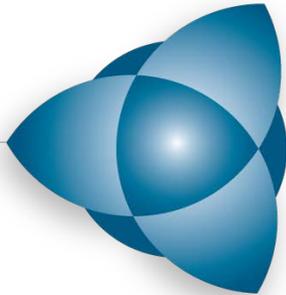


# Webinar

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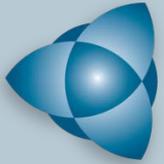


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**FAMILLE**

## Human Rights, Family Status, Caregiving Responsibilities & the Workplace

October 31, 2013





# About The Vanier Institute of the Family



Since our inception in 1965, The Vanier Institute of the Family has adopted new ways of **collecting, synthesizing and mobilizing knowledge** across a broad spectrum of family related issues. We monitor and report regularly on the changing face of Canada's families and bring to light emerging issues and challenges that impact Canada's families.

Our research reflects the diversity of family life. We use a broad and inclusive definition of what constitutes a family that focuses on the important roles that family plays in the lives of individual family members and in the communities within which they live.

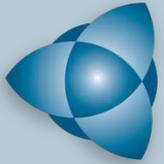
As such, we work with scholars and practitioners to publish timely and relevant research, analysis and commentary. We apply new media tools to communicate our research findings to maximize our reach and optimize our impact.

We publish our material in a variety of formats (e.g. articles, reports, PowerPoint, fact sheets, etc.) to provide educators and students with access to reliable, accurate classroom resources.

The Institute hosts roundtables and special events to engage in dialogue and delivers keynote addresses and lectures to facilitate conversations about families and family matters across Canada. We also work closely with journalists in both official languages to ensure that our message reaches Canadians in every corner of the country.

For more information about the work of The Vanier Institute of the Family, visit [www.VanierInstitute.ca](http://www.VanierInstitute.ca)

# About the Canadian Work-Life Leadership Circle and the Canadian Work-Life Network



## *Focusing on the way work, life and family intersect, interact and impact one another*

The **Canadian Work–Life Leadership Circle** and the **Canadian Work–Life Network** include forums for discussion, a clearinghouse for work–life research and a knowledge-sharing resource for individuals and organizations interested or involved in work–life and work–family.

Members of the **Canadian Work–Life Leadership Circle** enjoy access to information for the creation and/or maintenance of a supportive and productive family-inclusive workplace, while connecting with other employers, executives, human resource professionals and work–life/work–family professionals.

Members of the **Canadian Work–Life Network** may gather information on work–life issues and participate in important dialogues and discussions with colleagues and work–life experts.

For more information, visit [www.VanierInstitute.ca](http://www.VanierInstitute.ca)

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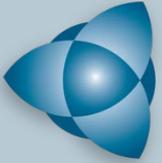
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**THE CANADIAN WORK-LIFE LEADERSHIP CIRCLE**

**THE CANADIAN WORK-LIFE NETWORK**

*Focusing on the way work, life and family intersect, interact and impact one another*

# About our Presenters



The following presentation *Human Rights, Family Status, Caregiving Responsibilities & the Workplace* took place via webinar on Thursday, October 31, 2013

**Ms. Sheila Osborne-Brown,  
Director and Senior Counsel, Legal Advisory Services  
Canadian Human Rights Commission**

**Ms. Marcella Daye,  
Senior Policy Advisor, Policy, Research and International Division  
Canadian Human Rights Commission**

For more information go to  
Canadian Human Rights Commission  
[www.chrc-ccdp.gc.ca](http://www.chrc-ccdp.gc.ca)

# **FAMILY STATUS & *THE CANADIAN HUMAN RIGHTS ACT***

**By: S. Osborne-Brown, Director and Senior Counsel  
Legal Advisory Services, CHRC  
and  
M. Daye, Senior Policy Advisor, Policy, Research and International Division, CHRC**

For the Vanier Institute Webinar– October 31, 2013



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# Agenda

1. **Why does Caregiving matter to human rights law?**
2. ***Canadian Human Rights Act* – Relevant Sections**
3. **What is “Family Status”?**
4. **Recent Cases Interpreting Family Status as a Ground of Discrimination**
5. **Some Principles Relevant to Accommodation**
6. **Some Policy and Organizational Guidance**



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# 1. Why does Caregiving matter to human rights law?

- **Population, demographics and changing families**
- **Statistics on caregiving prevalence**
- **Health care systems, unpaid caring**
- **Costs of caring**
- **Economic and productivity**
- **Speech from the Throne - federal**
- **Departmental interest – labour force participation**
- **Provincial interests**
- **Federal-Provincial-Territorial Minister press release**
- **Legislation and developing case law**



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## **2. *Canadian Human Rights Act* Some Relevant Sections**

- **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...**



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## CHRA – Some Relevant Sections (cont'd)

- **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 which a pardon has been granted or in respect of which a record suspension has been ordered.**

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



## **CHRA – Some Relevant Sections (cont'd)**

- **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.**



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## CHRA – Some Relevant Sections (cont'd)

- **10. It is a discriminatory practice for an employer ...**

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

**(b) to enter into an agreement ... relating to employment or prospective employment,**

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



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## CHRA – Some Relevant Sections (cont'd)

**15. (1) It is not a discriminatory practice if**

- (a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement;...**
  
- (f) an employer...grants a female employee special leave or benefits in connection with pregnancy or childbirth or grants employees special leave or benefits to assist them in the care of their children;...**



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## CHRA – Some Relevant Sections (cont'd)

- **15. (2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a bona fide occupational requirement...,**
- **it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.**



### **3. What is "Family Status" under the CHRA?**

- No definition of "family" or "family status" in the CHRA**
- CHRC working definition is broad**
- Family status refers to relationships from bonds of marriage, blood, or law. It includes relationships between parents and children (including adoptive or foster children), spouses (marital and common law), siblings, in-laws, uncles or aunts, and nephews or nieces, cousins, grandparents and grandchildren, etc.**
- Family status includes the parental, childcare, eldercare and other family caregiving duties and obligations that flow from this status as a member of society; these may apply to women and men**



## 4. Important New Cases – Main Results

- Johnstone and Seeley decisions issued from the Federal Court
- Tribunal Decisions upheld
- Caregiving obligations to family members protected
- No higher burden of proof
- A need must be shown, more than a choice/preference
- Practical guidance on obligations of employers and employees was given
- Hicks case now includes elder care



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## Important New Cases – Some Similarities

- **Employers refused opportunities to fix/use accommodation policies**
- **Employers refused to treat family status needs as human rights matter**
- **Employers inconsistently applied accommodation policy – allowed it for some employees, not for complainants**
- **Employers did not consider accommodation or analyse undue hardship**
- **Options for solutions were put forward by employees, and refused/not considered by employer**
- **Employers did not give sufficient training**



# Key Issue Considered:

## Does “family status” include caregiving obligations?

### CBSA / CN Positions

- Should not include caregiving
- Would open floodgates and shift burden to employer
- Individual choices do not equate to family “status”
- No intent of Parliament to include

### CHRC Positions

- Should include caregiving
- “Those who bear children and benefit society ... should not be economically or socially disadvantaged”
- Primary role of “parent” status is to care for children
- If parliament meant to exclude, would have been explicit
- Broad purposive interpretation needed



## Key Issue Decided

- **Family status ground includes:**
  - a parent's right and duty to strike balance of work obligations and childcare obligations

coupled with

- a clear employer duty to facilitate and accommodate that balance



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## Johnstone - Facts

- **Canada's busiest airport – 24-7 operations**
- **Operational requirements = rotating variable shifts**
- **When children born, Fiona Johnstone requested accommodation**
- **Request denied**
  - Offered part-time work on fixed schedule
  - CBSA unwritten policy
- **Johnstone accepted part-time fixed shifts**
- **Accommodation in the form of full-time fixed shifts were given to other employees based on other grounds**



## Johnstone - Decision

- **Federal Court upheld most of the CHRT decision**
- **Family status includes childcare**
- **More restrictive test from Campbell River et al. rejected**
- **Prima facie case of discrimination is made out when an employment rule or condition interferes with an employee's ability to meet a substantial parental duty or obligation in a realistic way**
- **Family-related obligation must be of substance**
- **Complainant must have tried to reconcile family obligations with work obligations**
- **This does not warrant creating a higher threshold test**



# Johnstone – Decision cont'd

- ***Prima facie* Case proof shown in this case by :**
  - Inability to find childcare - situation (unpredictable, rotating shifts, husband faced same, lack of childcare on non-standard hours, late notice)
  - Respondent reliance on a blanket policy
  - Lack of individualized assessment of circumstances
  - Respondent assumption that the need for family status accommodation was the result of choices rather than legitimate need



# Johnstone – Remedies

- **Award of full time wages and benefits was reasonable except for one year unpaid leave**
- **Award of special compensation justified because CBSA:**
  - ignored jurisprudence
  - did not implement a policy on family status accommodation
  - lacked human rights training
  - made no attempt to inquire into individual circumstances
  - made no attempt to inform complainant of options
- **Tribunal exceeded its jurisdiction in ordering the CBSA to develop policies satisfactory to Ms. Johnstone**



# Seeley – Facts

- **CN 24-7 Employer**
- **Denise Seeley - freight train conductor on lay off status, with 2 young children**
- **Seeley called back to another city during work shortage**
- **Seeley asked to be relieved from the callback for reasons due to childcare:**
  - Husband not available
  - No immediate family to care for children
  - Available daycare only covered standard hours
- **Seeley did not report by extended deadline**
- **CN did not respond to Seeley's request, and terminated her employment**
- **Tribunal decision upheld complaint, awarded damages**



# Seeley – Decision

- **Federal court confirmed the SCC O’Malley test for *prima facie* case**
- **For the ground of Family Status *prima facie* case :**
  - Can be shown when parental obligations + workplace rules make the complainant unable to participate equally and fully in employment with the employer.
  - Requires “a claimant to provide evidence but does not create a high standard of proof.”
  - Requires a workplace to do an individual, contextual and specific analysis of circumstances and of accommodation required
- **The facts in Ms. Seeley’s case proved *prima facie* discrimination on the basis of family status on any standard**

# Seeley – Decision cont'd

- **Federal Court found CN did not reach point of undue hardship**
- **Policy Issues**
  - CN did not consider or apply its accommodation policy
  - CN did not respond to request for accommodation under the policy
- **Process and communication issues**
  - CN did not meet duty to accommodate by providing more time
  - CN did not respond/responded poorly to communications
  - CN did not provide relevant information to complainant
  - CN did not even consider request for accommodation
  - CN ignored jurisprudence and policy - remedy for recklessness upheld
- **Union Issues**
  - CN cannot claim union responsibility retroactively
  - Interference with rights of other employees could be valid considerations for undue hardship



# Hicks – Newest decision

- Sept 2013 decision
- Dual residence required for caregiving
- Rigid application and interpretations of relocation directive benefits and dependents
- Found in favour of Hicks
- \$20 000 award for reckless discriminatory practice
- *“When faced with a difficult family situation and a request for compassion, there is no indication that the Respondent considered its duty to accommodate to the point of undue hardship. Overall, the Respondent showed disregard and indifference for the Complainant’s family status and for the consequences that its decision ... would have in this regard.”*
- Also see ON case : Devaney v ZRV Holdings



## 5. Some Principles Relevant to Accommodation

- **Some practical guidance on obligations of Employees and Employers**
- **Employee must**
  - show a ***substantial caregiving obligation, beyond personal choice***
  - ***first attempt to reconcile any conflicts*** between work and childcare obligations
  - specifically, they ***must explore realistic alternatives*** and available options
- **Employer must**
  - allow time for the employee to explore options
  - engage in discussion and provide relevant information
  - do an individual assessment to see if discriminatory impact exists
  - where a need for accommodation is shown, consider workplace arrangements to remove barriers and allow employee to meet work obligations



## 6. Some Policy and Organizational Guidance

- **CHRC Position Statement**
- **Policy Guidance**
  - Reviewing policies
  - Developing policies
- **CHRC Practical Guide in development**
- **Approach to topic**



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# CHRC Position Statement

- **The Commission recognizes the immense societal value provided by workers – both women and men – who also provide care for family members and loved ones such as young children, aging parents or grandparents, or relatives facing illness or disability.**
- **Each employee’s family care responsibilities are unique: these responsibilities can be complex and deeply personal, and may evolve over time.**
- **Family caregiving pressures may give rise to work-family conflict issues in the workplace; these should be approached with mutual respect and appreciation of the demands on both families and workplaces.**
- **As employers, employees, and unions or employee associations attempt to balance their roles, responsibilities, and obligations to each other, the Commission encourages all parties to plan ahead, to be flexible and creative, and to agree on reasonable solutions.**



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# Policy Guidance – Developing policies and tools

- 1. Prepare and do an Inventory**
  - Human rights protections policies
  - Human resource policies
  - Other employment or corporate policies
  - Service provision policies
- 2. Plan – Research other policies, requirements, and engage with those affected – caregivers in your workplace, managers, union reps, etc**
- 3. Write a draft – including legal and regulatory input. Consider different products like resource sheets**
- 4. Engage- do a human rights analysis – check on how it affects those most vulnerable – check for unintended effects or consequences**
- 5. Implement – test pilot with a smaller group and gather feedback**
- 6. Review and Adjust**



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# Policy Guidance – Key elements

- **Get leadership to promote a high level commitment to human rights, and a culture of respect**
- **Put in place a plan to analyse and regularly remove barriers**
- **Put in place or review a duty to accommodate policy and an anti-harassment policy**
- **Include “family status” as a protected ground in human rights-related policies**
- **Define family broadly – negotiate a broad definition with bargaining agents**
- **Use flexibility first, accommodation after**
- **Use same accommodation tests as other grounds, individual and contextual assessment**
- **Note limits of undue hardship**
- **Do not demand “proof”**



## Reviewing Policies

1. Scan and do a policy inventory
2. Assess what has changed – demographics, laws, regulations, expectations, family arrangements
3. Engage and revise – engage those affected, revise as needed, legal checks
4. Implement and follow up



# CHRC Guide in Development - 2014



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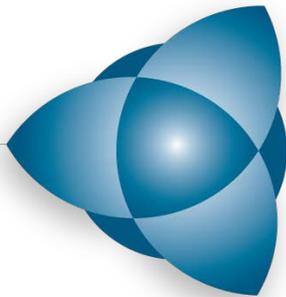
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## The approach matters – some comments

- New and developing area
- Strained hearts = strained workers
- Trust and good relationships are key especially with supervisor
- Some groups or individuals are particularly vulnerable
- Approach must be based in a fair and flexible policy
- Individual analysis and assessment is important
- Carefully distinguish between needs of the care receiver and the needs of the employer
- Offer assistance and resources
- Have an EAP program and promote it
- Develop resource networks or champions in the workplace
- Be prepared for delicate and intimate conversations
- Ask questions respectfully
- Do not demand proof



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