Court File No. A-89-13

FEDERAL COURT OF APPEAL

B E T W E E N:

ATTORNEY GENERAL OF CANADA

Appellant

and

FIONA ANN JOHNSTONE and
CANADIAN HUMAN RIGHTS COMMISSION

Respondents

and

WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.

Intervenor

MEMORANDUM OF FACT AND LAW OF THE INTERVENOR, WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.

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PART I: OVERVIEW

1. This case raises important human rights issues relating to substantive equality regarding the enumerated ground of "family status" discrimination. The Women's Legal Education and Action Fund ("LEAF") submits:

(a) The ground of "family status" includes caregiving responsibilities arising from family relationships. An interpretation of this protected ground that does not include caregiving responsibilities would adversely impact women workers, undermine substantive equality and contradict long-standing Canadian human rights principles.

(b) The Supreme Court of Canada ("Supreme Court") has established one "Unified Approach" that applies to allegations of discrimination on all protected grounds. Claims of family status discrimination do not require a new or different test. Such claims are properly addressed under the present discrimination framework which is accepted across Canada as a flexible and contextual test for discrimination on all enumerated grounds. The existing discrimination test establishes an analytical division of labour that appropriately responds to potential disruption to the workplace as part of the *bona fide* occupational requirement ("BFOR") analysis.

(c) The test advanced by the Canada Border Services Agency ("CBSA") as the threshold for establishing a *prima facie* case of family status discrimination conflicts with existing jurisprudence and human rights principles by imposing additional burdens on family status claimants that do not apply to other protected grounds. In particular, CBSA's submission that a claimant's "choices" and/or the "delegability" of her childcare responsibilities are relevant to establishing a *prima facie* case is contrary to the existing test for discrimination as established by the Supreme Court.

(d) To single out family status for a different test with a higher *prima facie* threshold would be contrary to established human rights principles, and would impose additional legal burdens on family status claimants who are likely to experience discrimination on multiple, intersecting grounds.

(e) The Canadian Human Rights Tribunal ("CHRT") adopted and applied the correct test for discrimination.

PART II: FACTS

2. LEAF relies upon the facts set out in the Memoranda of Fact and Law of the Respondent, Ms. Johnstone, at paras. 2 and 8-18 and of the Respondent, Canadian Human Rights Commission ("CHRC"), at paras. 6-9.

PART III: POSITION ON THE ISSUES

3. LEAF's position is that the CHRT did not err in its interpretation of the term "family status" or in its adoption and application of the appropriate test for discrimination. LEAF addresses only these issues and makes no submissions on the standard of review or remedies.

PART IV: SUBMISSIONS

4. The facts in the *Johnstone* case illustrate how the failure to accommodate family responsibilities in workplace standards can force women into precarious work situations. Ms. Johnstone had to find childcare, as her young children could not be left alone at home. The employer's rigid practice of requiring irregular rotating schedules for full-time employees forced Ms. Johnstone to change to part-time status in exchange for a fixed, predictable schedule. Although she only worked slightly fewer hours (34 hours per week as opposed to the full time 37.5 hours), due to her part-time status, she lost not only income but also benefits, pension entitlements, and training and promotional opportunities. This same schedule was, however, modified for full-time workers requiring accommodation for religious and disability reasons. The CBSA advanced no evidence of undue hardship with respect to similarly accommodating Ms. Johnstone.

5. In its 1987 decision in *Action Travail*, the Supreme Court established the foundation for ensuring that Canadian human rights law evolves in a manner that promotes substantive equality by combating systemic discrimination and

discriminatory assumptions about the "natural" roles and abilities of marginalized groups:

> ... systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces, for example, that women "just can't do the job". ... To combat systemic discrimination, it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged.[1]

6. Ms. Johnstone's case vividly demonstrates the systemic discrimination that arises from workplace standards designed to reflect historically male norms and social roles. Systemic discrimination can only be addressed by scrutinizing the dominant norms that have shaped and defined the workplace. Such norms have been distorted by those who have traditionally been employed in a particular job and have thereby been in a position to establish the conditions of that job.

7. Systemic discrimination consists of a web of direct and indirect barriers embedded in the accepted norms shaping employment rules, policies and practices that have the cumulative effect of excluding members of disadvantaged groups from equal access to and treatment in employment.[2]

8. Due to the gendered social reality of family caregiving obligations, family status discrimination will disproportionately affect women who also face direct and systemic discrimination in workplaces. In keeping with the Supreme Court's guidance in *Action Travail* and subsequent human rights cases, the test for family status discrimination must be responsive to the gendered social reality of family caregiving obligations and to the effects of systemic discrimination through

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[1] *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 ["*Action Travail*"] at 1139, citing Abella, Rosalie S. *Report of the Commission on Equality in Employment.* Ottawa: Minister of Supply and Services Canada, 1984 at pp 9-10.

[2] *Canadian National Railway v. Canadian Human Rights Commission*, [1987] 2 SCR 114, at 1124, 1138-39.

workplace standards that reflect the historically male norm of workers unencumbered by family obligations.

A. "Family Status" includes caregiving responsibilities arising from family relationships

1. Existing jurisprudence recognizes inclusion of caregiving

9. Canadian jurisprudence has already accepted that family status includes family obligations, such as childcare and eldercare. The numerous cases set out in the Respondents' facta recognize the inclusion of family caregiving responsibilities within the protected ground of family status.[3] This point has also been conceded by the Appellant CN Railway in the companion case to this appeal, *CN Railway v. Seeley.*[4]

2. Social reality of women's role in family caregiving

10. The Supreme Court has long recognized and given judicial notice to the historical and social reality of the gendered nature of family caregiving obligations in Canadian society. Chief Justice Dickson's statements in *Brooks* in 1989 with respect to women and childbirth are still applicable and equally so for childcare issues. Dickson C.J. stated that "accommodating the childbearing needs of working women are ever-increasing imperatives." His recognition that "those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious" applies not only to those who bear children, but also to those who benefit society by caring for children.[5]

11. The Supreme Court has extended this analysis to recognize the gendered nature not only of pregnancy and childbirth, but also childcare. For instance, in *Symes v. Canada,* Iacobucci J. stated for the majority:

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[3] See cases cited at paras 41-47 of the Memorandum of Fact and Law of the Respondent, Fiona Johnstone and paras 63-67 of the Memorandum of Fact and Law of the CHRC. In addition, see also the recent case of *Communications, Energy, and Paperworkers Union, Local 707 v. SMS Equipment Inc.*, 2013 CanLII 71716 (AB GAA) at paras 73-84 ["*CEP v SMS*"].

[4] *CN Railway v. Seeley*, 2013 FC 117 at paras 59-71.

[5] *Brooks v. Canada Safeway*, [1989] 1 SCR 1219 at para 40 ["*Brooks*"].

> Based upon [the evidence] -- indeed, even based upon judicial notice -- I have no doubt that women disproportionately incur the social costs of child care.[6]

12. The disproportionate responsibilities for childcare and the adverse effects on women in the workplace requiring accommodation under the ground of family status have been recognized by courts, human rights tribunals and commissions, as well as labour arbitrators.[7]

13. In its *Policy and Guidelines on Discrimination because of Family Status*, the Ontario Human Rights Commission states:

> Persons with caregiving responsibilities are disproportionately likely to find themselves in part-time, casual or other non-standard work. This is particularly true for women. Those in non-standard work are unlikely to have access to pensions and health-related benefits. This has long-term consequences for the economic security of caregivers and has the effect of disadvantaging persons identified by family status, particularly as it intersects with the ground of sex.[8]

14. Numerous academic authorities also confirm the adverse consequences of family caregiving obligations on women's ability to fully participate in employment, including forcing women into part-time and other precarious work.[9] Indeed, despite

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[6] *Symes v. Canada*, [1993] 4 SCR 695 ["*Symes*"] at para 131. See also *Moge v Moge*, [1992] 3 SCR 813 at para 70 ["*Moge*"].

[7] *CEP v. SMS, supra*; *Symes, supra; Moge, supra*; *Hoyt v. Canadian National Railway*, 2006 CHRT 33 (CanLII) ["Hoyt"]; *Brown v. Canada (Department of National Revenue)*, 1993 CanLII 683 (CHRT) at p 20 ["Brown"]

[8] Ontario Human Rights Commission, *Policy and Guidelines on Discrimination because of Family Status*, online (2007): at "Section IV: Relationship Between Family Status and Other Code Grounds," <http://www.ohrc.on.ca/en/policy-and-guidelines-discrimination-because-family-status> ["OHRC Policy"] at 41-42.

[9] A. Noake and L. Vosko, *"Precarious Jobs in Ontario: Mapping Dimensions of Labour Market Insecurity by Workers' Social Location and Context"*. Research Report: Law Commission of Ontario (2011). Available at: http://www.lco-cdo.org/en/vulnerable-workers-call-for-papers-noack-vosko ["Noake & Vosko"] L. Vosko and L. Clark, "Gendered Precariousness and Social Reproduction" in Vosko et al., eds, *Gender and the Contours of Precarious Employment* (New York: Routledge, 2009) 26 at pp 27-34 and 37-38 ["Vosko & Clark"]; Fudge and Owens, "Precarious Work, Women and the New Economy: The Challenge to Legal Norms," in Judy Fudge and Rosemary Owens, eds, *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (Oxford: Hart Publishing, 2006) 4 at pp 14-15 ["Fudge & Owens"].

the dramatic growth in participation of women in the paid workforce, there are still substantial limitations to full participation.[10] For example:

> High levels of responsibility for unpaid work, particularly childcare, impede women's ability to engage in full-time and permanent employment, because such activities take up a significant number of hours per day and their timing and performance are non-negotiable."[11]

15. In Canada women dominate in casual employment, much of which is part-time and "characterized by high levels of income and time insecurity."[12] Due to the feminized nature of part-time work, "women are thus more likely than men to lack access to social and labour protections extended on the basis of hours of work."[13]

B. The Supreme Court's discrimination framework applies to all protected grounds including family status

1. The Supreme Court has established a Unified Approach to discrimination

16. Through a firmly established line of jurisprudence, the Supreme Court has established a "Unified Approach" to all discrimination claims under human rights statutes, which is consistent with the applicable *Canadian Human Rights Act* ("*CHRA*").[14] LEAF submits that there is no need to depart from this flexible and contextual framework for any ground of discrimination, including family status.

17. At the first stage of this established framework, claimants must meet the threshold requirement of demonstrating a *prima facie* case of discrimination in relation to a protected ground.[15] After this threshold is met, a respondent may, at the second stage of the framework, defend the allegations by establishing that its

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[10] *Action Travail, supra* at paras 38-43; *Meiorin, supra* at paras 74-75, 82; Decision of the Canadian Human Rights Tribunal, dated August 6, 2010, ["Tribunal decision"] Appeal Book [AB] Vol 1, Tab 4, p. 104 at para 149.

[11] Vosko and Clark. 26 at 34.

[12] Vosko and Clark, at 26 at 31.

[13] Vosko and Clark, 26 at 29.

[14] *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union* (BCGSEU) (Meiorin Grievance), [1999] 3 SCR 3 at para 54 ["*Meiorin*"]; *Canadian Human Rights Act*, RSC 1985, c H-6 at ss 2, 3, 3.1, 7, 10 ["*CHRA*"].

[15] *Ontario (Human Rights Commission) v Simpsons Sears Ltd.*, [1985] 2 SCR 536 at para 28 ["*O'Malley*"]; *Moore v British Columbia (Education)*, [2012] SCJ. 61 at para 33 ["*Moore*"].

conduct, rule or standard is a BFOR and that it has satisfied its duty to reasonably accommodate the claimant to the point of undue hardship.[16]

18. The CHRT decision and reasoning in this case is consistent with Supreme Court jurisprudence, including its most recent confirmation of the established test for *prima facie* discrimination found in the unanimous decision of *Moore*.[17]

19. The CHRT's articulation of the *prima facie* test is also consistent with this Honourable Court's application of the discrimination framework under the *CHRA*. This Court has held that the *prima facie* test "requires only that a person was differentiated adversely on a prohibited ground in the course of employment."[18]

2. No "hierarchical approach to rights"

20. LEAF submits that establishing a different and higher threshold test for claims of family status discrimination would be contrary to the wording and purpose of the *CHRA*, the jurisprudence on the broad and purposive interpretation of human rights statutes,[19] and the Supreme Court's direction in *Meiorin* that human rights claims be considered within a consistent and "Unified Approach."

21. Neither the *CHRA*[20] itself nor the Supreme Court's jurisprudence differentiates between prohibited grounds with respect to the threshold test of *prima facie* discrimination. The Supreme Court has held that there is no reason to treat one employment related discrimination ground differently from another. As the Federal Court in this case recognized,[21] departure from this well-recognized approach to discrimination would cause a hierarchy between grounds, an approach rejected by

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[16] *Meiorin, supra* at paras 54-68.
[17] *Moore, supra* at para 33; Tribunal decision, Appeal Book [AB] Vol. 1, Tab 4 at p 121, citing *O'Malley, supra*
[18] *Morris v Canada (Canadian Armed Forces)*, 2005 FCA 154 at paras 27-28; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 91. See also *Patterson v Canada Revenue Agency*, 2011 FC 1398 at para 37.
[19] *Action Travail, supra* at para 24; *B v Ontario*, [2002] 3 SCR 403, at para. 44.
[20] *CHRA, supra*, ss 2, 3, 3.1, 7, 10; *Meiorin, supra* at paras 45-46.
[21] Federal Court Reasons ["FC Reasons"] AB Vol. 1, Tab 2 at p 47.

the Supreme Court, which has affirmed that: "a hierarchical approach to rights, which places some over others, must be avoided".[22]

22. Moreover, the Supreme Court has considered and rejected setting different thresholds or adopting a *de minimis* approach with respect to human rights. With respect to a matter dealing with religious discrimination it stated:

> . . . the idea that because the effect of the discrimination is not great no steps need be taken in order to make a reasonable accommodation is unacceptable. The whole aim and purpose of human rights legislation is to prevent discrimination. If there can be discrimination without any consequences, then the very purpose of the legislation is defeated.[23]

23. In keeping with the jurisprudence outlined above, human rights adjudicators in various forums, including the CHRT in this and other cases, have refused to adopt a higher threshold in respect of the *prima facie* test for family status discrimination.[24] There is no reason to depart from this well-established approach in discrimination cases and to impose a higher threshold on family status claimants. The approach to family status discrimination taken by the Court of Appeal of BC in *Campbell River,*[25] relied on by the Appellant CBSA, would require a claimant to establish both a change in a term of employment and "significant interference" with a "substantial" family obligation in order to make out a *prima facie* case of discrimination. These added requirements are out of step with the jurisprudence, unnecessary given the Supreme Court's unified approach, and would result in the undermining of substantive equality.

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[22] *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at para 72 ["*Dagenais*"]; *Meiorin, supra* at paras 45-46.

[23] *Commission scolaire regionale de Chambly v Bergevin* [1994] 2 SCR 525 ["*Chambly*"] at para 23, emphasis added; see also *id* at paras 19, 22-26; *Central Okanagan School District No. 23 v Renaud*, [1992] 2 SCR 970 ["*Renaud*"] at p 983.

[24] *Brown, supra* at p 20; *Seeley*, 2010 CHRT 23 at paras 120-22 *CEP v SMS, supra* at pp 20-22; *Hoyt v Canadian National Railway*, 2006 CHRT 33 (CanLII) ["*Hoyt*"].

[25] *Health Sciences Assoc. of BC v Campbell River and North Island Transition Society*, 2004 BCCA 260 ["*Campbell River*"].

3. Existing analytical division of labour promotes substantive equality

24. Legal scholars have affirmed the distinct purposes of the different stages of the discrimination analysis and warned that importing considerations relevant to the BFOR analysis into the *prima facie* threshold inquiry undermines substantive equality. For example, Professor Dianne Pothier writes:

> Wherever there is a BFOR provision, the Supreme Court of Canada has been careful to clearly separate the analysis of the prima facie case from the BFOR. . . . The analytical distinction not only distinguishes the onus of proof but also ensures that issues of justification are stringently scrutinized. The unified approach from *Meiorin*, whereby the BFOR analysis applies equally to direct and adverse effects discrimination, reinforces the separation of the BFOR analysis from the prior establishment of the *prima facie* case of discrimination. Any blurring of that distinction risks weakening the scrutiny of the respondents justification arguments.[26]

25. Given the distinct purposes of the two stages of the Supreme Court's discrimination framework, LEAF submits that divergence from the established analytical division of labour would "weaken scrutiny" of discriminatory conduct and thereby undermine substantive equality.

4. BFOR analysis addresses CBSA's concerns

26. The CBSA's position is that claimants should be required to demonstrate at the *prima facie* stage that "the application of the impugned work rule significantly interferes with a **substantial** parental obligation that is **non-delegable.**" The stated rationale for this position is the claim that if such an additional hurdle is not ordered "any employer action which has a negative impact on all but the most trivial parental obligations amounts to *prima facie* discrimination."[27]

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[26] Dianne Pothier. "Tackling Disability Discrimination at Work: Toward a Systemic Approach," (2010) 4(1) *McGill JL & Health* 17 at para 41, emphasis added; see also *id* at paras 45, 53-56. See also: Benjamin Oliphant, "*Prima facie* Discrimination: Is *Tranchemontagne* Consistent with the Supreme Court's Jurisprudence?" 9 JL & Equality (2012) 33.

[27] Memorandum of Fact and Law of the Appellant, the Attorney General at paras 103, 92, emphasis added ["CBSA Factum"].

27. Concerns such as those raised by the CBSA are irrelevant to the threshold issue of a *prima facie* case and are properly addressed at the BFOR/undue hardship stage. In particular, the "third step" of this analysis provides respondents an opportunity to demonstrate that the impugned workplace standard is "reasonably necessary to the accomplishment of [a] legitimate work-related purpose."[28]

28. In *Hoyt*, the CHRT properly adhered to the analytical division of labour established by the Supreme Court's discrimination framework by finding that concerns such as those raised by in the *Campbell River* case [29], and relied on by CBSA, are properly addressed under the third step of the BFOR/undue hardship analysis:

> In my respectful opinion, the concerns identified by the Court of Appeal, serious workplace disruption and great mischief, might be proper matters for consideration in the Meiorin analysis and in particular the third branch of the analysis, being reasonable necessity. When evaluating the magnitude of disruption in the workplace, and serious impact on employee morale are appropriate considerations...Undue hardship is to be proven by the employer on a case by case basis. A mere apprehension that undue hardship would result is not proper reason . . . to obviate the analysis.[30]

29. This third step of the *Meiorin* BFOR analysis is well-designed to refute non-substantial claims for family status accommodation that, for example, would be contrary to a reasonably necessary scheduling requirement. This step is well-equipped to prevent an employer from suffering undue hardship that may arise in the event, for example, of a flood of requests for fixed day shifts in a 24-hour operation.

5. Requirement for inclusive workplace standards prevents systemic discrimination and promotes substantive equality

30. In *Meiorin*, the Supreme Court further held that workplace standards must be inclusive and prevent both direct and systemic discrimination:

> Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences

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[28] *Meiorin, supra* at paras 54.
[29] *Campbell River, supra*, at para 39.
[30] *Hoyt, supra* at paras 120-121, emphasis added.

> that characterize groups of individuals. They must build conceptions of equality into workplace standards. . . . To the extent that a standard unnecessarily fails to reflect the differences among individuals, it runs afoul of the prohibitions contained in the various human rights statutes and must be replaced. The standard itself is required to provide for individual accommodation, if reasonably possible.[31]

31. Designing inclusive standards requires examining workplace standards through a lens that is sensitive to potential discrimination on multiple grounds. In *Meiorin*, the Supreme Court found the impugned fitness standard "failed to address the possibility that it may discriminate unnecessarily on one or more prohibited grounds, particularly sex."[32] The standard was flawed as it was developed solely with reference to male aerobic capacity and could not be justified on safety standards. Other workplace standards or rules may be discriminatory because they are designed with reference to able-bodied persons or on the assumption that all employees have the same religious holidays. Family status is no different; workplace standards should not be designed on the assumption that employees are unencumbered by family responsibilities.

32. The requirement that workplace standards be designed to prevent potential discrimination is consistent with the recognition under the *CHRA* of discrimination on multiple grounds and with the Supreme Court's direction that, in order to promote substantive equality, human rights law must be developed in a manner capable of recognizing the often multidimensional nature of discrimination and the interaction between prohibited grounds of discrimination.[33]

33. Human rights legislation should be given a broad and purposive interpretation that accords rights their full recognition and effect. Narrow restrictive

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[31] *Meiorin, supra* at para 68, emphasis added; see also *id* at paras 40-42.
[32] *Meiorin, supra* at para 75.
[33] *CHRA*, s. 3.1; *Turner v Canada (Attorney General)*, 2012 FCA 159 at para 49 ["*Turner*"]; *Withler v Canada (Attorney General)*, [2011] 1 SCR 396 at para 58 ["*Withler*"]; *Corbière v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 2013 at para 61 ["*Corbière*"]; *Egan v Canada*, [1995] 2 SCR 513 (L'Heureux-Dubé J. dissent) at paras 80-82 ["*Egan*"].

interpretations which would defeat the purpose of the legislation, i.e. the elimination of discrimination, are not acceptable.[34]

C. CBSA test imposes additional and irrelevant requirements

34. The CBSA's proposed test for *prima facie* discrimination imports additional and irrelevant requirements that would unnecessarily increase the burden on family status claimants. First, the CBSA's test proposes that protection from discrimination on this ground is limited to "parents of a young child."[35] However, human rights tribunals have extended human rights protection on the basis of caregiving obligations toward elderly parents and disabled spouses.[36]

35. Second, the CBSA argues that a family status claimant should be required to show that "she has suffered disadvantage as a consequence of a work rule."[37] The case law is clear that the focus of the discrimination analysis is on the adverse **effect** on the claimant, who is not required to prove causation between the prohibited ground or a particular work rule and that effect. The Ontario Court of Appeal has recently reconfirmed that when talking about individual discrimination there is absolutely no requirement of intent. Requiring a "causal link" would be "counter to the evolution of human rights jurisprudence, which focuses on the discriminatory effects of conduct, rather than on intention and direct cause."[38]

36. Third, the CBSA's proposed test imports notions of "choice" and what it calls "delegability". The concepts of "choice" and "delegability" would unfairly create a higher *prima facie* threshold for family status claimants. The CBSA's proposed test would require claimants to establish that a relevant caregiving obligation cannot be delegated to a third party. The CBSA's proposed test could therefore bar a legitimate claim from the outset if a claimant was deemed to have "chosen" to refuse certain

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[34] *Action Travail*, at 1134; *O'Malley, supra*, at p 546-7.
[35] CBSA Factum, *supra* at para 103.
[36] *Hicks v HRSDC*, 2013 CHRT 20; *Devaney v ZRV Holdings*, 2012 HRTO 1590.
[37] CBSA Factum, *supra* at para 103.
[38] *Peel Law Association v Pieters*, 2013 ONCA 396 at paras 59-60.

childcare options, including delegating her childcare obligations to a third party she found inappropriate.

37. Dating back at least to its decision in *Brooks* in 1989, the Supreme Court has repeatedly rejected the argument that a claimant's "choice" has any relevance to the question of discrimination. In the 2013 case *Quebec (Attorney General) v. A,* it stated "this Court has repeatedly rejected arguments that choice protects a distinction from a finding of discrimination".[39] In *Lavoie*, the Supreme Court raised the following example relevant to the present case:

> [T]he fact that a person could avoid discrimination by modifying his or her behaviour does not negate the discriminatory effect. If it were otherwise, an employer who denied women employment in his factory on the ground that he did not wish to establish female changing facilities could contend that the real cause of the discriminatory effect is the woman's "choice" not to use men's changing facilities. The very act of forcing some people to make such a choice violates human dignity, and is therefore inherently discriminatory.[40]

38. The CBSA's reliance on the irrelevant factor of "choice" is also contrary to the Supreme Court's direction that workplace standards and human rights law must be developed in a manner that prevents systemic discrimination on multiple grounds.[41] The CBSA's emphasis on caregiving choices relies on a false understanding of autonomy and fails to reflect the social reality that individuals' choices are often circumscribed by discrimination on multiple, intersecting grounds. As is well documented in academic literature, such constraints can result in a lack of autonomy in making choices relating to family caregiving obligations. For example, Canadian academics Vosko and Clark state:

> The dearth of affordable, high-quality child care compounds patterns of gendered precariousness in the prime working age population ... While the division of child care responsibilities

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[39] *Quebec (Attorney General) v. A*, [2013] S.C.J. No 5 ["*Quebec v. A*"] at para 336, per Abella J.

[40] *Lavoie v. Canada*, [2002] 1 SCR 769 at para 5; *Brooks*, *supra* at paras 28-29; *Symes*, *supra* at para 209 (per L'Heureux-Dubé dissent); *Nova Scotia (Attorney General) v Walsh*, 2002 SCC 83 at para 157; *Communications, Energy and Paperworkers Union, Local 707 v SMS Equipment Inc*, 2013 CanLII 68986 at paras 52-53, 64, 73-76.

[41] *Meiorin, supra* at paras 40-42, 68, 75; *Withler, supra* at para 58; *Corbière, supra* at para 61; *Egan, supra* (L'Heureux-Dubé J. dissent) at paras 80-82. See also: *CHRA*, *supra,* s. 3.1.

> continues to be cast as a matter of parental 'choice,' the supply of child care reinforces prime working age women's socially prescribed responsibility for care-giving work (paid and unpaid), perpetuating gendered precariousness in households and the labour force.[42]

39. As articulated by the Ontario Human Rights Commission:

> It is all too easy to consider individual caregiving needs as isolated personal issues. An employee seeking reduced work hours or a flexible schedule to attend to the needs of their children or their aging parents may easily be viewed as simply expressing their personal preferences regarding balancing their various responsibilities. Viewed in the broader light of the disadvantage faced by caregivers, particularly those who are vulnerable by virtue of being racialized, low-income, newcomer, female, disabled or lone-parent, these "one-off personal issues" may be seen in a different light.[43]

D. A separate test for family status discrimination would adversely affect women

40. Singling out family status for a different discrimination test would adversely impact families and women, thereby amplifying the discriminatory effect of workplace rules. This adverse impact would undermine the social value of childbirth and childrearing, as recognized by the Supreme Court, and disproportionately impact women, who continue to fulfil the majority of family caregiving responsibilities while also increasing their participation in the labour force.[44]

41. It is particularly important not to impose additional legal burdens on family status claimants because they are likely to experience discrimination on multiple, intersecting grounds. Not only is the burden of family caregiving disproportionately borne by women, but marital status and social, religious or cultural norms can also

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[42] Vosko & Clark, *supra* at pp 37-38. Clement et al, "Precarious Lives in the New Economy: Comparative Intersectional Analysis " in Vosko et al., eds, *Gender and the Contours of Precarious Employment* (New York: Routledge, 2009) 240 at p 241. ["Clement"]

[43] OHRC *Policy, supra,* at 28; see also *Turner, supra* at para 49.

[44] *Canada (Attorney General) v. Mossop,* [1993] 1 SCR 554 at para 127; *Brooks, supra* at para 40; *Symes, supra* at para 131; *Moge, supra* at para 70.

impact the division of labour of caregiving work in ways that compound the disadvantage experienced by family caregivers in respect of employment.[45]

E. CHRT adopted and applied the appropriate discrimination test

42. For all of the foregoing reasons, LEAF submits that the discrimination framework adopted and applied by the CHRT in this case is not only reasonable but is also consistent with the existing discrimination framework established by the Supreme Court of Canada. Furthermore, it promotes substantive equality by being responsive to the social reality that caregiving and other family obligations are disproportionally borne by women and others who experience barriers to full participation in the labour market and workplace on intersecting grounds of discrimination. The CHRT's approach further promotes the critical examination of workplace standards to address the effects of systemic discrimination resulting from practices that reflect the historically male norm of a worker unencumbered by family obligations.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 3rd DAY OF FEBRUARY, 2014.

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Kim Stanton
Women's Legal Education and Action Fund, Inc.

[45] Clement, *supra* at p 249; Vosko, *supra* at 27*ff.*

PART V: LIST OF AUTHORITIES

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2. *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (BCGSEU) (Meiorin Grievance)*, [1999] 3 SCR 3
3. *Brooks v Canada Safeway*, [1989] 1 SCR 1219
4. *Brown v Canada (Department of National Revenue)*, 1993 CanLII 683 (CHRT)
5. *Canada (Attorney General) v Mossop*, [1993] 1 S.C.R. 554
6. *Central Okanagan School District No. 23 v Renaud*, [1992] 2 SCR 970
7. *Canadian National Railway v. Canadian Human Rights Commission*, [1987] 2 SCR 114
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9. *CN v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114
10. *Commission scolaire regionale de Chambly v Bergevin* [1994] 2 S.C.R. 525
11. *Communications, Energy and Paperworkers Union, Local 707 v SMS Equipment Inc*, 2013 CanLII 68986
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13. *Corbière v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 2013
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17. *Health Sciences Assoc. of BC v Campbell River and North Island Transition Society*, 2004 BCCA 260
18. *Hicks v HRSDC*, 2013 CHRT 20
19. *Hoyt v Canadian National Railway*, 2006 CHRT 33 (CanLII)
20. *Lavoie v. Canada*, [2002] 1 SCR 769

21. *Moge v Moge*, [1992] 3 SCR 813 at para 70 ["Moge"].

22. *Moore v British Columbia (Education)*, [2012] SCJ. 61

23. *Morris v Canada (Canadian Armed Forces)*, 2005 FCA 154

24. *Nova Scotia (Attorney General) v Walsh*, 2002 SCC 83

25. *Ontario (Human Rights Commission) v Simpsons Sears Ltd.*, [1985] 2 SCR 536

26. *Patterson v Canada Revenue Agency*, 2011 FC 1398

27. *Peel Law Association v Pieters*, 2013 ONCA 396

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29. *Sketchley v Canada (Attorney General)*, 2005 FCA 404

30. *Symes v Canada*, [1993] 4 SCR 695

31. *Turner v Canada (Attorney General)*, 2012 FCA 159

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36. Benjamin Oliphant, "*Prima facie* Discrimination: Is *Tranchemontagne* Consistent with the Supreme Court's Jurisprudence?" 9 JL & Equality (2012) 33.

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<http://www.ohrc.on.ca/en/policy-and-guidelines-discrimination-because-family-status> ["OHRC Policy"]

38. Dianne Pothier. "*Tackling Disability Discrimination at Work: Toward a Systemic Approach*," (2010) 4(1) *McGill JL & Health* 17

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APPENDIX A

RELEVANT STATUTORY PROVISIONS

Canadian Human Rights Act, RSC 1985, c H-6 at ss 2, 3, 3.1, 7, 10

PURPOSE OF ACT

Purpose

2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

PART I

PROSCRIBED DISCRIMINATION

General

Prohibited grounds of discrimination

3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

Idem

(2) Where the ground of discrimination is pregnancy or child-birth, the discrimination shall be deemed to be on the ground of sex.

Multiple grounds of discrimination

3.1 For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.

. . . . .

Employment

7. It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee,

on a prohibited ground of discrimination.

. . . . .

Discriminatory policy or practice

10. It is a discriminatory practice for an employer, employee organization or employer organization

(a) to establish or pursue a policy or practice, or

(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,

that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

OBJET

Objet

2. La présente loi a pour objet de compléter la législation canadienne en donnant effet, dans le champ de compétence du Parlement du Canada, au principe suivant : le droit de tous les individus, dans la mesure compatible avec leurs devoirs et obligations au sein de la société, à l'égalité des chances d'épanouissement et à la prise de mesures visant à la satisfaction de leurs besoins, indépendamment des considérations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, la déficience ou l'état de personne graciée.

PARTIE I

MOTIFS DE DISTINCTION ILLICITE

Dispositions générales

Motifs de distinction illicite

3. (1) Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, l'état de personne graciée ou la déficience.

Idem

(2) Une distinction fondée sur la grossesse ou l'accouchement est réputée être fondée sur le sexe.

Multiplicité des motifs

3.1 Il est entendu que les actes discriminatoires comprennent les actes fondés sur un ou plusieurs motifs de distinction illicite ou l'effet combiné de plusieurs motifs.

. . . . .

Emploi

7. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :

a) de refuser d'employer ou de continuer d'employer un individu;

b) de le défavoriser en cours d'emploi.

. . . . .

Lignes de conduite discriminatoires

10. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite et s'il est susceptible d'annihiler les chances d'emploi ou d'avancement d'un individu ou d'une catégorie d'individus, le fait, pour l'employeur, l'association patronale ou l'organisation syndicale :

a) de fixer ou d'appliquer des lignes de conduite;

b) de conclure des ententes touchant le recrutement, les mises en rapport, l'engagement, les promotions, la formation, l'apprentissage, les mutations ou tout autre aspect d'un emploi présent ou éventuel.