their household incomes in rent.¹⁴² Overwhelmingly, these persons pay their rent in full and on time. There is no evidence that social assistance recipients default on their rent more often than others, or that they are less responsible with their money.¹⁴³ In fact, a 1997 report by the Quebec Human Rights Commission shows that 78 percent of defaulting tenants had a job at the time they failed to pay the rent.¹⁴⁴ The Quebec report concluded that a tenant selection criterion used by landlords based on a rent-to-income ratio leads to systemic discrimination for individuals with low income on the ground of "social condition".¹⁴⁵

¹⁴¹ (1993) 20 C.H.R.R. D/349 (Que. Trib.), upheld on appeal, (1997), 29 C.H.R.R. D/1 (Que. C.A.)

¹⁴² J.D. Hulchanski, *How Households Obtain Resources to Meet their Needs: The Shifting Mix of Cash and Non-Cash Sources* (Toronto: University of Toronto, 1994) at p.34-35; M. Ornstein, *Income and Rent: Equality Seeing Groups and Access to Rental Accommodation Restricted by Income Criteria*, (Toronto: York University, October 1994) at p.63.

¹⁴³ J. Stapleton, *Report on Social Assistance Programs in Ontario* (April 1994) at 8.

¹⁴⁴ Commission des droits de la personne, *Pauvreté et droit au logement en toute égalité : une approche systémique* (Québec, avril 1997) at 50.

¹⁴⁵ The Quebec report further states that:

- Housing should not be seen as a good like any other because it fills a basic human need for shelter;
- Landlords are obligated to provide appropriate housing to individuals who can demonstrate their ability to fulfill the obligations of a lease without discrimination based on source of income or rent-to-income ratio measures;
- The presence of risk does not justify a systemic refusal to rent to individuals on social assistance.

In Ontario, the use of rent-to-income ratios and minimum income requirements was considered in the case of *Kearney v. Bramalea*.¹⁴⁶ The case involved three landlords, two of which used rent-to-income ratios, and a third that applied a minimum income cut-off of \$22,000 per annum. The Board of Inquiry ruled that rent-to-income ratios and minimum income criteria breach the *Code*, whether used alone or in conjunction with other criteria or requirements. The Board found that the evidence showed that these practices had a disparate impact on groups protected under the *Code*, including those identified by marital and family status, and that these policies were not *bona fide* as they had no value in predicting whether a tenant would default. On appeal, the Ontario Superior Court upheld the Board's finding that the landlord's use of rent-to-income ratios/minimum income criteria as the sole basis for refusing applications constituted indirect discrimination against the complainant on a ground prohibited by the *Code*.¹⁴⁷

The *Code* was subsequently amended by the addition of section 21(3), which permits landlords to use, in the manner prescribed by the *Code* and regulations, income information, credit checks, credit references, rental history, guarantees or other similar business practices for selecting prospective tenants. With respect to the use of income information, Reg. 290/98 under the *Code* permits landlords to request income information from a prospective tenant only if the landlord also requests credit references, rental history, and credit checks, and to consider income information only together with all the other information that the landlord obtained.

The Board of Inquiry in *Vander Schaaf v. M.R. Property Management Ltd.*¹⁴⁸ considered the use of rent-to-income ratios in the context of the new regulations. While the Board did not find a causal connection between the denial of the application and the use of rent-to-income ratios in this instance, it did make a number of comments with respect to this issue. The Board stated that the phrase "income information" is broad enough to encompass information about the amount, source and steadiness of a potential tenant's income. It further stated that permitting landlords to obtain "income information" does not permit them to apply rent-to-income ratios.

Receipt of Social Assistance and Access to Housing

In September 2004, the total number of families receiving social assistance through the Ontario Works ("OW") program was 188,661.¹⁴⁹ Of this total, 38 percent were sole support parents, and 12 percent were couples. In regards to

¹⁴⁶ *Kearney v. Bramalea, J.L. v. Shelter Corporation, Luis v. Creccal Investments* (1998), 34 C.H.R.R. D/1 (Ont. Bd. of Inq.)

¹⁴⁷ (2001), 39 C.H.R.R. D/111 (Ont. Sup. Ct.)

¹⁴⁸ (2000), 38 C.H.R.R. D/251 (Ont. Bd. of Inq.)

¹⁴⁹ *Ontario Works: Quarterly Statistical Report, September 2004*, Ministry of Community and Social Services, online: <www.cfcs.gov.on.ca>

families with children and/or dependent adults, the numbers are very different. The latest caseload statistics show that slightly more than half (53 percent) of OW participants with dependents are sole support parents. When combined with couples with children or caring for a dependent adult, the percentage rises to 75 percent.¹⁵⁰ Thus, three quarters of those on social assistance are caring for dependent children and/or adults.

Each month, families on OW receive a shelter allowance along with a basic needs allowance. The amount received (for both allowances) is based on the size of the family: the bigger the family, the greater the amount. In 2003, the monthly shelter allowance provided by OW ranged from \$325 for a household of one to \$673 for a household of six or more.¹⁵¹ As is quite well known, these amounts are much less than the current average rent in Ontario and the difference in amounts creates a shelter gap. In order to afford rent or mortgage on a home, families often combine their basic needs and shelter allowance. This is especially true for sole support parents who rely on a single income to support their families. For example, in 2003, the maximum monthly allowance for a single parent with two children under twelve years was \$1,086 (\$554 shelter allowance and \$532 basic needs allowance). If this family rented a two-bedroom apartment in Toronto, they would have approximately \$31 left after rent to cover all other needs for the month.¹⁵² Because rent takes up the majority of the assistance received, many sole support parent-led families are turning to food banks and other means to make ends meet. Also, the stress of having to do this every month may hinder their ability to find employment or participate in OW employment activities.

Currently, one of the responses to the effects of high rents on sole support parent-led families has been access to social or subsidized housing. Families living in such housing pay a rent amount that is related to their income, which is often more affordable for single parent families. However, subsidized housing costs may become problematic if an OW participant begins a new job. As his or her income rises, so does the rent and thus, the family does not benefit from the additional employment income.¹⁵³ As well, waitlists for such housing are quite long. In 2004, 158,000 households were on waiting lists for affordable/social housing in Ontario.¹⁵⁴ Families may therefore have to wait years to access subsidized housing. The Commission has received complaints regarding the practice whereby a co-operative charges as rent the entire shelter allowance of a tenant on social assistance, which obliges the tenant to make additional

¹⁵⁰ *Ibid*

¹⁵¹ Advocacy Centre for Tenants in Ontario, www.acto.ca

¹⁵² Toronto Community and Neighbourhood Services, *Social Assistance and Social Inclusion: Findings from Toronto Social Services' 2003 Survey of Single Parents on Ontario Works*, (2003). Online: <www.toronto.ca/socialservices/index.htm>

¹⁵³ Daily Bread Food Bank, *Ontario Works?* (2004). Online: <www.dailybread.ca>

¹⁵⁴ Ontario Non-Profit Housing Association/Cooperative Housing Federation of Canada, *Moving Forward for Ontario Children and Families* (2004), Campaign 2000.

payments for utilities, even though the shelter allowance was intended to cover the cost of utilities.

As noted previously, international human rights treaty bodies have expressed concern regarding the deepening poverty and lack of access to housing among sole support mothers in receipt of social assistance. The Commission shares this concern, viewing this as a serious human rights issue. The intent of the *Code*, as expressed in the Preamble, is to promote a society in which the dignity and worth of all are recognized, and all feel a part of the community, and able to contribute to the community. The Commission urges the government, in the spirit of the *Code*, to take steps to address this issue.

What should be done to improve access to housing among parents in receipt of social assistance?

Occupation of Housing

Differential Treatment

As well as experiencing difficulties in obtaining housing, families with children may experience differential treatment in the occupancy of housing. In *Leonis v. Metropolitan Toronto Condominium Corporation No. 741*,¹⁵⁵ an Ontario Board of Inquiry found that the complainant was discriminated against because of his family status as the parent of a child under 16. The rules of the condominium where the complainant lived prohibited children under 16 from using certain recreation facilities, and permitted access to others only during very restricted hours. The Board of Inquiry found that the recreational facilities were an integral part of the complainant's occupancy of accommodation, and that such rules indirectly discriminate on the basis of family status. The Board of Inquiry noted that the rules would have a disparate negative impact on parents because their child care responsibilities would restrict them from using the facilities on their own, and many parents would wish to use the facilities in the company of their children. While it was reasonable for the respondents to have some rules restricting access, particularly where there were health and safety concerns, the complainant and his daughter could have been provided with greater access to the facilities without undue hardship.

¹⁵⁵ *Supra*, note 112

Children's Noise

The Commission has heard reports that families are being evicted from their apartments because of the noise of children crying.

Life in apartment-type housing inevitably involves some exposure to the noises and activities of one's neighbours. Many normal activities cause noise – listening to music or socializing, for example. Children, like other tenants, may cause noise as part of their normal activities, such as playing, talking and crying. Noises associated with children's normal activities should not be treated differently from other types of noise that may be experienced when living in close quarters. Nor should the noise normally associated with children be an excuse for refusing to rent to families with children.

Where children's noise is genuinely disruptive to other tenants, all parties can work cooperatively to resolve the issue. Parents can take reasonable steps, consistent with good parenting practices, to minimize children's noise. Landlords can attempt to resolve matters without evicting families. For example, extra soundproofing for an apartment could be considered, or moving a family to a different apartment.

Accommodation of Needs Related to Family Status

The Commission has heard reports that families have been barred from rental housing because of concerns for children's safety. There may on occasion be situations where some alterations may be required to housing to accommodate the needs of children. For example, it may be necessary to place safety devices on windows or balconies in high-rise apartments. Such steps may be reasonable accommodations on the part of a landlord. Families with children should not be barred from rental housing because such reasonable steps are required.

What should a Commission policy statement on family status and the occupancy of housing contain?

What should the Commission's policy position be on issues related to children's noise in the housing context?

What types of accommodations for family status are appropriate in the housing context?

How can the Commission assist landlords in understanding and complying with their obligations under the Code?

SERVICES

Section 1 of the *Code* prohibits discrimination based on family status in the social areas of services, goods and facilities. This is an extremely broad social area, covering everything from corner stores and shopping malls, to education, health services and public transit. The issues are therefore also extremely diverse. However, very little attention has been paid to these issues. The Commission receives only a handful of complaints each year related to family status and services, and outside of a few specific issues, there is a similar paucity of academic or social science research on human rights concerns related to family status and services.

Physical Accessibility

As the Commission has noted in other documents, families with very young children may face barriers when attempting to physically access services such as restaurants, theatres, and public transit.¹⁵⁶ Heavy doors, numerous steps, and narrow aisles may pose significant challenges for families with young children who are attempting to access a facility. Some facilities have adopted no-stroller policies, making access difficult or impossible for families with young children.

Human rights law affirms the principle that society should be structured and designed for inclusiveness. Service providers have a duty to provide equal access without discrimination on the basis of family status. Where services are inaccessible to families with young children, service providers are vulnerable to a complaint of discrimination under the *Code*.

If found in breach, a business would have to demonstrate as a defence to such a complaint that providing access or accommodating services would amount to undue hardship with regards to cost, outside sources of funding, or health and safety factors.

Universal Design and Family Friendly Services

As with employers and housing providers, service providers should, where possible, consider the needs of individuals with caregiving responsibilities when designing programs, procedures, and facilities. Restaurants, for example, can ensure that high-chairs are available for the use of children, and public

¹⁵⁶ See Ontario Human Rights Commission, *Discussion Paper on Accessible Transit Services*, (January 2001); *Human Rights and Public Transit Services in Ontario: Consultation Report* (March 2002); and *Dining Out Accessibly: An Accessibility Audit of Select Restaurant Chains in Ontario* (April 2004), online: Ontario Human Rights Commission <www.ohrc.on.ca>.

washrooms include family facilities and change tables for children. In the education context, as with employment, the policies and procedures surrounding educational services may not take into account the caregiving responsibilities of students. Given educational trends and demographic shifts, it is no longer uncommon for students to be juggling educational and caregiving responsibilities. Educational institutions have been evolving to meet these changes. Some educational institutions, for example, have developed formal parental leave policies. However, educational structures have not necessarily caught up with these changes, and barriers may remain.

For example, at the post-secondary level, students who have significant caregiving responsibilities, such as parents of young children, are likely to gravitate to part-time studies, where these are available. However, part-time students face a number of disadvantages. For example, part-time students are often not eligible for student health plans. As well, scholarships, bursaries, internships, campus jobs and subsidized housing at both the graduate and undergraduate levels are designed mainly for students who undertake full-time studies.¹⁵⁷ In terms of scholarships, the Commission's *Policy on Scholarships and Awards* notes that such awards are significant, not only in terms of financial access to education, but also as a means to access employment or post-graduate training. The *Policy* notes that:

[S]cholarships and awards should be based on factors such as merit, personal financial need, course specialization, or recognition of special contributions to academic or extracurricular life. Exclusionary scholarships or awards, on the other hand, use discriminatory criteria to assess eligibility. These criteria affect access to educational opportunities, either directly or indirectly.¹⁵⁸

Education providers should therefore take care that eligibility criteria do not negatively impact students on the basis of family status.

Service providers should also take care to take into account the diversity of Canadian family structures. For example, a British Columbia Human Rights Tribunal found that the B.C. government's birth registration process had not kept pace with changes in reproductive technology, and that it had discriminated on the basis of sex, sexual orientation and family status when it refused to register the same-sex partner of a birth mother as a parent of the child.¹⁵⁹ As well, negative stereotypes of single mothers from racialized communities may have a

¹⁵⁷ The Commission discussed its concerns with the impact of policies regarding part-time studies on students with disabilities in *The Opportunity to Succeed: Achieving Barrier-Free Education for Students with Disabilities* (July 2003), online: Ontario Human Rights Commission, <www.ohrc.on.ca>

¹⁵⁸ Ontario Human Rights Commission, *Policy on Scholarships and Awards*, (July 1997) at Part 2, online: Ontario Human Rights Commission <www.ohrc.on.ca>.

¹⁵⁹ *Gill v. British Columbia (Ministry of Health) (No. 1)*, (2001), 40 C.H.R.R. D/321 (BCHRT)

significant impact on how a range of services, from education, to banking, to policing, are provided.

Similarly, although same-sex couples are included in the *Ontario Works Act, 1997* on the same basis as opposite-sex couples, limited information exists regarding how same-sex couples will be treated, which may affect the implementation of OW policies in practice. For example, the OW policy on family support focuses on women as single parents seeking support and refers to those needing to be found to provide support as “fathers”.¹⁶⁰ Gay and/or lesbian parents seeking support from former same-sex spouses are not mentioned. Nor are situations where children are residing with their fathers, and support is being sought from their mothers. If such situations occur, OW policies appear unclear as to how they will be addressed.

What barriers exist for families in accessing services?

What steps can service providers take to ensure that their policies, procedures and programs do not exclude or negatively impact on families?

Duty to Accommodate in Services

Even where services have been designed to support the needs of families, some individual accommodation needs may remain. Service providers have the same duty as employers to provide accommodation to the point of undue hardship for needs related to family status. For example, in an educational context, where a significant conflict arises between a student’s caregiving responsibilities and educational requirements, the education provider may have a duty to consider possible accommodations of family-related needs. Where a child becomes ill during an examination period, or an out-of-town practicum placement significantly interferes with a student’s caregiving responsibilities for a child or an aging parent, the education provider may be required to consider appropriate accommodations.

Issues of accommodation of child care needs have arisen in the context of social assistance programs, where participation requirements for OW may conflict with child care responsibilities. As stated in OW’s policy directive on participation requirements, sole support parents are required to participate in employment activities when their youngest child enters full time or part time publicly funded education.¹⁶¹ Although it is required that employment activities be scheduled during school hours, it is not always possible. For example, employment

¹⁶⁰ *Directive #23.0: Family Support*, (September 2001), Ontario Works, Ministry of Community and Social Services, www.cfcs.gov.on.ca

¹⁶¹ *Directive #6.0: Setting Participation Requirements* (September 2001), Ontario Works, Ministry of Community and Social Services, online: <www.cfcs.gov.on.ca>

activities may end after school ends or it may not be possible for parents to get to school in time to pick up their children if their training/programme is a long distance away. In these situations, not having access to child care can lead to many problems. A study conducted by Toronto Social Services in 2003, which was aimed at examining the experiences of single parents on OW, revealed that 64 percent of sole support parents stated that lack of appropriate and/or affordable child care was an obstacle to finding employment.¹⁶² For sole support parents who had access to formal care, 20 percent felt that the hours of operation were incompatible with their schedule, 20 percent had concerns surrounding the quality of the program, 17 percent felt that the cost of care was too expensive, and 15 percent felt child care lacked reliability.¹⁶³

Ultimately, parents receiving support from OW are considered responsible for finding adequate child care for their children, although some assistance is provided. For example, several municipalities offer some child care subsidies. In Toronto, individuals participating in OW who require child care are eligible for child care assistance if this assistance is necessary for them to adhere to their individual service plan.¹⁶⁴ Clients who request this assistance through OW receive the same service as clients who apply through normal Children's Services intake, which consists of either being placed on a subsidy waiting list or placement in subsidized care. In addition, parents receiving social assistance are given priority status to subsidized child care while they upgrade and find employment.¹⁶⁵ The Toronto programme assists with access to formal and informal child care.

Although the existence of such programmes can help sole support parents with accessing child care, the implementation and structure of such programmes may be problematic. For example, under the Toronto programme described above, informal care is provided on a temporary basis. These regulations become problematic for sole support parents when formal child care is not available and the period of the provision of informal child care ends. Parents may find themselves without a child care provider and thus, may be forced to withdraw from an employment activity or a job.

Furthermore, issues regarding child care that is currently available or provided may also arise. Although sole support parents on OW have priority access, there is a waitlist for subsidized child care. During the waiting period, lack of child care limits parents' ability to work or participate in employment activities, which in turn can affect their receipt of financial assistance. Another issue that arises is that

¹⁶² Toronto Community and Neighbourhood Services, *Social Assistance and Social Inclusion: Findings from Toronto Social Services' 2003 survey of Single Parents on Ontario Works*, (2003), online:<www.toronto.ca/socialservices/index.htm> .

¹⁶³ *Ibid*

¹⁶⁴ *Ontario Works Child Care Service Delivery Protocol*, (1999), City of Toronto, online: <www.city.toronto.on.ca/socialservices>

¹⁶⁵ D. Matthews, *Review of Employment Assistance Programs in Ontario Works & Ontario Disability Support Program* (Ministry of Community and Social Services, 2004).

once employment is secured, sole support parents lose their space and child care is stopped because it is assumed that they no longer need subsidized care. In order to continue receiving subsidized care, parents must go on another waiting list and thus must begin the process over again.¹⁶⁶ Finally, child care costs may be a barrier to employment or OW participation.¹⁶⁷

This raises the following question: where a parent is required to comply with certain requirements in order to access a service or benefit, and those requirements do not take into account that parent's caregiving responsibilities, is the duty to accommodate engaged? For example, if a parent with young school-aged children is required to engage in full-time employment activities as a condition of participation in the Ontario Works program, but is unable to access after-school childcare, does the service provider have a duty to accommodate? If so, what are the roles and responsibilities of the various parties? What are the appropriate accommodations?

Are there other circumstances in which the issue of a service provider's duty to accommodate for issues related to family status arises?

In what circumstances does a service provider have a duty to accommodate on the basis of family status? What is the extent of that duty?

Customer Preferences, Age-Based Restrictions, and Children's Behaviour

Children's typical behaviour should not, by itself, be used as a justification for denying services to persons identified by family status. However, there may be circumstances where behaviour normally associated with children may be incompatible with the nature of the service being offered. For example, loud and persistent children's crying during a theatrical performance may interfere with the ability of other patrons to hear and enjoy the performance. It may therefore be a *bona fide* requirement that patrons be quiet during the performance, and that crying or noisy children be removed. Similarly, in some restaurants, it may be inappropriate for children to wander throughout the premises. It may therefore be appropriate in such circumstances to require that patrons remain in their seats while at the restaurant.

Concerns about children's behaviour sometimes lead to age-based restrictions on accessing services. For example, service providers may implement formal policies denying access to individuals who are under a certain age. Since

¹⁶⁶ *Ibid*

¹⁶⁷ Daily Bread Food Bank, *Ontario Works?* (2004), online: < www.dailybread.ca >

children are as variable in their behaviour as adults, it may be problematic to use age-based restrictions to exclude children from a service on the grounds that their presence is in itself incompatible with the service being offered. It may be more appropriate to specify the essential requirements for accessing the service in question: those who cannot meet these essential requirements (whatever their age) may be excluded. For example, it is more appropriate for a swimming pool to designate times and spaces for “lane swimming” and “free swimming”, rather than “adult-only swimming” and “family swimming”, since there will be some children who are proficient swimmers and some adults who are boisterous. It will also generally be more appropriate to specify appropriate behaviours (“Patrons must remain seated at all times”) rather than imposing age-based restrictions (“Children under the age of three will not be admitted”).

There are, of course, services the content of which is simply inappropriate for children, such as, for example, adult-rated movies, and in such cases a rule excluding children under a particular age will be justifiable.

The argument has been made, as with “adult lifestyle” housing, that adults should have the option of “child-free” or adult-only spaces, where adults will not have to contend with the noises or activities associated with children. As noted above, there will be circumstances where quietness or stillness will be a *bona fide* requirement for accessing a service, so that children who are boisterous or noisy may be excluded. Section 20(3) allows recreational facilities to restrict or qualify access to services or facilities and to give preferences in membership dues or fees on the basis of marital and family status. This defence would likely protect a singles’ club, for example. However, the *Code* has generally not been interpreted to defer to customer preferences. For example, the Commission has taken the position that complaints from other persons will not justify interference with a woman’s right to breastfeed.¹⁶⁸ A preference on the part of some patrons for avoiding the company of children will not justify interference with the right of persons identified by family status to equally access services, goods and facilities. For example, in a British Columbia case, a vacationing family with three children was denied access to the main dining room in their vacation lodge, and directed instead to the cafeteria, on the basis that customers in the dining room did not like being disturbed when children make a fuss. A Human Right Tribunal found that discrimination on the basis of family status had occurred, as the actions of the respondents imposed a disadvantage on the complainant and his family members based solely on his association with his children. The Tribunal stated:

Behaviour that goes beyond a reasonable limit can be dealt with on a case-by-case basis, having regard to all the circumstances. While many families may prefer to eat in the cafeteria so that their children can run around, some parents may reject the cafeteria for the very same reason... Information about these options can certainly be provided by the

¹⁶⁸ *Supra*, note 4.

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respondent; however, the choice must be left up to the parents....The fact that some diners might be disturbed by the presence of young children is not a *bona fide* and reasonable justification for a policy which attempts to dissuade families from eating in the dining room.¹⁶⁹

What policy position should the Commission take with respect to age restrictions on access to services?

What policy position should the Commission take with respect to children's behaviour and access to services?

What policy position should the Commission take with respect to customer preferences for "child-free" or adult-only spaces?

Are there human rights issues related to family status that the Commission has not identified and that it should address?

¹⁶⁹ *Micallef v. Glacier Park Lodge Ltd.*, (1998), 33 C.H.R.R. D/249 (BCHRT)

CONCLUSION

Based on this survey of human rights issues related to family status, the Commission is concerned that there are significant systemic issues affecting individuals because of their family status, and that these issues may be having a wide impact. The impact of caregiving responsibilities on access to employment, housing and services requires, in general, greater attention than it has received to date. Negative stereotypes and a failure to recognize and fully integrate the diversity of the current day family may lead to discriminatory treatment. The Commission is concerned that in many situations, organizations and individuals are unaware of the protections of the *Code* related to family status, or do not view these as human rights issues worthy of protection. There is a need for greater clarity regarding the requirements of the *Code* related to family status.

PUBLIC CONSULTATION PROCESS

The Commission regards this *Discussion Paper* as the first step in addressing human rights and family status. It is the Commission's intent to develop a policy statement on discrimination on the basis of family status. This policy will cover all social areas, and will consider such issues as universal design, systemic barriers to persons identified by family status, the duty to accommodate needs related to family status, *bona fide* requirements, and the effects of intersecting grounds of discrimination.

The Commission is therefore seeking input from stakeholders on the issues raised in the *Discussion Paper*. The Commission hopes that this input will assist in identifying further human rights issues related to family status, and provide perspectives and information on the issues raised in this *Discussion Paper*. Submissions may be sent to:

Policy and Education Branch
"Family Status Consultation"

Ontario Human Rights Commission
180 Dundas Street West, 7th Floor
Toronto, Ontario M7A 2R9
Fax: (416) 314-4533
E-mail: consultation@ohrc.on.ca

Submissions should be provided prior to **July 22, 2005**. Based on the materials provided in the submissions, the Commission may undertake further consultations.

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The Commission is also interested in hearing the personal experiences of individuals who believe they have experienced discrimination based on their family status. A brief survey has been attached to this Discussion Paper, and is also available on the Commission's website. Individuals are invited to complete this survey and return it to the Commission by mail or fax or via the website, prior to **August 31, 2005**.

All documents related to this consultation, including this *Discussion Paper*, are available on our Web Site at www.ohrc.on.ca. Should you have any questions about the consultation process, you may contact the OHRC by telephone at (416) 314-4507, or 1-800-387-9080, or by TTY at (416) 326-0603 or 1-800-308-5561.

Information provided during the consultations is subject to the requirements of the *Freedom of Information and Protection of Privacy Act*. The information obtained during the consultation may be made public.

GLOSSARY OF CONCEPTS IN HUMAN RIGHTS

***Prima facie* Case of Discrimination**

The phrase '*prima facie* case of discrimination' is often used in human rights cases. The Supreme Court of Canada has described the test for such a case as follows:

The complainant in proceedings before human rights tribunals must show a *prima facie* case of discrimination. A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent–employer.¹⁷⁰

Forms of Discrimination

Discrimination can take many forms. It can occur when a service provider adopts a rule that, on its face, discriminates against persons on the basis of family status.

Example: A restaurant reserves its dining area overlooking a lake only to adults and prohibits families with children.

Discrimination can also take place through another person or other means.

Example: An apartment building's rules prohibit any noise after 11 p.m. regardless of the cause. The rule is enforced with equal vigour to evict tenants that play loud music as well as parents of a newborn that is crying. In this case the superintendent's application of the building's rules would also constitute discrimination.

Rules, policies, procedures, requirements, eligibility criteria or qualifications may appear neutral but may nonetheless amount to constructive, or "adverse effect" discrimination.

Example: An employer restricts its sick leave policy to situations where the employee, alone, is ill. This would likely have an adverse effect on

¹⁷⁰ *O.H.R.C. and O'Malley v. Simpsons-Sears, Ltd.* [1985] 2 S.C.R. 526 at 558. There is current debate as to whether the approach in *O'Malley* is still appropriate in human rights cases in light of the more recent approach to discrimination cases set out by the Supreme Court of Canada in *Law v. Canada (Minister of Employment and Immigration)*, *supra*, note 50. Nevertheless, an approach that first asks whether the complainant has made out a "prima facie case" continues to be used by many human rights tribunals.

parents, who are healthy themselves, but who have to attend to the needs of an ill child at certain times.

Bona Fide and Reasonable Requirements or Qualifications (BFORs or BFOQs)

Where the complainant makes out a *prima facie* case of discrimination because a standard or requirement has had an adverse impact based on a prohibited ground of discrimination, the respondent may avoid liability by establishing that the standard or requirement in question is a 'BFOR' or 'BFOQ'.

The Supreme Court of Canada has held in that in such cases, a three-step test should be adopted to assess the standard or requirement in question. In the context of an employment case, the Court described the test as follows:

- (1) The employer must show the standard is adopted for a purpose rationally connected to the performance of the job;
- (2) The employer just establish it adopted the standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose;
- (3) The employer must show that the standard is reasonably necessary to the accomplishment of that purpose. To demonstrate this, the employer must show that it is impossible to accommodate individual employees sharing the characteristics of the complainant without imposing undue hardship upon the employer.¹⁷¹

Undue Hardship

The duty to accommodate exists up to the point of undue hardship. It is the Commission's position that the *Code* prescribes only three considerations in assessing whether an accommodation would cause an undue hardship:

Cost: Both the *Code* and the courts have set the cost standard as a high one. Costs will amount to an undue hardship if they are: quantifiable; shown to be related to the accommodation; and so substantial that they would alter the essential nature of the enterprise, or so significant that they would substantially affect its viability.

Outside Sources of Funding: Outside sources of funding may be available to alleviate accommodation costs. Organizations should avail themselves of such resources in order to meet their duty to accommodate and must do so before claiming undue hardship.

¹⁷¹ *Supra*, note 79

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Health and Safety Risks: Whether a health and safety risk is sufficient to constitute an undue hardship must be evaluated using the three-step test described in this policy. The nature, probability, severity and scope of the risk must be determined based on objective, cogent evidence and not on assumptions or impressionistic evidence. It is also necessary to consider the fact that, in most things, perfect safety is not possible and that a reasonable level of safety is the goal.

APPENDIX: CONSULTATION QUESTIONS

The questions raised throughout this paper for discussion and consultation are summarized below.

1. What are the roles of the Commission, government, and other actors in resolving the issues raised in this Paper?
2. What can the Commission do to raise public awareness about human rights issues related to family status and to more effectively combat discrimination based on family status?
3. Is the definition of “family status” in section 10 of the *Code* overly narrow? Should the Commission consider advocating for a definition that covers other kinds of dependency relationships? If so, what kinds of relationships should the definition be expanded to cover?
4. Should the *Code* provide protection for persons who are not in a parent-child relationship? If so, under what circumstances?
5. How do gender, race, sexual orientation, and other *Code* grounds impact on discrimination because of family status? Are there situations not identified in this Paper where discrimination based on family status is compounded by other *Code*-related factors?
6. What more could or should be done by government, employers or others to assist employees to balance their work and family responsibilities?
7. Are there other aspects or effects of the conflict between work and family that you would like to tell us about?
8. What programs or policies should employers put in place to ensure that their workplaces do not disadvantage individuals on the basis of family status?
9. Recognizing the necessity to balance the needs of both employers and employees, what is the extent of an employer’s duty to accommodate needs related to an employee’s family status? What are the respective responsibilities of the employer and the employee? What types of accommodation are appropriate in this context?
10. Are there other systemic issues in employment related to family status? How can these barriers be addressed?

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11. Are there other negative attitudes and stereotypes based on family status? How do these attitudes and stereotypes affect employees?
12. Are you aware of instances in which pension or benefit plans have a discriminatory effect based on family status? Are there instances where differences in access to pensions and benefits are based on *bona fide* requirements? Are there steps that could be taken to make pension and benefit plans more inclusive of persons with caregiving responsibilities?
13. What are the barriers to adequate, affordable housing for individuals with caregiving responsibilities?
14. What can be done to improve access to adequate, affordable housing for families?
15. Are there other ways in which discrimination against families with children is manifested in the housing market?
16. Are there other occupancy policies that may have a negative effect on families with children? In what circumstances are occupancy policies that may have a negative effect on families with children justifiable?
17. What should be done to improve the access to housing among parents in receipt of social assistance?
18. What should a Commission policy statement on family status and the occupancy of housing contain?
19. What should the Commission's policy position be on issues related to children's noise in the housing context?
20. What types of accommodations for family status are appropriate in the housing context?
21. How can the Commission assist landlords in understanding and complying with their obligations under the *Code*?
22. What barriers exist for families in accessing services?
23. What steps can service providers take to ensure that their policies, procedures and programs do not exclude or negatively impact on families?
24. Are there other circumstances in which the issue of a service provider's duty to accommodate for issues related to family status arises?

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25. In what circumstances does a service provider have a duty to accommodate on the basis of family status? What is the extent of that duty?
26. What policy position should the Commission take with respect to age restrictions on access to services?
27. What policy position should the Commission take with respect to children's behaviour and access to services?
28. What policy position should the Commission take with respect to customer preferences for "child-free" or adult-only spaces?
29. Are there human rights issues related to family status that the Commission has not identified and that it should address?