

Care/Work

Law Reform to Support Family Caregivers to Balance Paid Work and Unpaid Caregiving

**A Study Paper prepared by
The British Columbia Law Institute
&
The Canadian Centre for Elder Law**

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Information on this project, including all publications and appendices to this paper, are available online at:

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EXECUTIVE SUMMARY

Care/Work examines to what extent the laws of British Columbia support caregivers of adult family members to balance paid work and unpaid caregiving, and considers whether BC laws recognize the social value of unpaid caregiving labour. This study paper is primarily a research paper; however, it also concludes with an array of suggestions for law reform that would both render the law more responsive to the needs of caregivers and enhance the value public policy attaches to the unpaid labour of BC family caregivers.

This paper takes a comparative approach. *Care/Work* compares BC to the rest of Canada, as well as other key countries, in order to mine international innovations for creative options for reform. Our research and suggestions for reform are also informed by consultation with caregivers and employers.

What is family caregiving? Family caregivers look after aging parents, children with disabilities, people coping with mental health issues, addictions and chronic illnesses, cancer survivors, and individuals in post-surgical recovery. Family caregivers care for biological family, as well as friends and neighbours, delivering a variety of services including managing medication and appointments, assisting with personal care, providing emotional support, assisting with mobility and conducting household activities like meal preparation, shopping and housework, on a short-term, long-term, or episodic basis.

The timing of this research paper reflects a preoccupation with the impact of specific social, demographic and health policy trends on the capacity of families to manage care. These changes include: an aging population, characterized by greater life expectancy, declining birth rates and older adults making up a larger proportion of the general population; smaller, fragmented families, as a function of delayed child-bearing, fewer children per family, and increasing rates of divorce and separation; greater participation of women in the labour force; and de-institutionalization of aspects of health care, such that more aspects of caregiving are being left to families and volunteers. Longevity, technology and family shifts mean that more people are surviving into lengthy periods of disability, and care is concentrated on fewer people, many of whom must maintain employment and face significant work, health and financial consequences in order to sustain caregiving.

The work of this project is informed by an advisory committee of professionals who work with caregivers in diverse capacities and whose expertise collectively encompasses employment and labour law, human rights, immigration, social work, elder law, pensions and social welfare law. As part of this project we also conducted two small surveys: an electronic survey of BC caregivers and a very select telephone survey of Vancouver area employers. These surveys served to both direct research by highlighting the unmet needs of caregivers and inform our thinking about potential options for reform.

Care/Work includes a number of resources including comparative tables, profiles for countries that formed part of our international research, educational tools that may be used to structure presentations on the research findings, and an annotated bibliography. These documents are included as electronic appendices to this paper.

What we found was that existing law and policy directly supports caregivers only minimally and in broadly three areas: employment leave provisions; human rights law and the duty to accommodate family responsibilities; and measures to address income loss, largely through tax credits. We also found that each of these areas is deficient in a number of respects that seriously undermine the effectiveness of social policy in the area of supporting family caregivers. In terms of short and long-term income security, both the pension regime and BC health policy regarding payments to people with disabilities also addresses adult caregivers indirectly and only in a very limited sense. All five of these areas – employment law, human rights, tax policy, health policy and pensions – present territory for reform.

By way of conclusion, this paper highlights the following six problems and options for reform:

1. Employment Leave

The existing provincial employment standards law [the *Employment Standards Act*] does not provide any job protection to workers requiring leave for greater than five days to address care other than end-of-life and infant care. Moreover, the federal employment insurance regime only provides income replacement for end-of-life care. To remedy this problem, consideration should be given to revising employment standards legislation to provide for job protection for periods of caregiving for adult family members in the event of a serious illness or injury, and amending employment insurance benefits to provide for income replacement for part of the period of protected leave. The length of the protected leave period should also be increased to more accurately reflect the demands of caregiving, which are rarely fleeting.

2. Workplace Accommodation of Family Responsibilities

In BC, like other Canadian jurisdictions, employment relationships are governed by both human rights and employment standards legislation, subject to regulations regarding excluded employees, which vary from province to province. Subject to the limited leave provisions described above, the *Employment Standards Act* is silent on the issue of accommodation of family responsibilities. Therefore, aside from the prohibitions against discrimination in the terms and conditions of employment contained in the *Human Rights Code*, workplace accommodation of family responsibilities is at the discretion of BC employers. In terms of human rights, the law in relation to accommodation of family responsibilities is in its infancy, and current human rights cases have interpreted the prohibition against discrimination on the ground of family status in a very limited manner in relation to caregiving responsibilities. Consequently, it is very challenging to successfully mount an argument that an employer's inflexibility amounts to discrimination.

This paper highlights two potential solutions to this problem for further consideration. One option is to insert into the *Employment Standards Act* a provision that grants employees a right to request flexibility in relation to the scheduling of hours, days and location of work around the demands imposed by family caregiving. This is an approach that has been explored by a number of Commonwealth countries that have created work flexibility laws. Such a change would require employers to accommodate a request unless prevented by legitimate business reasons. An employee would retain the right to argue discrimination contrary to the *Human*

Rights Code where an employer denied a request and this inflexibility appeared to be discriminatory; however, the employee would not be limited to the more time-consuming, complex and costly human rights route. Provincial legislation would thus also contain a clearer message regarding the right to work flexibility and the duty of employers to accommodate family responsibilities in BC.

Another option is to amend human rights legislation. Although the meaning of the family status ground is not self-evident, currently the BC Code, unlike the human rights legislation of a number of other Canadian jurisdictions, does not contain a definition of “family status”. We encourage the government to consider amending the *Human Rights Code* by inserting a definition of family status, and that this definition state that “family status” includes the care of family members including children of any age, parents, persons related by biology, adoption, marriage or common law partnership, and anyone else a claimant considers to be like a close relation. The purpose of such an amendment would be to clarify that family responsibilities discrimination may arise in the context of caregiving relationships, and to provide protection to a diversity of relationships. One of the rationales for this amendment is that human rights remains the only route for addressing work flexibility available to those employees excluded from coverage under the *Employment Standards Act*. In addition to expanding the net of protection to a broader category of workers, this reform would also reconcile the *Human Rights Code* with the expansive language of the BC *Employment Standards Act* and the federal *Employment Insurance Act*, both of which acknowledge caregiving between friends.

3. The Caregiver Tax Credit

The federal caregiver tax credit and its provincial equivalent allow taxpayers to deduct a small amount from their tax payable in respect of financially dependent family members who meet various eligibility criteria. A caregiver tax credit that determined eligibility based on caregiving labour, rather than financial dependency, would be more successful in reaching existing caregivers. Making the credit a refundable credit would enable low-income caregivers to access it. Consideration must also be given to the value of the credit – currently very low in relation to the social and economic worth of caregiving labour – if this credit is to continue to be viewed as a measure, let alone the primary measure, to recognize the value of caregiving labour in this province.

4. Direct Income Support

Nova Scotia is the only Canadian jurisdiction that provides a direct monthly government subsidy to family caregivers. We encourage the governments of BC and Canada to similarly explore income replacement measures for low-income family caregivers through the creation of a caregiver allowance payable into retirement and during the years of the life course when a caregiver maintains paid employment. The determination of the amount of this allowance requires study. This paper provides a summary of the value of caregiver allowances in select countries.

5. The Caregiver Drop-out Provision

There is no provision in the *Canada Pension Plan Act* that responds to the impact of adult caregiving on pension security, aside from the general drop-out provisions. These provisions allow for the exclusion of 15% of the lowest income-earning years from the calculation of entitlement to Canada Pension Plan Benefits, in recognition of lower income-earning potential during the early working years. By way of reform to address this problem, we encourage consideration of amending the *Canada Pension Plan Act* to include a drop-out provision parallel to the Child-Rearing Provision, applicable to all years of full-time family caregiving. This would allow a person to reduce paid labour force participation with fewer consequences for pension security, and recognize caregiving labour as a socially valuable form of work.

6. Caregiver Pension Plan Contributions

The above proposed caregiver drop-out provision would not address the income security of caregivers for whom caregiving has taken them out of full-time employment to such a degree, and for such a lengthy period of time, that they do not have the years of adequate paid employment required to qualify for Canada Pension Plan benefits. For these caregivers, their labour is essentially accorded no value under the current pension regime, and unless they possess independent wealth, they are consigned to poverty during the typical years of retirement. One solution to this problem would be for the federal government to top-up the contributions made on behalf of family caregivers where reduced hours of employment would otherwise result in a reduction in contributions and consequent pension entitlement. Under this proposal unpaid family caregivers would be treated like government employees with respect to the accumulation of public pension benefits. This raises the question of what dollar value to attach to this unpaid labour – a matter that requires further study.

7. Valorization of Caregiving Labour

A number of the reforms described above – the Caregiver Tax Credit, direct income support for caregivers, government pension contributions payable on behalf of unpaid caregivers – require further consideration of the value attached to caregiving labour. The question of what dollar amount to attach to each of these reform options is a complex question requiring further study.

The topic of caregiver support is vast, encompassing a number of complex areas of law, and so to some degree, although this study paper is lengthy, it remains but an early step in the law reform process. Greater research and analysis will be required to explore how to put the content of this study's suggestions and conclusions into practice. *Care/Work* should provide a foundation of research to direct this next phase in the process and indicate other areas where amendments to legislation should be developed without delay.

Grace and her ex-husband have two children who are in secondary school. Until recently, before the children started to spend part of the day in school, Grace stayed home in order to spend more time with her children and take responsibility for most of the family's domestic responsibilities. This was a decision that made economic sense for the family, as Grace's income as a secretary was significantly less than her ex-husband's business income, and the cost of child care remained high in relation to her employment income. The couple is now divorced and Grace is supporting the family through a combination of employment income and child support, the latter of which will only continue while the children remain in school. Grace is an only child. Her aging widowed mother has significant health problems associated with a back injury from which she never fully recovered. Her mother experiences chronic pain associated with sciatica and decreasing mobility. Her health has recently worsened such that Grace spends more and more time helping her mother with appointments, meals and other household tasks, and increasing amounts of time driving back and forth between her home and her mother's apartment. After only two years of full-time employment, Grace has been forced to cut back on her hours of work because there are simply not enough hours in the day for taking care of her children and her mother as well as full-time employment.

CHAPTER 1 – Background and Project Overview

I. Introduction

Taking care of dependent or vulnerable adult family members, rather than contracting the work out to third parties outside the family, is the norm in many cultures around the world. This practice is known as family or informal caregiving. Family caregivers look after aging parents, children with disabilities, and people coping with mental health issues, addictions and chronic illnesses. Caregivers manage medical care, assist with intensely intimate elements of personal care, and provide a range of services including emotional support, meals, housework and mobility assistance – all tailored to the particular needs of a loved one and organised around the other demands paid work, family and community impose on a caregiver's time and energy.

Balancing paid work and unpaid caregiving in a healthy manner presents individuals who participate in the paid workforce with an enormous personal challenge. Energy and time are finite resources. The potential implications of caregiving include emotional stress, health deterioration, exhaustion, social isolation – outcomes captured under the umbrella term “caregiver strain” – as well as work-related consequences such as a reduction in employment income, pensionable earnings and opportunities for career development. There exists a large body of literature on this conflict between the demands of work and family out of which has emerged the expression “work-life balance”. Although parenting was the central theme of

early writing on work-family conflict, adult caregiving forms a growing aspect of family-related responsibilities.

This legal research and law reform paper exists at the nexus between paid work and unpaid caregiving. It brings together research on family caregiving and work-life balance and integrates legal analysis to examine how the laws of British Columbia currently respond to the needs of working caregivers and explore how legislation could be revised to be more supportive of family care.

Family caregiving is a complex social phenomenon embedded within a more complex network of workplace and family values. Law reform is neither capable of affecting a revolution in the valorisation of family care, nor able to resolve all of society's concerns in relation to supporting family caregivers. However, integrating support – symbolic, financial or otherwise – can ease the burden on caregivers in many practical ways, facilitating the balance of work and caring responsibilities, permitting caregivers to get more time to care, and replacing lost income associated with prioritizing care. Law and culture exist in a dialectic relationship. Thus, while culture informs law, law is part of the moral and social fabric of a culture, such that the recognition of family caregiving in legal institutions has the potential to alter social practices and increase the value attached to care.

There is no single law in BC or Canada that addresses the circumstances of caregivers. Rather, the law of caregiving is impacted by diverse legal provisions found in employment and labour law, human rights, pensions, tax policy and health law. The system is a patchwork quilt sewn into the fabric of our legal system over the years and law reform has been an exercise in patching holes. There is yet to be a broad investigation of the overall effectiveness of this ad hoc framework in BC or Canada. It is time to question whether the law has evolved commensurate with social change and determine whether modernization is required. This paper provides an answer to this question. Although further study will be necessary to translate some of the conclusions of this report into legislation, this paper is the first step in the law reform process.

II. The Social Framework: Recent Changes Impacting Family Caregiving

Various changes in social and labour force demographics concurrent with an evolution in the structure of both families and the health care system fuel the present growing crisis of caregiving.

Community care has become an increasingly large component of the Canadian long-term care strategy as a function of de-institutionalization of aspects of health care service delivery, a rapidly aging population, and a desire on the part of older adults and people with disabilities to “age in place” and maintain as much independence and autonomy as possible. Given the costs associated with professional or quality care, the limited number of spaces in care facilities, and reluctance to leave the long-term care of a loved one to strangers, many families opt to provide care through a family caregiving relationship.

Unpaid family caregiving has thus become a key component of Canada's publicly-funded health care system. Recent statistics indicate that over 1.4 million Canadians over the age of 45 combine aged care and paid work – a figure that represents only a fraction of caregivers, excluding, as it does, the care of adult children with disabilities, illnesses and mental health issues.¹ As our population continues to age, more and more British Columbians will find themselves caring for parents, grandparents and other older adults. Many caregivers will join the “sandwich generation”, who provide care simultaneously for both young children and parents. *One of the questions motivating this study is how to support caregiving labour in the face of an aging population.*

Although many people will say they “choose” to care for their family member, the notion of choice occupies a complex position within a discussion of caregiving. Lack of choice may be a function of the manner in which social expectations and current legislation reinforce the division of caregiving labour and influence other caregiving decisions. There are generally various pressures on a caregiver to sustain employment or assume care.

An aspect of this lack of choice is connected to the reality that in Canada care remains overwhelming the work of women.² The language of choice has historically been invoked to rationalize this gendered allocation of unpaid labour: i.e., when women leave the work sphere or reduce hours of paid employment to become full-time caregivers they do so “voluntarily”. However, this rhetoric disguises constraints on choice.³ *One of the problems this project tackles is how to reform the legal system to enhance the choices available to working caregivers.*

Family caregiving became the tradition in Canada long before women entered the paid work force in large numbers in the last century. As women are now just as likely as men to maintain paid employment outside the home, there are fewer family members able to assume the responsibility of family care without also assuming the challenge of juggling workplace and domestic responsibilities. High rates of divorce mean women are providing care with less support from their family infrastructure, and lower rates of fertility concentrate the care of an increasing community of care recipients on the resources of fewer caregivers. Delayed parenting means women are increasingly balancing caring for children and parents during the same phase of their lives.

Work is a “deeply gendered activity”.⁴ Academic literature on work-family balance posits the notion that law and policy take advantage of the family caregiver, by virtue of being premised on the concept of an ideal worker breadwinner who is unencumbered by caregiving responsibilities and supported at home by the unpaid domestic labour of a spouse

¹ Kelly Cranswick, *General Social Survey, Cycle 16: Caring for an Aging Society*, 89-582-X1E, Housing Family and Social Statistics Division, Statistics Canada, 2003, online: <<http://www.statcan.ca/english/IPS/Data/89-582-X1E.htm>>.

² Pyper, Wendy, “Balancing Career and Care”, *Perspectives on Labour and Income*, Statistics Canada Catalogue no. 74-001-XIE, (November, 2006), online: <<http://www.statcan.ca/english/freepub/74-001-XIE/0020474-001-XIE.pdf>> [Pyper].

³ Joanne Conaghan, “Work, Family and the Discipline of Labour Law,” in Joanne Conaghan & Kerry Rittich, eds., *Labour, Law and Family* (London: Oxford University Press, 2005) 19 at 30 [Conaghan, “Work”].

⁴ Kerry Rittich, “Feminization and Contingency: Regulating the Stakes for Work and Women” in Joanne Conaghan, Richard Michael Fischel and Karl Klare, eds. *Labour Law in an Era of Globalization* (Oxford: Oxford University Press, 2003) 117 at 122, cited in Conaghan, “Work”, *ibid.* at 29.

(generally the female partner). While this norm is increasingly less representative of the circumstances of most workers, “in various guises the ideal worker is assumed in the way in which work is organised, in the scheduling of hours, the design of jobs, the allocation of tasks and responsibilities, in the ways in which commitment and performance are recognised, and in the increasingly time-unburdened character of many jobs”.⁵ It is built into the construction of labour over the life-course that is reflected in legal and social institutions but this norm is rarely rendered explicit.

Equitable policy development to support caregivers may thus require a shifting of the paradigm underlying legislation. As Belinda Smith writes:

State intervention in the market is needed to transform the ideal worker from one who is unencumbered to one who participates in both paid work and caregiving. Such cultural change cannot simply be mandated, but law can play a significant role in challenging entrenched practices that reflect and constitute the norm, and promoting innovation to develop alternatives.⁶

Although caregiving policy is often characterized as a women’s issue, gendered norms can have negative consequences for the broader community, limiting the participation of men in family life and reducing the social security system’s tax base by reducing women’s presence in the labour force. Still, caregiving policy more directly impacts women. *One of the concerns underlying this paper is how to recognize the gendered nature of family caregiving without further reinforcing this inequitable division of labour.*

The concept of “family” is also broader than might be considered at first glance. Family caregiving includes the care of parents, children, spouses, siblings, aunts, uncles, grandparents, people related by birth or marriage, legal or common law, and also friends and neighbours who assume caregiving responsibilities. Families are increasingly fragmented by virtue of separation and divorce. Diverse social arrangements are emerging, only a fraction of which are recognized by legal institutions. The definition of “family member” and eligible caregiving relationships vary across different legislative provisions, sometimes even within a single statute. Other requirements in relation to eligibility such as residency or degree of financial dependency more indirectly create a disparity of access to benefits as between various relationships of love and care. Ultimately not all caregiving relationships are equal before the law. *Our definitions of family are shifting and it is important to consider whether the law is sufficiently modernized to recognize current notions of family.*

III. The Ideological Framework: Theorizing Family Care and the Meaning of Work

There are a number of respects in which the scope of this project has been circumscribed. Caregivers form a vast and diverse group and this paper considers but a subset of the community of caregivers.

⁵ Sara Charlesworth, “Managing Work and Family in the ‘Shadow’ of Anti-discrimination Law” (2005) 23(1) *Law in Context* 88 at 96.

⁶ Belinda Smith, “Not the Baby and the Bathwater – Regulatory Reform for Equality Laws to Address Work Family Conflict” (2006) 28(4) *Sydney Law Review* 689 at 704.

First, the care relationship is one of dependency and inter-dependency, and the concept of a “family caregiver” has meaning only within the context of this relationship. Measures that improve the circumstances of care recipients may improve the lot of caregivers and vice versa. Alternatively, there may be tensions between the needs of caregivers and care recipients. This study is concerned with the circumstances of caregivers and the recognition of their unpaid labour specifically and thus focuses on measures that target caregivers directly. This fragmentation of the caregiver/ care recipient dyad is an artificial but analytically useful distinction. However, it does mean that some measures that impact on working caregivers indirectly are not discussed in this paper.

Second, although aspects of this paper will be relevant to the experience of parents caring for infants and under-age children, the care of adults implicates different laws, values and beliefs. An emphasis on adult care allows us to interrogate how we as a society do or should value the work of family caregivers of adults. Although there remain significant problems with the Canadian approach to supporting childbearing, parenting and infant care, there is greater recognition of this aspect of caregiving in current public policy and law, manifest in the isolation of the parent-child relationship in employment standards, tax policy and pensions law. Other forms of caregiving remain slightly less charted territory.

Third, this project explores how the law treats family caregivers who maintain a labour force attachment. This includes caregivers who are employed or self-employed, caregivers who work full or part-time, caregivers who have taken leave from employment in order to provide care but intend to resume work when possible, caregivers who would be working if combining care and work was better facilitated within the employment sphere, and caregivers facing pensionable earning consequences as a function of caregiving. Although some of our suggestions for reform could have implications for retired caregivers who are not interested in working outside the home, these individuals are not the subject of this paper.

Although an analytical lynchpin of this study, “work” is a delicate term in the caregiving context. For there is no question that the labour of caregivers is work in the sense of the effort expended, the time involved, the degree of difficulty. In this paper “work” generally denotes paid employment; however, the problem of recognizing caregivers raises challenging questions of how we value unpaid work in general and care work in particular. *Care/Work* considers these questions insofar as they impact on legislation and law reform with respect to family caregiving labour. Our focus on working caregivers arises out of the desire to both give proper consideration to the urgent problems facing the community of employed caregivers, and to situate care conceptually within a theoretical framework that juxtaposes employment and caregiving as categories of “work”. The purpose of this approach is to highlight the differential treatment of two types of productive labour embedded within our legal system, allowing us to reflect on whether this distinction is either fair or consistent with Canadian values, and explore how this distinction imbues public policy in relation to family caregiving. In the end, properly recognizing family caregiving labour may require the law and society to begin a values shift.

Although various parameters circumscribe this project, this paper is relevant to everyone: at any time any one of us not already involved in family caregiving may be compelled to assume

caregiving responsibilities. From the point of view of caregivers, law reform will enhance quality of life; from the perspective of the state, reform may insulate the labour sphere from the loss of workers otherwise associated with an aging population, declining birth rates, and increasing demands for family-based care.

IV. The Legal Framework Governing Family Care

Care/Work examines and evaluates the current laws governing leave, accommodation and other entitlements potentially available to family caregivers balancing paid employment and care. This study considers how employment standards, employment insurance law, tax policy, health law, human rights, labour law, and pensions law support, or fail to support, working family caregivers. The focus of this project is the laws of BC and Canada and the circumstances of BC workers. However, this paper compares BC to other provinces and countries in order to investigate how the laws might be reformed to better respond to the needs of BC's caregivers. Each chapter also discusses approaches adopted in different countries.

Existing legal recognition of the circumstances of family caregivers fall into roughly three categories: (a) employment leave provisions; (b) measures that offset income loss; (c) workplace flexibility innovations. This trio of approaches is the subject of this paper.

Employment leave provisions may be grounded in legislation such as employment standards or employment insurance, contracts such as collective agreements between employers and trade unions, individual employment contracts between employees and employers, and employer workplace policies. Leaves allow workers to take a break from work while they focus on care, sometimes with financial subsidy. Measures to offset income loss include tax deductions, benefits and credits, as well as pensions and direct stipends or wages paid to the caregiver in recognition of caregiving labour. These approaches address the short and long-term financial consequences of caregiving. The concept of “workplace flexibility” denotes measures such as opportunities to change work hours or location, telecommuting and access to reduced hours. Such arrangements allow workers and employers to identify creative solutions to balancing workplace and family caregiving responsibilities. The accommodation of family responsibilities through flexibility is grounded in employment or human rights law, depending on the jurisdiction.

Care/Work addresses the regulation of work-life balance in the context of family care and the recognition of caregiving labour through public systems that compensate, or ought to compensate, caregiving labour. The study does not cover every contractual response to care. In particular, this paper does not explore the compensation of caregiving labour through measures that do not involve state regulation, such as private family care agreements according to which a family member agrees to pay her family caregiver, often in a delayed manner through estate planning.⁷ *Care/Work* is also not concerned with the payment of caregivers through trust funds and employment relationships. These solutions implicate

⁷ For further discussion of this issue see British Columbia Law Institute, *Report on Private Care Agreements between Older Adults and Friends or Family Members*, (2002), online: <<http://www.bcli.org/bclrg/publications/18-private-care-agreements-between-older-adults-and-friends-or-family-members>>.

different laws and raise different public policy issues as they do not involve either state regulation or public funding. In this sense this paper accepts, to some extent, a distinction between public and private.

However, *Care/Work* also problematizes the public-private distinction that underlies our laws. For it challenges the current inadequate recognition or valuation of family caregiving labour that arguably arises out of its existence within the private sphere of the family as compared to the public sphere of the workplace. As feminists have pointed out for years, public policy has long presumed the presence of unpaid domestic labour without which markets could not operate. Addressing the work-life balance issue and coming to terms with the sheer volume of family care required in Canada may require an acknowledgement of some forms of unpaid labour. It may demand, as Lisa Philipps proposes, a re-conceptualization of the relationship between paid and unpaid work as one of interdependency, in the form of a “unified image of the worker, as someone who crosses the market, household, and state sectors, undertaking both paid and unpaid responsibilities.”⁸ Ultimately, in the context of care, the distinction between public and private is slippery, for “if the care economy is overburdened” costs will spill over into the public sphere.⁹ As Terrance Hensley explains, notions of private and public embedded within law and public policy must shift in accordance with shifts in cultural demographics:

There was a time when a matter, such as work-life balance, would have been considered a private concern for families to work out. But when the economy, as well as families’ ability to live at prevailing community standards, depends on the supply of two workers per family, and when the fertility rate continues to drop, private risks tend to be defined as public crisis.¹⁰

Care/Work strives to move public policy incrementally forward in the direction of reconceptualising the relationship between paid work and unpaid care.

This legal research and law reform paper canvasses federal, provincial and territorial laws and studies approaches taken in the UK, Australia, New Zealand, France, the Netherlands, Germany, Norway, Sweden and the United States – countries selected because their legal systems bear some resemblance to the Canadian system and because our cultures maintain some overlap in terms of values. Each country we reviewed has adopted a unique approach to responding to the phenomenon of family caregiving through legislation. Canada emphasizes indirect subsidization of care labour through personal income tax refunds. Other countries subsidize care more directly through pensions, stipends or wages. Each approach emerged out of a particular social and historical context. *Care/Work* explores the values underlying Canadian legislation to assess the appropriateness of the Canadian response and test the compatibility of international responses to the Canadian context. The goal is to approach this problem with creativity and innovation as well as respect for Canadian values and institutions. The aim is to craft a workable solution.

⁸ Lisa Philipps, “There’s Only One Worker: Toward the Legal Integration of Paid Employment and Unpaid Caregiving”, in Law Commission of Canada, ed., *New Perspectives on the Public-Private Debate* (Vancouver: UBC Press, 2003) 3 at 31 [Philipps, “One Worker”].

⁹ D. Elsen, *Gender Budget Initiative: Background Papers* (London: Commonwealth Secretariat, 199) at 8, cited in Philipps, “One Worker”, *ibid.* note 8 at 7.

¹⁰ Terrance Hunsley, “Informal Caregivers: Balancing Work and Life Responsibilities” (2006) 8(3) *Horizons* 3 at 9 [Hunsley].

V. Methodology, Structure and the Role of Story-Telling in this Report

The scope of *Care/Work* is broad, including a number of areas of law, many of which are quite complex. Holism demands such breadth but complexity limits the nature of our conclusions. In some instances our suggestions for reform are detailed, connecting to specific subsections of legislation; in others, they are broad and preliminary, implementation necessitating further refinement and study.

Care/Work is built on an extensive literature review including consultation papers, government reports and study papers. It is also influenced by a survey of BC caregivers conducted in five languages, as well as interviews with BC employers selected because they have been recognized locally, provincially, or nationally for their responsiveness to work-life balance. The work of the project is also informed by an advisory committee of professionals working in the areas of human rights, employment law, immigration, pensions, social welfare and family care. As much as possible our conclusions have been tested through formal and informal consultation.

As we discuss in greater detail in Chapter 2, caregiving encompasses a wide range of activities. It includes short, long-term, fluctuating and intermittent care work, the care of adult children and aging friends and family relations, people recovering from surgical procedures, cancer treatment regimes and addictions treatment, as well as the care of people with degenerative conditions characterized by increasing care needs culminating in palliative and end-of-life care. Working caregivers also differ by virtue of their employment circumstances.

In order to ground our thinking in the reality of caregiving and represent family caregivers in all their diversity, this paper employs the strategy of story-telling. Each chapter begins with a caregiver story. These stories are fictitious in the sense that they are fabricated composites crafted from reviewing literature on family caregiving and responses to our caregiver survey. Many respondents took the time to tell their own story of struggling to balance work and care, and this information has greatly informed our assessment of BC legislation and policy. However, each of the caregiver stories in this paper is an invention.

Each chapter of *Care/Work* is introduced by a caregiver story that links with some of the issues raised within that particular chapter. This paper includes eight chapters. Chapter 2 provides the socio-demographic context of family caregiving. Chapter 3 reviews the law of employment leave. Chapter 4 considers the law surrounding the accommodation of employee caregiving obligations in the workplace. Chapter 5 examine income tax provisions of relevance to caregivers. Chapter 6 explores the availability of direct payments to caregivers in recognition of the value of their caregiving labour. Chapter 7 considers the implications of family caregiving activity on pension security. Chapter 8 contains our conclusion including suggestions for reform. In a sense the placement of each story is arbitrary: each caregiver presents a number of needs and her circumstances are impacted by a number of areas of law.

The eight stories come together in Chapter 8. In our concluding remarks we rely on these portraits to present the weaknesses of the existing legislative regime and frame options for

reform. These stories by no means represent caregivers in all their diversity. However, they should present many different types of caregiving relationships, such that our review of legislation and policy is both comprehensive and connected to the experiences of family caregivers.

VI. The Value of Care: How Value and Values Inform this Project

In many respects *Care/Work* is a valued-based inquiry. Therefore, a discussion of values and valuation is in order at the outset.

The term “value” bears many meanings. Derived from multiple linguistic sources (Middle English, Anglo-French and Latin) meaning worth, the word “value” denotes both “something intrinsically valuable or desirable” and “the relative worth, utility, or importance” of a thing, measured in monetary terms or otherwise.¹¹ The “value” of something is the “regard that something is held to deserve; its importance or worth.”¹² Finally, “value”, in the plural form, (values), refers to “principles or standards of behaviour.”¹³ All of these meanings are implicated in this study of caregiving.

Caregiving is valuable. Firstly, the subject of this paper is the question of how the legal system of British Columbia values or should value family caregiving labour. *Care/Work* begins with the proposition that family caregiving has worth, instrumental as it is to the functioning of families, relationships, communities and the health care system. Although family caregiving is also arguably an intrinsically valuable activity, this point is not explored in this paper. This review of law examines the legal system to determine whether it accords value to caregiving. In order to answer this question we examine how its value is manifest in various laws (tax policy, pensions, employment law, labour law, human rights). Worth may be reflected in monetary terms (for example, in the form of the amount of a tax credit) or be evident in other respects in which the law recognizes caregiving (for example, entitlement to employment leave to prioritize care responsibilities). The issue is whether the laws recognize the importance of care to the function of the family and the state.

Caregiving is inadequately valued by current legislation. Secondly, *Care/Work* explores the related question of how the law values care. This is not a matter of attaching specific numbers to caregiving labour. Studies of the aggregate value of caregiving in Canada have diversely valued caregiving, at \$6 billion in 1999,¹⁴ at \$6-9 billion in 2002,¹⁵ and finally at \$25-

¹¹ Merriam-Webster's Online Dictionary, s.v. “value”, online: <<http://www.merriam-webster.com/dictionary/value>>.

¹² Compact Oxford English Dictionary of Current English (United Kingdom), s.v. “value”, online: <http://www.askoxford.com/concise_oed/value?view=uk>.

¹³ *Ibid.*

¹⁴ Janet E. Fast & Judith A. Frederick, “Informal Caregiving: Is it Really Cheaper?” (Paper presented at the International Association of Time Use Researchers Conference, Colchester England, 6-8 October, 1999)[unpublished].

¹⁵ Janet E. Fast, L. Niehaus, J. Eales & Norah Keating, *A Profile of Canadian Chronic Care Providers*, Final Report Submitted to Human Resources and Development Canada, 2002.

26 billion in 2009,¹⁶ generally employing the cost of labour replacement in the public market as a measure of worth. These numbers are useful in marking the scope of caregiving in Canada and BC, but they do not indicate a reasonable approach to valuing or recognizing this labour in BC. As Joke Swiebel writes, speaking more broadly with respect to the larger category of unpaid work, “[i]t is hardly thinkable, however, that all work would be paid – or what amounts to the same thing – that unpaid work would not exist. Unpaid work is an essential element in the social fabric and an important factor for the quality of life.”¹⁷

The other problem with valuing care time in this manner is the challenge of delineating the boundaries of family caregiving:

Those advocating for unpaid caregivers have frequently argued for time budget studies, and successfully argued for census counting of care time. The purpose is to make the care more visible so it can be valued and supported. Although the purpose is laudable, the solution of counting care time is problematic. Care time is hard to count in part because it is hard to define and the boundaries are so unclear... those who provide care often do not define it as care time.¹⁸

The challenge of how to recognize caregiving as socially useful raises some difficult questions in terms of valuation. For, from the perspectives of caregivers, the cost of care is greater than the market equivalent of care labour:

While many of the costs of caregiving include very real out-of-pocket financial and time expenditures (e.g. forgone opportunity, unpaid labour career interruption, time lost from work, financial loss, and especially for women, job loss)[,] emotional and physical costs to caregivers are often characterized as ‘hidden costs’ since they are less visible and do not directly factor into the ‘costs’ of the public health care system.¹⁹

Care/Work considers where the legal system might be used to place value on care in order to support the activities of unpaid working family caregivers. It comments on whether current levels of monetary recognition, manifest, for example, in tax initiatives, might be generally too low. This paper raises factors that might be brought to bear on the determination of value and indicates where future study is needed to determine numbers. However, in a fluctuating economy, where law reform is time-consuming, identifying numbers is of marginal utility.

This analysis is informed by a set of values. *Care/Work* is not a value-neutral inquiry. A number of principles inform our assessment of legislation and underlying policy. These values serve as an analytical starting point as values which we submit should underlie caregiving policy.

¹⁶ Marcus J. Hollander, Guiping Liu and Neena L. Chappell, “Who Cares and How Much? The imputed economic contribution to the Canadian healthcare system of middle-aged and older unpaid caregivers providing care to the elderly” (2009) 12(2) *Healthcare Quarterly* 42.

¹⁷ Joke Swiebel, *Unpaid Work and Policy-Making: Towards a Broader Perspective of Work and Employment*, Discussion Paper No.4, (United Nations Department of Economic and Social Affairs, 1999) at 1.

¹⁸ Pat Armstrong, *Thinking it Through: Women, Work and Caring in the New Millennium* (Halifax: Healthy Balance Research Program, 2001) at 46.

¹⁹ Linda Duxbury, Christopher Higgins & Bonnie Shroeder, *Balancing Paid Work and Care Responsibilities: A Closer Look at Family Caregivers in Canada*, (2009) at 35 [Duxbury, Higgins & Shroeder].

Diversity. Family structures are varied. Caregivers care for children, parents, grandparents, spouses, siblings, aunts, uncles, friends and neighbours, including people related by blood, marriage or other union, people who live in the same residence and people who live apart. Law and public policy should respond to family caregiving in all its diversity and not privilege one arrangement over another. In other words, rules ought not to exclude certain types of caregiving relationships.

Gender-sensitivity. This means analysis which takes into account how policies affect men and women and relationships between men and women, including the distribution of different kinds of labour. In the caregiving context the challenge is to recognize the existing gendered nature of family caregiving without creating laws and policies that reinforce this inequitable division of labour. How do laws construct women as caregivers?²⁰ How can laws encourage greater sharing of care between men and women? How do facially neutral laws oppress women by ignoring the social pressures on them to provide care?

Choice. As much as possible the law should mitigate against people being conscripted into full-time unpaid caregiving through lack of alternatives or support for combining work and caregiving. People should not be coerced into caregiving. Care is constructed as a labour of love but this does not mean the choice to care is unhindered. How can we use law reform to enhance choice?

Equity and personal security. This paper endeavours to be conscious of the manner in which measures are regressive or reinforce poverty and is built on the assumption that in a social welfare state individual poverty is a negative. Do laws privilege caregivers possessing greater personal income? Do laws recognize the long-term financial consequences of caregiving and their role in producing or exacerbating poverty?

Holism. Although various legal provisions are isolated for examination, the overarching question is, how do the various provisions interact to reflect on the value accorded to caregiving labour? Do the existing laws of BC adequately support family care?

One of the challenges of the current patchwork approach to family caregiving policy is that it does not render transparent the values underlying existing law and public policy. A principled approach to assessing current laws thus requires a kind of excavation of legislation. Our aim is to underscore hidden values and assess their appropriateness in the context of current health policy and existing trends evidenced in labour and social demographics.

Value is both the question and the answer. The above discussion reflects our starting place in terms of our study of *Care/Work*. In our conclusion we return to the problem of valuation.

²⁰ Pat Armstrong and Olga Kits raise this important question in their paper, *One Hundred Years of Caregiving*, Law Commission of Canada, 2001 [Armstrong & Kits].

VII. Why this Study Paper is Needed

The last 10 years has seen a proliferation in studies on the economic, health and employment consequences of family caregiving on the caregiver. Research indicates that caregivers experience deleterious effects on their own health and well-being, often as a result of the stress associated with balancing multiple demands arising from the combination of caregiving and paid employment.²¹ Given the impact of care work on caregivers, it is not surprising that caregiving responsibilities are associated with negative impacts on paid employment. Studies generally suggest that the impact of caregiving on labour force participation is to require caregivers to reduce the number of hours of paid employment rather than withdraw completely from the paid labour force, except in instances of especially intense caregiving needs.²² Caregivers who remain in the labour force are more likely to report reduced work hours, increased absenteeism, more interruptions at work, and more missed job opportunities than those workers without caregiving responsibilities.²³ While public (paid work) and private (domestic work) are often seen as separate, they are more often “connected and in conflict”.²⁴

In consultations, caregivers consistently indicate the following problems with the system of support for caregivers in Canada, all of which are mirrored in the BC legal framework:

1. inadequate financial support for caregivers through existing tax initiatives;
2. overly restrictive and inadequate compassionate care leave provisions;
3. lack of encouragement of workplace flexibility innovations and accommodation of family caregiving responsibilities;
4. absence of pension security for caregivers; and
5. absence of income support for caregivers whose caregiving responsibilities compromise their earning capacity.

Our limited survey of BC caregivers revealed similar themes. Financial strain was a prominent issue: close to 60% of respondents felt they should be somehow financially compensated for their unpaid labour and 75% of caregivers stated that a caregiver allowance would significantly improve their lives. 65% would benefit from improvements to available

²¹ Christina Lee, “Health, Stress and Coping among Women Caregivers: A Review” (1999) 4(1) *Journal of Health Psychology* 815 [Lee].

²² Jane Jenson & Stephane Jacobzone, “Care Allowances for the Frail Elderly and Their Impact on Women Care-Givers”, *OECD Labour Market and Social Policy Occasional Papers*, No. 41 (OECD Publishing, 2000) at 17 [OECD].

²³ Maaik G.H. Dautzenberg, Jos P. M. Diederiks, J. P. M., Hans Philpsen, Fred C. J. Stevens, Frans E. S. Tan and Myrra J. F. J. Vernooij-Dassen, “The Competing Demands of Paid Work and Parent Care” (2000) 22(2) *Research on Aging* 165; Benjamin B. H. Gottlieb and Monique A. M. Gignac, “Family Support and Care of the Elderly: Program and Policy Challenges” in Sharan L. Kagan and Bernice Weissbourd, eds., *Putting Families First: America's Family Support Movement and the Challenge of Change* (San Francisco: Jossey-Bass Publishers, 1994); Benjamin H. Gottlieb, E. Kevin Kelloway and Maryann Fraboni, “Aspects of Eldercare that Place Employees at Risk (1994) 34(6) *The Gerontologist*, 815; Robyn I. Stone and Pamela Farley Short, “The Competing Demands of Employment and Informal Caregiving to Disabled Elders” (1990) 28 *Medical Care* 513.

²⁴ Judith Phillips, “Working Carers: Caring Workers” in Miriam Bernard, Judith Phillips, Linda Machin, and Val Harding Davies, eds., *Women Ageing: Changing Identities, Challenging Myths* (Routledge: London, 2000) 42 [Phillips, “Working”].

tax credits and over 45% requested pension reform. 16% of caregivers were compelled to accept lower-paying positions as a function of caregiving.

Just over 8% were able to access paid leave for caregiving. The same number received employment insurance at some point. However, close to 25% indicated they required time off work in order to meet their caregiving obligations, and a significant number used up sick time (25%) and vacation time (35%) in order to get that time off work.

And while the survey revealed that a number of caregivers have benefited from various arrangements that accommodate their caregiving responsibilities, lack of work flexibility remains a pressing issue: over 25% of workers indicated they would benefit from greater flexibility and close to 20% changed jobs to be better able to meet the demands of care.

By way of solution, some reports propose financial compensation of caregivers for the short and long term financial consequences of caregiving combined with the increase in caregiving expenses.²⁵ Most reports highlight the financial strain associated with caregiving and indicate a need for revisions to existing measures designed to respond to losses of income associated with caregiving, including a need for a refundable tax credit.²⁶ Some propose that caregivers be provided with a salary²⁷ or advocate for the creation of a direct federal compensation program for caregivers.²⁸ Most reports also recommend expansion of Compassionate Care provisions to include care for individuals who are not facing imminent death, or creation of other legislative protection for long-term family leave more broadly.²⁹

There exists a very strong demand for law and policy reform with respect to the impact of caregiving. A number of the options for reform highlighted by *Care/Work* are not unique to this project and are rather informed by an existing body of research into the needs of caregivers. In these areas *Care/Work* adds a detailed analysis of existing legal provisions to explore how to follow up on the broader directives for reform expressed in consultations with caregivers. In the arena of work-place flexibility, which is rarely dealt with in much detail in family caregiving material but consistently highlighted as a key manner in which caregivers could be supported to manage the balancing of work and care, *Care/Work* explores how the laws of BC might be revised to integrate the call the reform – a enterprise

²⁵ Chantal Abord-Hugon & Celine Romanin, *Amélioration des conditions de vie des personnes aidantes francophones dans les communautés francophones et acadiennes du Canada*, Rapport Finale, Alliance des femmes de la francophonie canadienne, (2008) at 22 [Abord-Hugon & Romanin].

²⁶ *Ibid.*; VON Canada, *Program and Policy Perspectives on the Interplay of Risk Factors and Negative Outcomes Among Family Caregivers: Key Informant Report* (Human Resources and Skills Development Canada, 2008), prepared for Human Resources and Skills Development Canada [VON Canada]; Canadian Home Care Association. *Consultation on Family Caregiving...From the 2008 Home Care Summit: The Power of People*, 2008 [Canadian Home Care Association]; Rajnovich, Beth, Janice Keefe & Janet Fast, *Supporting Caregivers of Dependent Adults in the 21st Century: A CRPN Background Paper* (Ottawa: Health Balance Research Program, 2005) [Rajnovich et al]; Human Resources and Skills Development Canada, *National Conference on Caregiving: Results of Public Engagement on Unpaid Caregiving*, n.d, online: <<http://www.hrsdc.gc.ca/eng/cs/sp/sdc/socpol/conferences/caregivers/page04.shtml>> [HRSDC].

²⁷ VON Canada, *ibid.*

²⁸ HRSDC, *supra* note 26.

²⁹ Federal Labour Standards Review Commission, *Fairness at Work: Federal Labour Standards for the 21st Century*, by Harry Arthurs (Ottawa: Human Resources and Skills Development Canada, 2006) [Arthurs Report].

that does not appear, at the time of writing, to have been taken on by anyone working in this area.

Overall, *Care/Work* will provide a picture of how and where the laws of BC can be revised to reflect the concerns of caregivers. We intend this project to provide a snapshot of where BC stands as compared to the rest of the country and the world, and ultimately, to serve as a springboard to further critical discussion and law reform in this area.

Sunita is a unionized employee working in health care as a nurse. She works a shift schedule set out in her collective agreement: a rotation that includes twelve hour shifts and frequent overnights. Recently her father-in-law suffered a stroke resulting in partial paralysis, and requiring administration of medication at home as well as ongoing accompaniment to medical and rehabilitation appointments. Although the man has many children, the family decided he should live with Sunita, who has health care skills, can administer his medication, and can deal best with his other health care providers. Sunita requested a one month paid leave to allow her to get father-in-law settled into her home, onto a new routine, and stabilized on medication. Her employer denied her request for a paid compassionate leave and is considering granting her an unpaid leave. In terms of longer term adjustments, Sunita's employer has denied Sunita's request for a set schedule of shorter shifts that excludes evenings. Sunita thinks this modification in her hours of work is necessary because her father-in-law is at greatest risk of respiration problems when he is sleeping or lying down. Shift work that includes evenings has become problematic but there are very few positions in her bargaining unit that are not associated with rotations that include nights.

CHAPTER 2 – Family Caregiving in BC

I. The Growth of Community Care in Canada

A number of recent changes to the delivery of health care in Canada have had significant consequences on the growth of family caregiving. Most of the activities associated with family caregiving – bathing, toiletry, grooming, cooking, housework, emotional support, shopping, managing appointments – are not covered by the *Canada Health Act*, the federal legislation governing health care in Canada.³⁰ Health care is regulated at the provincial level and there exists tremendous diversity in access to services across the country. Key caregiving activities may or may not be covered by the various provincial medicare programs; however, their performance remains pivotal to the wellbeing of many people with disabilities, chronic illnesses and various health issues associated with aging.

In BC there has been a growing emphasis on community care and family caregiving as a function of de-institutionalization of certain forms of caregiving, changes in the administration of health care such as revisions to long-term care facility legislation reducing access to residential care, and a decrease in access to home support caused by stricter eligibility requirements.³¹ Increasingly, you need to be in poorer and poorer health to have access to either institutional care or publicly-funded community care services.

³⁰ *Canada Health Act*, R.S.C. 1985, c. C-6.

³¹ Marcy Cohen, Jeremy Tate & Jennifer Baumbusch, *An Uncertain Future for Seniors: BC's Restructuring of Home and Community Health Care 2001-2008* (Vancouver: Canadian Centre for Policy Alternatives, 2009).

The *Romanow Report* on Canadian health care identified home care as “one of the fastest growing components of the health care system” in Canada.³² Changes in technology have resulted in more outpatient care and a shift toward community delivery of some forms of care previously provided institutionally, resulting in an expansion in both the prevalence and complexity of family caregiving. A positive outcome of this is a potential for increased independence and autonomy for some people with disabilities and a heightened capacity on the part of the elderly to “age in place” – assuming there is someone in the community available to assist with tasks no longer covered by provincial health care programs. However this shift has also enhanced the burden of care on families. As Pat Armstrong, writes, while women have often been engaging in caregiving in the home, “[o]ur grandmothers never cleaned catheters or checked intravenous tubes; they did not examine incisions or do much wound care.”³³

Recognizing the scope of family caregiving and its indispensable place in the current Canadian health care system, the *Romanow Report* called for improved support for “informal caregivers”, defined as family and friends who provide unpaid support. “Quite simply,” states the Report, “home care could not exist in Canada without the support of social networks and informal caregivers.”³⁴

II. Demographics Fueling the Caregiving Crisis

Canada is aging. Seniors constitute that fastest growing subgroup of the population of Canada. Whereas in 1921 they accounted for only five percent of the overall population, by 2001 they formed nearly thirteen percent of Canadians.³⁵ Seniors are anticipated to account for nearly half of the overall population growth in Canada between now and 2041– the fastest growth occurring amongst older seniors age 85 and older – and seniors are expected to make up close to fifteen percent of the population by 2011,³⁶ and twenty percent of the population by 2056.³⁷

This rapid growth is in part a function of the aging of the country’s baby boomers (people born in the years subsequent to WWII, between 1945-1965), the first of whom will reach age 65 in 2011. Birth rates are also falling. Children form an increasingly smaller aspect of the population and fertility continues to be below replacement rate.³⁸ Another factor impacting on the aging of our population is the increasing average life expectancy in Canada: average

³² Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada*, by Roy J. Romanow (Ottawa, 2002) at 171, online: <<http://publications.gc.ca/pub?id=237274&csl=0>> [Romanow Report].

³³ Armstrong & Kits, *supra* note 20 at 26.

³⁴ Romanow Report, *supra* note 32 at 183.

³⁵ Health Canada, *Canada’s Aging Population* (Ottawa: Division of Aging and Seniors, 2002) at 3 [Canada’s Aging Population].

³⁶ *Ibid.*

³⁷ Kelly Cranswick & Donna Dosman, “Eldercare: What we know today”, *Canadian Social Trends*, Statistics Canada – Catalogue no. 11-008 48 at 48 [Cranswick & Dosman].

³⁸ Government of Canada, *Addressing the Challenges and Opportunities of Ageing in Canada*, prepared for the United Nations Commission for Social Development for the 5th Anniversary of the 2002 United Nations Second World Assembly on Ageing (2007) at 6.

life expectancy reached 80 years for the first time in 2004 (77.8 for men and 82.6 for women).³⁹

British Columbia remains one of the “oldest” provinces in Canada: in 2006, 14.6 percent of its population was 65 years or older, compared with 13.7 percent for Canada as a whole, and BC maintains both the lowest national fertility rate and the highest life expectancy.⁴⁰

These statistics will result in an increasing need for elder care. For while these numbers also mean an increasing pool of elderly retired caregivers, as many older adults maintain significant well-being long into their retirement years, increased life expectancy made possible by scientific development means a potential for adults to live long lives of dependency and disability, potentially increasing the period of time during which they will be recipients of family caregiving.

While some seniors continue to work, the vast majority are retiring.⁴¹ Sources are inconsistent with respect to whether the average retirement age is going up or down. In 2002 Health Canada suggested adults were retiring earlier and earlier in life.⁴² Statistics Canada data confirms that the majority of Canadians plan to retire at age 65 or earlier, although it does indicate that labour force participation into the late 60's has gone up again in recent years.⁴³ As only a small portion of seniors claimed to be retiring as a result of mandatory retirement policies in 2002 (14 percent)⁴⁴ the recent eradication of mandatory retirement in BC and other Canadian jurisdictions is not likely to have a huge labour force impact. Still, age 65 continues to be a benchmark year for older Canadians considering retirement.

The size of the Canadian workforce may continue to grow very slowly until 2013, as a function of anticipated increased female participation and longer earning potential resulting from higher levels of education, at which point a gradual decline in labour supply is anticipated.⁴⁵ The result is more seniors requiring care, fewer younger adults to provide care, a smaller labour force contributing to national wealth, and an increasing portion of employed people participating in family caregiving. Caregiving labour will become concentrated on fewer caregivers and fewer income earners.

However, while Canada's aging population has significant implications for family caregiving, both in scope and character, elder care forms but a subset of family caregiving. Family caregivers care for a diverse group of people including adults with developmental and physical disabilities, addictions, chronic health problems and mental illnesses.

³⁹ *Ibid.* at 5.

⁴⁰ Statistics Canada, *Portrait of the Canadian Population in 2006, by Age and Sex*, catalogue no. 97-551-XIE at 26 [Statistics Canada].

⁴¹ *Canada's Aging Population*, *supra* note 35 at 15.

⁴² *Ibid.*

⁴³ Statistics Canada, *supra* note 40 at 19-20.

⁴⁴ *Canada's Aging Population*, *supra* note 35 at 16.

⁴⁵ Hunsley, *supra* note 10 at 8.

III. The Prevalence of Family Caregiving

One of the most often cited statistics on family caregiving is that in 2002, over two million family and friend caregivers aged 45 years and older provided care to seniors.⁴⁶ According to Statistics Canada, this figure rose to 2.7 million in 2007,⁴⁷ representing roughly eight percent of the population. 57% of these caregivers were employed.⁴⁸ One of the few studies that focus on working family caregivers indicates that one in four employed Canadians is involved in elder care alone.⁴⁹ Other studies indicate that up to 90% of eldercare is delivered through family caregiving.⁵⁰

High as these numbers are, these figures only partially capture the scope of family caregiving in Canada and BC, including, as they do, only the care of older adults. Health Canada figures indicate that about 500,000 people, roughly two percent of the population is caring for an adult with a mental illness.⁵¹ Again, the majority of caregivers surveyed were women,⁵² and about 70% of caregivers were employed.⁵³ Similarly, a 2002 Health Canada survey found that four percent of the population was providing care to a family member who was chronically ill or frail or suffered from a physical or mental disability,⁵⁴ 77% of whom were female caregivers.⁵⁵ Comparable studies have not occurred in BC. However, given that the population of BC is older than the national average, family caregiving is likely even more prevalent in this province.

The scope of caregiving is also likely greater than suggested by statistics. For instance, statistics likely under-report spousal caregiving of women to male partners: Statistics Canada data indicate that only 1 in 10 caregivers cares for a spouse, and postulates that some aspects of caring of aging seniors may not be characterized as caregiving by a female partner who took responsibility for domestic and other tasks long before her spouse became physically or cognitively incapable of performing them.⁵⁶ The same explanation may point to under-reporting of caregiving by parents of children with lifetime support needs. A number of studies predict that caregivers generally under-report caregiving because they do not characterize what they are doing as providing care.⁵⁷

Another interesting feature of family caregiving is that a great number of caregivers are not caring for members of their biological family. Family caregiving includes the care of friends

⁴⁶ Cranswick & Dosman, *supra* note 37 at 49. This study relies on Kelly Cranswick, *General Social Survey Cycle 16: Caring for an Aging Society*, (2002), Statistics Canada – Catalogue no. 89-582-XIE, online: <<http://www.statca.ca/bsolc/english/bsolc/?catno=89-582-X>>.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ Duxbury, Higgins & Shroeder, *supra* note 19 at 8.

⁵⁰ *Ibid.* at 29.

⁵¹ Decima Research, *Informal/ Family Caregivers in Canada Caring for Someone with a Mental Illness*, (Ottawa: Health Canada, 2004) at 14.

⁵² *Ibid.*

⁵³ *Ibid.* at 16.

⁵⁴ Decima Research, *National Profile of Family Caregivers in Canada* (Ottawa: Health Canada, 2002) at 3.

⁵⁵ *Ibid.*

⁵⁶ Cranswick & Dosman, *supra* note 37 at 49.

⁵⁷ Duxbury, Higgins & Shroeder, *supra* note 19 at 29

and neighbours in high numbers. Recent Statistics Canada data places friend care as the second largest group of care recipients, after people caring for their mothers, at fourteen percent, slightly above spousal caregiving.⁵⁸

IV. Family Caregiving and Women

Caregiving is overwhelmingly the work of women. Although Statistics Canada data indicates that men are involved in caregiving, studies suggest that women are more intensely involved in care, dedicating more hours to care, providing more hands on care, and making more compromises in terms of their paid employment choices to continue to provide care.⁵⁹ Caregiving also appears to have more significant long-term financial consequences for women carers.⁶⁰ Employed women, and to a lesser extent men, juggle caregiving responsibilities and employment rather than choosing to “relinquish to care.”⁶¹ As Philipps points out with respect to domestic labour more broadly, Statistics Canada data indicates that “women’s share of unpaid work has remained fairly consistent since the 1960s (at about two-thirds) despite the dramatic increase in their paid labour market participation.”⁶² The results of the BCLI’s survey of BC family caregivers indicate that over 75% of caregivers are women. The impact of balancing caregiving and paid employment also has been shown to be particularly stressful for employed women.⁶³

Research tells us that female caregivers are more likely than their male counterparts to find themselves members of the sandwich generation, a growing subgroup providing care simultaneously to under-age children and older adult family members, often while maintaining paid employment.⁶⁴ There were over 2 million sandwich generation caregivers in Canada in 2001.⁶⁵ This group is likely growing as a function of later marriage and parenting later in the life-course.

Why do women perform the majority of caregiving labour? According to Marika Morris women are socialized as caregivers: they are both “viewed by society as “natural” caregivers and feel pressure to do this work.”⁶⁶ As the primary caregivers of children, women often assume caregiving generally within the family. Moreover, as a function of greater longevity and age disparities between partners, heterosexual women are often the caregivers of their aging spouses and friends.⁶⁷

⁵⁸ Cranswick & Dosman, *supra* note 37 at 29.

⁵⁹ Pyper, *supra* note 2, and Marika Morris, *Gender-Sensitive Home and Community Care and Caregiving Research: A Synthesis Paper*, Final Report, Women’s Health Bureau, 2001 [Morris].

⁶⁰ Morris, *ibid.* at 22.

⁶¹ Phillips, “Working”, *supra* note 24 at 49.

⁶² Philipps, “One Worker”, *supra* note 8 at 8.

⁶³ Lee, *supra* note 21; Martha MacDonald, Shelley Phipps and Lynn Lethbridge, “Taking its Toll: Implications of Women’s Paid and Unpaid Work Responsibilities for Women’s Well-being” (2005) 11(1) *Feminist Economics* 63.

⁶⁴ Duxbury, Higgins & Shroeder, *supra* note 19 at 29.

⁶⁵ *Ibid.*

⁶⁶ Morris, *supra* note 59 at 22.

⁶⁷ Armstrong & Kits, *supra* note 20 at 12.

V. What is Family Caregiving?

We define a family caregiver as a person who is providing care, without pay or wage, to a friend or family member, including an adult child, for at least 2 hours a week. This care is provided outside of a hospital or care facility and may include any of the following activities: assistance with attending and scheduling appointments; transportation; feeding, meal planning or diet management; personal care (bathing, dressing, toiletry); household chores, including cooking, laundry and shopping; medications management and administration; mobility assistance. “Parenting” and “family caregiving” may be overlapping concepts in the experience of parents of adult children with disabilities.

Caregiving is often delineated according to categories of care. Armstrong and Kits divide care into the following overlapping groupings:

- Care management: identifying and arranging formal care services, mediating between and dealing with care providers, advocating for the rights of the care receiver, completing forms
- Assistance with instrumental activities of daily living: cooking, shopping, household tasks
- Assistance with activities of daily living: dressing, bathing, eating, personal care, administration of medication and other health equipment
- Emotional and social support⁶⁸

Although often characterized by the presence of types of activities, ultimately caregiving is not an action, but rather a “complex social relationship”.⁶⁹ The caregiving relationship emerges out of a previous familial or friendship connection. Social relationships are by definition associations of interdependency, and caregiving heightens the demands placed on the time and energies of one of the partners.

While there is great diversity in the amount of time caregivers spend in caregiving, caregivers face substantial demands on their time. Duxbury, Higgins and Shroeder’s recent study of employed caregivers who maintained full-time positions, found that “the majority of caregivers in the interview study “work” the equivalent of two full time jobs: they spend an average of 36.5 hours per week in paid employment and 34.4 hours per week in caregiving”.⁷⁰

Family caregiving encompasses very diverse relationships. Some caregiving relationships are life-long, as is the case with the parenting of some children with disabilities. Other care recipients have fluctuating needs, increasing during periods of poorer mental or physical health and becoming minimal when an illness is effectively in remission. This may be the case with a family member with a mental illness or with some conditions like Multiple Sclerosis.⁷¹ People recovering from various types of surgery may require significant post-surgical monitoring as well as ongoing emotional support and assistance with basic tasks of

⁶⁸ *Ibid.* at 3-4.

⁶⁹ *Ibid.* at 1.

⁷⁰ Duxbury, Higgins & Shroeder, *supra* note 19 at 9.

⁷¹ Armstrong & Kits, *supra* note 20 at 10.

daily living; however, their needs may diminish over time to the point that caregiving is no longer required at all.⁷² In contrast, some degenerative conditions are characterized by increasing care needs and lengthy life expectancy, meaning that a caregiver can be providing care on a full-time basis for many years. Still other family members may require support through a lengthy period of convalescence. A sudden car accident may precipitate a temporary or lifelong period of caregiving. Care needs may increase or decrease over time, but, in any event, are extremely varied.

Caregiving itself is also not static or linear. For example, even within the context of providing care to a single person, caregiving is often not stable, but consists of ups, downs and plateau phases. For example, a caregiver caring for someone with a chronic condition may find needs shift when that person develops an acute illness. In this case extra time and resources may be needed. Similarly, an individual may have a period of remission where, for a prescribed period of time, they require less assistance. To make matters more complicated, these changes in caregiving do not always have a clear onset and resolution phase as suggested by some research (Yeager & Roberts, 2003), but are highly variable and context-specific. From an employment perspective, this means that while it is important to consider the nature of the relationship and the duration of the caregiving commitment, it is equally important to understand that caregiving needs may be variable and unpredictable. It is difficult to quantify how much “time” it takes to care. The burden of care is unique for each individual circumstance. What is certain is that caregivers need flexibility and support to manage their unique caregiving situations. There must be short-term, long-term and crisis-type solutions for employed caregivers.

VI. A Note on the Term “Family Caregiver”

The term “family caregiving” has been the subject of some criticism. Many studies employ the alternate term “informal caregiving” to denote the same behaviours and in a sense this is a more accurate term. “Family care” includes the care of friends, neighbours and other non-family members in receipt of voluntary unpaid care. Australia and the U.K. use the term “carer” to capture care delivered in a family setting.⁷³

We use the term “family caregiver” because, as compared with the alternatives, it captures the reality that caregiving behaviour generally exists in the context of pre-existing relationships. The language of “informal” fails to capture the social reality of caregiving and sterilizes an emotionally complex subject. The term “informal” emphasizes organization and the absence of infrastructure, and obscures the lack of payment. The language of “family” also emphasizes the public-private distinction implicated in the relegation of caregiving to family members. This is useful to our study, which looks at the relationship between paid employment (public) and unpaid caregiving (private) manifest in legislation. The word “carer” is arguably too broad: we may care for many people for whom we are not performing any caregiving activities. Caregiving, denoting an action, again brings the

⁷² *Ibid.* at 9.

⁷³ See, for example, Australia, Commonwealth, House of Representatives Standing Committee on Family, Community, Housing and Youth, *Who Cares...? Report on the Inquiry into better support for carers* (Canberra: Parliament of the Commonwealth of Australia, 2009) at 18 [*Who Cares...?*].

emphasis back to labour and work. Moreover, ultimately “family caregiving” remains the term most commonly invoked in Canada to capture unpaid care and would like to situate *Care/Work* firmly within this larger body of literature.

For the last five years Kelly has been teaching film studies at a number of local colleges. This represents about 50% of her income. She is an artist and also supports herself and her art practice by applying for grants through foundation that fund the arts. Kelly is casual employee at each institution for which she teaches classes. Most colleges in the province are union environments and teaching is generally associated with excellent benefits. However, Kelly cannot join a union until she is hired for a full-time position and full-time opportunities in her area of knowledge have not come up in many years. Therefore, although she sometimes teaches a full-time course load fragmented amongst a number of employers, she faces employment uncertainty at the close of every school term, and has no access to health or other employment benefits. Moreover, for Kelly employment is consistently precarious: every term it is possible that she will not secure any classes or too few to meet her living expenses. In early 2008, Kelly's sister Emily was diagnosed with breast cancer. Emily became very ill as a result of her cancer being extremely progressed and contracting a number of illnesses during her period of treatment. Kelly missed out on two terms of teaching to support her sister into remission. She was not eligible for any benefits through her employer. Because she had been working intensely on her own film in the months leading up to Emily's diagnosis, and teaching only a single weekly class, her Employment Insurance benefits under the Compassionate Care Benefit program were negligible.

CHAPTER 3 – Employment Leave for Family Caregiving

I. Overview of the *Employment Standards Act*

The statute that governs most employment relationships in British Columbia is the *Employment Standards Act*.⁷⁴ It sets out minimum rights for certain employees in British Columbia regarding wages and conditions of employment. Comparable legislation exists in all other Canadian jurisdictions including the federal level. The federal legislation, the *Canada Labour Code*, applies to employees working in federally regulated industries, such as telecommunications. The focus of this chapter is the BC Act and mirroring provisions of the *Employment Insurance Act*. The *Canada Labour Code* does not provide significantly different rights and so concerns about the BC Act generally apply to the federal legislation.

The *Employment Standards Act* is the only current legislative source of entitlement in BC legislation for leave in relation to family issues. Part 6 of the Act sets out a number of statutorily protected unpaid leaves: pregnancy leave, parental leave, family responsibility leave, compassionate care leave, reservists' leave, bereavement leave and jury duty leave. The significance of statutory protection is twofold. First, the employer cannot deny the leave request provided the statutory requirements for leave are met;⁷⁵ second, the employee must not be prejudiced for taking the leave in the following respects: the employer may not

⁷⁴ *Employment Standards Act*, R.S.B.C. 1996, c.113.

⁷⁵ *Ibid.* at s. 54(1)

terminate employment or change a condition of employment because of the leave; the employer must return the employee to the same or a comparable position subsequent to the leave;⁷⁶ and employment is deemed continuous for the purpose of calculating vacation pay and pension, medical or other plan benefits.⁷⁷ Essentially, the significance of the leave provisions is that both employment and benefits are protected throughout the duration of the leave.

Our caregiver survey results indicate that access to paid employment leave is an issue for BC family caregivers. Just over 8% of respondents were able to take a paid leave and slightly over 20% took unpaid leaves from employment. Close to 25% indicated paid time off work would significantly improve their lives. Only 8% stated they had received employment insurance, and over twice as many caregivers went on income assistance at some point during their period of caregiving. Over 35% used up vacation time and 25% used up sick time in order to meet caregiving obligations without a loss of income. However, access to unpaid leave is also an issue for BC caregivers: close to 25% indicated an unpaid extended leave of absence would assist them.

Employment leave protection is a relatively recent and growing aspect of employment law in BC. When the first comprehensive employment statute came into effect in 1979,⁷⁸ the only leave protected under the act was the weeks immediately preceding and following a pregnant woman's due date. This limited maternity leave protection dates back to the *Maternity Protection Act* of 1921,⁷⁹ and has grown over the years to include both pregnancy and parental leave, the latter of which is no longer restricted to mothers. Bereavement, jury duty and family responsibility leave were creations of the revised 1995 consolidation of the *Employment Standards Act*, added in response to the recommendations of the Thompson Report on employment law.⁸⁰ The most recent addition to the Act is Canadian Forces reservist's leave, added in 2008. Compassionate care leave was added in 2006, following the federal government initiative, which resulted in both entitlement to compassionate care under the *Canada Labour Code*, and the corresponding changes to Employment Insurance benefits (which applies across the country).

Employees may be entitled to additional benefits by virtue of a union collective agreement or other contract negotiated individually with an employer. While employers and employees subject to the *Employment Standards Act* cannot contract out the minimum statutory obligations set out in the Act, they can contract for additional rights and obligations over and above those set out in the Act.

This chapter of *Care/Work* introduces family responsibility and compassionate care leave in BC and considers whether the existing legislation is adequate. The chapter compares the BC framework to the rights and benefits available in other Canadian jurisdictions as well as a number of other countries. The Canadian approach to care leave generally emphasizes end-

⁷⁶ *Ibid.* at s. 54

⁷⁷ *Ibid.* at s.56.

⁷⁸ *Employment Standards Act*, R.S.B.C. 1979, c.107. Legislation protecting employee rights existed prior to the 1979 Act; however, rights were fragmented into various statutes.

⁷⁹ *Maternity Protection Act*, R.S.B.C, 1921, c. 37.

⁸⁰ Mark Thompson, *Rights and Responsibilities in a Changing Workplace: A Review of Employment Standards in British Columbia* (Victoria: Ministry of Skills, Training and Labour, 1994).

of-life caregiving and provides little recognition for other forms of caregiving other than care for children during the first year of their lives. An international comparison reveals slightly more expansive rights available in Australia and Europe.

II. Family Care Entitlements under the *Employment Standards Act*

British Columbia employees governed by the *Employment Standards Act* possess two separate and distinct family care leave rights:

1. short-term leave entitlement called “family responsibility leave”; and
2. long-term leave entitlement called “compassionate care leave”.

Both of these rights allow an employee to take unpaid leave to care for a family member, if certain criteria are met. There is no right to paid family leave in British Columbia, that is to say, there is no statutorily-protected right to take any time off work to care for a family member and to still be paid by your employer or the Government for that time. The right is limited to the ability to take leave without jeopardizing your job status.

A. Section 52 - Family Responsibility Leave

Family Responsibility Leave creates a right to short-term leave. The section does not require the production of a medical certificate and is not restricted to caring for an ill family member. Pursuant to s.52 of the Act, an employee is entitled to take up to 5 days off per year (unpaid) to attend to child care or adult care needs broadly conceived. The section is worded as follows:

Family responsibility leave

52 An employee is entitled to up to 5 days of unpaid leave during each employment year to meet responsibilities related to

- (a) the care, health or education of a child in the employee's care, or
- (b) the care or health of any other member of the employee's immediate family.

As with all Part 6 leaves, the employer has no discretion to grant or not to grant family responsibility leave to an employee who requests it and is entitled to it. The non-discretionary nature of this leave has been articulated by the Employment Standards Tribunal on several occasions and is well-settled law. As one tribunal member has noted, “family responsibility leave is an employee *entitlement*, not something that may or may not be granted at the discretion of the employer.”⁸¹

The leave applies to the care of children and immediate family members. Section 1 of the Act (the Definitions section), defines the term “immediate family” as follows:

⁸¹ *Re Windsor Holdings Ltd.*, [1997], B.C.E.S.T. (October 22, 1997), BCEST #D187/97 (Pawluk). (reconsideration of BC EST #D187/97).

(a) the spouse, child, parent, guardian, sibling, grandchild or grandparent of an employee, and

(b) any person who lives with an employee as a member of the employee's family.⁸²

The meaning of immediate family thus excludes, for example, aunts, uncles, nieces, nephews, close friends and neighbours.

The Employment Standards Branch (ESB) Manual provides the following by way of clarification of the definition of the term "immediate family":

A broad and liberal interpretation of "immediate family" is considered by the director to include common-law spouses, step-parents, and step-children, or same sex partners and their children.

Any persons will be included as "immediate family" if they reside with the employee as a member of that employee's family.

An exchange student residing with the employee's family would be considered "immediate family."⁸³

The ESB Manual neglects to clarify whether common-law spouses, step-parents, step-children, same-sex partners and their children are considered to fall under part (a) of the definition (and thereby do not have a residency requirement) or part (b) of the definition (and thereby do have a residency requirement).

The ESB Manual does address the issue again in its discussion of s.52, stating:

Under s.1 of the Act, "immediate family" means the spouse, child, parent, guardian, sibling, grandchild or grandparent of an employee, and any person who lives with an employee as a member of the employee's family. It includes common-law spouses, step-parents, and step-children, and same sex partners and their children as long as they live with the employee as a member of the employee's family.⁸⁴

A strong argument could be made that the ESB Manual's interpretation is incorrect – one could argue that such persons should fall within the ambit of part (a) of the definition of immediate family, and thereby would not be subject to the requirement that they live with the employee. Same-sex spouses, nowadays, would certainly fall within part (a) and not part (b) of the definition, in light of the recent legalization of same-sex marriage in Canada.

Family Responsibility leave entitlement is broadly defined in terms of the reasons for which one may take leave. Although it must be connected to the "health, care or education" of a

⁸² *Employment Standards Act, supra*, note 74, s.1(1).

⁸³ Ministry of Labour and Citizen's Services, *Interpretation Guidelines Manual: British Columbia Employment Standards Act and Regulations*, online: <<http://www.labour.gov.bc.ca/esb/igm/esa-part-1/igm-esa-s1-immediate-family.htm>> [ESB Manual].

⁸⁴ *Ibid.* note 83, online: <<http://www.labour.gov.bc.ca/esb/igm/esa-part-6/igm-esa-s-52.htm>>.

family member, there is no requirement of urgency or emergency. There also does not appear to be any restriction on how much time the employee must take at a time, suggesting that the employee can take as little as a hour or as much as the full five days at a time. Although the Ministry's policy is that any part of a day counts as a full day of time off unless the employee and the employer agree otherwise,⁸⁵ the language of the Act does not support this interpretation.

B. Section 52.1 - Compassionate Care Leave

Compassionate Care Leave is a longer-term leave right that requires the production of a medical certificate. This leave entitlement is quite new as it came into effect in BC in 2006. Section 52.1 provides a right to take up to 8 weeks of unpaid leave if the following criteria are met:

1. the leave request must be to care for a family member who is either an "immediate family member" as defined in the Act, or a member of the "prescribed class" set out by regulation;
2. the family member must have a serious medical condition with a significant risk of death within 26 weeks; and
3. the employee must provide a medical certificate from a medical practitioner certifying that the family member has a serious medical condition with significant risk of death within 26 weeks.

Section 52.1 is worded as follows:

Compassionate care leave

- 52.1 (1) In this section, "family member" means
- (a) a member of an employee's immediate family, and
 - (b) any other individual who is a member of a prescribed class.
- (2) An employee who requests leave under this section is entitled to up to 8 weeks of unpaid leave to provide care or support to a family member if a medical practitioner issues a certificate stating that the family member has a serious medical condition with a significant risk of death within 26 weeks, or such other period as may be prescribed, after
- (a) the date the certificate is issued, or
 - (b) if the leave began before the date the certificate is issued, the date the leave began.
- (3) The employee must give the employer a copy of the certificate as soon as practicable.
- (4) An employee may begin a leave under this section no earlier than the first day of the week in which the period under subsection (2) begins.

⁸⁵ *Ibid.*

- (5) A leave under this section ends on the last day of the week in which the earlier of the following occurs:
- (a) the family member dies;
 - (b) the expiration of 26 weeks or other prescribed period from the date the leave began.
- (6) A leave taken under this section must be taken in units of one or more weeks.
- (7) If an employee takes a leave under this section and the family member to whom subsection (2) applies does not die within the period referred to in that subsection, the employee may take a further leave after obtaining a new certificate in accordance with subsection (2), and subsections (3) to (6) apply to the further leave.

The category of family members captured by the compassionate care provisions appears to be broader than the meaning of “immediate family member”. The *Compassionate Care Leave regulation* sets out a lengthy list that includes step-siblings, aunts, uncles, nieces, nephews, current and former foster parents and children, spouses of sibling, step-siblings, children and step-children, and other family members, and contains the following language that suggests one would be able to take leave to care for a friend one considers to be akin to a close relation:

Whether or not related to the person by blood, adoption, marriage or common law partnership, an individual with a serious medical condition, as described by section 52.1(2) of the Act, who considers the employee to be, or whom the employee considers to be, like a close relative.⁸⁶

Leave can be renewed if family member does not die within 26 weeks. By securing a new medical certificate the employee will be entitled to eight additional weeks of leave within a subsequent 26-week period.⁸⁷ Leave under this section must be taken at least one week at a time and cannot be further fragmented.⁸⁸

III. Comparison with other Jurisdictions in Canada

British Columbia is not lagging behind other Canadian provinces and territories in terms of setting minimum standards for family care leave rights. All jurisdictions, save Alberta, have developed some form of long-term statutory leave entitlement, although Alberta, Yukon, the Northwest Territories, Nunavut, and the Federal government have no short-term statutory leave provisions.

A. Short-Term Leave

Although the language of “Family Responsibility” is not invoked across the country, most jurisdictions now have some kind of short-term leave. BC’s five day Family Responsibility leave is longer than the leave protected by the legislation of Manitoba, New Brunswick,

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ *Employment Standards Act, supra*, note 74, at s. 52.1(5)(b)

Nova Scotia, and Prince Edward Island, which grant employees a right to a leave of up to three days. Saskatchewan, Ontario, Quebec, and Newfoundland have more generous provisions with twelve, ten, ten, and seven days of allowed leave, respectively. The criterion for short-term leave is fairly standard across Canada, although BC's residency requirement for members of immediate family is more onerous than most other provinces.

BC separates sick leave entitlements from short-term leave, which is done in a minority of Canadian jurisdictions. In most of Canada, any sick leave you take will reduce your short-term leave entitlement. Furthermore, every jurisdiction in Canada combines short-term leave for childcare and adult caregiving. BC, like most provinces, does not have a length of service requirement for eligibility for short-term leave.

B. Long-Term Leave

Every jurisdiction in Canada allows up to eight weeks of long-term leave, except for Quebec and Saskatchewan, which offer more generous provisions. Every jurisdiction in Canada except for Saskatchewan requires that the family member whom the employee is caring for be diagnosed with a serious medical condition with a significant risk of death within 26 weeks. Saskatchewan simply requires that the family member is incapable of working due to illness or injury. The leave must always be taken in weeklong periods. BC and Ontario allow an employee to renew the leave if the family member requiring care does not die within 26 weeks. Saskatchewan grants employee job protection for up to twelve weeks per year due to serious illnesses requiring caregiving and an additional four weeks where the employee is in receipt of EI compassionate care benefits.⁸⁹ Quebec allows up to twelve weeks.⁹⁰

Appendix A contains a table that compares employment leave provisions available under the various provincial and territorial employment law statutes.

IV. The Unionized Worker

The rights of unionized employees are, in part, defined by the terms of the collective agreement negotiated between the employer and the union. Potentially, a unionized employee may acquire benefits above the minimum rights set out in the *Employment Standards Act*. However, while there is a fair amount of variety in British Columbia in terms of specific collective agreement language, based on our limited review of collective agreement provisions in this province, they do not contain significantly greater rights in the area of family leave.

In terms of the duration of leave, collective agreements often contain provisions that mirror the limitations of existing employment legislation; however, leaves tend to be with pay, and in this sense collective agreement membership does appear to provide some wage loss protection. Generally, employees tend to be entitled to up to ten days of leave to address family “emergencies”, although most employees have access to less than ten days. Some employees are also entitled to an additional Compassionate Leave of up to five days,

⁸⁹ *Labour Standards Act*, R.S.S., 1978, c. L-1, s. 44.2(1)(b)(ii).

⁹⁰ *An Act Respecting Labour Standards*, R.S.Q., c. N-1.1, s. 79.7.

distinguished from Compassionate Care Leave, in the event of death or serious illness of a family member. Consistent with the limitations of the *Employment Standards Act*, these leaves are not directed at employees with ongoing caregiving responsibilities, and the leave periods are quite brief in relation to the demands of caregiving.

V. Employment Insurance and Caregiving Leave

For most workers the challenge associated with taking a leave of absence for caregiving is not job protection, but the loss of income that often accompanies an absence from work. The *Employment Insurance Act* addresses this problem in a narrow set of circumstances. Employees who take time off work to care for a gravely ill family member may be eligible to receive employment insurance benefits under the Compassionate Care Benefits program of the EI Act for part of the time of their leave.⁹¹ However, there is no comparable income replacement available in respect of family responsibility or short-term leave.

Under the Compassionate Care Benefits program, a caregiver is entitled to Employment Insurance benefits for up to six weeks, if certain eligibility criteria are met. The Act provides for up to eight weeks of compassionate care leave if an employee needs to care for a family member, provided the family member has a serious medical condition with a significant risk of death within 26 weeks. However, the EI entitlement is for six weeks of EI benefits, because EI claimants must serve a two-week unpaid waiting period before benefits are payable. The benefits and eligibility criteria mirror the Compassionate Care leave entitlements provided under the BC *Employment Standards Act* such that, effectively, six out of eight weeks of compassionate care leave are potentially linked to EI payments. This benefit is one of several benefits that are called “Special Benefits” under the Act. It is a relatively new benefit, which came into effect in January 2004.

The definition of family member contained in the Employment Insurance Regulation is broad, for it includes the catch-all language of “any person, whether or not related to the individual by blood, adoption, marriage, or common law partnership, who considers the individual to be like a close relative.”⁹² This definition matches the language governing entitlement to Compassionate Care Leave under the *Employment Standards Act*. As is the case with all EI benefits, entitlement is limited to employees who have sufficient recent work history in terms of hours of insurable employment. Benefits are a maximum of 55% of weekly insurable earnings subject to caps on insurable earnings set by Service Canada.

Once an employee has successfully applied for EI and created a file with Human Resources and Skills Development Canada, she can claim EI for the weeks within the 26-week window for which she is unable to work as a result of caregiving, and receive benefits for up to six weeks.

The significance of this requirement for sufficient insurable hours of employment is that the benefit is totally inaccessible to caregivers who withdraw from the workplace to focus on care well in advance of the end of life diagnosis. As of January 2010, self-employed

⁹¹ *Employment Insurance Act*, S.C. 1996, c.23.

⁹² Employment Insurance Regulations, SOR/96-332, s.41.11(1).

individuals became eligible for Compassionate Care Leave benefits and other Special Benefits.⁹³ Reductions in income prior to applying for leave can also have negative consequences on the amount of the benefit.

VI. The Results of our Survey of BC Employers

Even amongst leading employers, adult caregiving leave appears to be a rare benefit. Most firms with policies in this area had documented leave entitlement consistent with the minimums set out in the *Employment Standards Act*, and in many instances even the five days of family responsibility leave were unpaid. Compassionate care leave was also unpaid in a number of instances. Interestingly, even a number of those employers we spoke with who were recorded in other surveys as providing a top-up during compassionate care leave indicated that in fact they did not top-up EI benefits. Some employers do provide a full salary during the EI deductible period and a top-up to full salary for six weeks, effectively insuring eight weeks of paid leave for end-of-life caregiving. Only one employer had created an eldercare specific policy. This policy provided for one day off with pay in the event that a parent developed a serious illness.

Most of the employers we spoke with indicated that an extended unpaid leave of up to six months is available to employees under general discretionary leave of absence policies. In these instances leave requests are determined on a case-by-case basis, taking into consideration the circumstances of the employee, the business needs of the employers, and often the degree of dispensability of the employee is a factor in terms of both access to leave and the length of the period of leave available. These general leaves have been taken to address personal health, education, travel and volunteerism as well as family caregiving. Eldercare was not an issue employers appear to have encountered: only one human resources manager that we spoke with was aware of an employee having taken a leave for adult family caregiving; this manager indicated that the employee took an unpaid six months leave and returned to work for financial reasons.

As an alternative to short or long-term leave, a number of employers allow employees to earn paid personal days off by essentially banking time. Policies ranged from two to seventeen days per year. Some employers permit employees to carry forward into subsequent years unused earned days off, thereby creating a bank of paid time from which employees can draw in order to address some of their family caregiving obligations.

VII. Comparisons with other Leave Rights in BC

There is inconsistency as between the family members for which one may take leave under the Family Responsibility, Compassionate Care and Bereavement leave provisions. The

⁹³ Bill C-56, An Act to amend the Employment Insurance Act and to make consequential amendments to other Acts, 2nd Sess., 40th Parl., 2009, c.152.06 (Royal Assent, December 15, 2009), online: <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Pub=status&Language=E&Mode=1&Parl=40&Ses=2&File=1 - DOC--FE197B48B58140F2965B2C577C6088FD>

rationale for this disconnect is unclear. In BC compassionate care leave captures the broadest group of family members, potentially including close friends and neighbours.

The rationale for the length of either leave is similarly unclear. By way of comparison, other leave entitlements provided under the *Employment Standards Act* include:

1. vacation entitlement:
 - at least two weeks of paid vacation, after 12 consecutive months of employment, and
 - at least three weeks of paid vacation, after five consecutive years of employment⁹⁴
2. Pregnancy leave:
 - 17 weeks of unpaid leave, and in some cases six additional weeks⁹⁵
3. Parental leave
 - 35 weeks of unpaid leave, and in some cases up to 37 weeks of unpaid leave
 - if the child has a physical, psychological or emotional condition, up to five additional weeks of unpaid leave⁹⁶
4. Bereavement leave
 - three days unpaid leave on the death of an “immediate family” member⁹⁷
5. Jury Duty
 - unpaid leave, for as long as is necessary to complete the jury duty⁹⁸
6. Reservists leave
 - unlimited, for the duration of the reservist’s deployment combined with pre and post-deployment activity⁹⁹

As compared with other forms of family caregiving, employment standards legislation places significantly greater value on infant care. The current laws permit new parents to jointly take up to one year off work in order to care for a new baby.¹⁰⁰ Leaving aside the issue of whether one year is adequate, the lack of entitlement to take a comparable leave for caregiving of older adults and other family members raises the question of why other forms of caregiving are not also worth recognition. The goal of this study is certainly not to undermine maternity and parental leave benefits, but rather to query why other forms of care are not similarly valued. There is no question that the purpose of maternity and parental leave would be different from the purpose of adult caregiving leave, as the former is associated with breast-feeding, post-natal recovery and bonding with infants – purposes clearly not linked to adult caregiving. However, the current framework accords little value to

⁹⁴ *Employment Standards Act*, *supra*, note 74 at s.57.

⁹⁵ *Ibid.* at s.50.

⁹⁶ *Ibid.* at s.51.

⁹⁷ *Ibid.* at s.53.

⁹⁸ *Ibid.* at s.55.

⁹⁹ *Ibid.* at s.52.2

¹⁰⁰ *Ibid.* at s.50 and 51.

caregiving aside from infant care. While these forms of caregiving meet different social and economic objectives, both activities are crucial given our aging population and de-institutionalization of components of the Canadian health care system.

The *Employment Standards Act* does accord value to forms of civil service. Both reservist and jury duty leave are subject to no temporal restrictions. Why are these leaves distinguished for special treatment? Likely, because in both instances the leaves are provided to serve the state – in the military and the court system – and hence these activities are deemed valuable in terms of unpaid leave – and as both are associated with a stipend Employment Insurance does not come into play in terms of valuation. Family caregiving is not similarly viewed as a service to the state, although this approach may require re-evaluation in the context of the current downloading of care to the family. In a social welfare state, where aspects of health care are subsidized by the government, family caregiving might be more properly viewed as a form of service to the state and community.

VIII. Problems with the Employment Standards / Employment Insurance Framework

It is for this reason that numerous reports and consultations recommend an expansion of benefits available to family caregivers. Characterizing family care as “a cornerstone of our communities and health care systems” the Final Report of the Special Senate Committee on Aging recommends that the *Employment Insurance Act* be amended to: eliminate the two-week waiting period; increase benefits to 75% of pre-leave earnings; increase the length of the leave to thirteen weeks; and expand entitlement beyond end-of-life caregiving.¹⁰¹ The Romanow Report recommended more generally that relevant areas of government work together on proposals to support informal caregivers to take time off work to provide home care at “critical times”, stating that “home care could not exist in Canada without the support of social networks and informal caregivers.”¹⁰²

Under the current legislation there is essentially no entitlement to unpaid or paid leave for the purpose of providing care to adult family members who are not expected to die within 26 weeks. The language of Compassionate Care provisions is unequivocal that these benefits were created to support palliative and end-of-life care. They were not designed to support caregivers to sustain other caregiving relationships. Family responsibility leave, providing only five days of relief, does not address the actual ongoing care needs of most recipients of family care, and being unconnected to any income replacement measures through the Employment Insurance system, provides for no paid leave. The purpose of family responsibility leave is rather to allow the worker to take a day off work here and there. Comparison with legislation across the country and the language of collective agreements confirms that the intention of Family Responsibility was not to address ongoing family caregiving; rather, it is intended to permit employees to respond to unexpected family concerns and emergencies. Ultimately, employment standards do not recognize the

¹⁰¹ Special Senate Committee on Aging, *Canada's Aging Population: Seizing the Opportunity* (Ottawa: 2009) at 117 and 127.

¹⁰² Romanow Report, *supra* note 29 at page 183.

demands ongoing family caregiving places on the worker. Rather, caregiving is viewed as a temporary digression from work that does not generally interfere with labour force activity.

Section 2 of the *Employment Standards Act* sets out the purposes of the Act, the last of which is directly relevant to the issue of family care. One of the goals of the act is “to contribute in assisting employees to meet work and family responsibilities.” Although significant changes have been made to the Act over the years, especially with respect to infant care and maternity leave, the Act currently meets this goal only in a very limited sense. The fact is that Compassionate Care leave is limited to a small community of potential recipients, leave being limited to end-of life care circumstances in which a physician can prognosticate death within 26 weeks. This is reflected in the very low uptake of the EI benefit: less than 4% of the funds budgeted for this benefit were utilized in the 2004-2005 fiscal period,¹⁰³ suggesting that the Government of Canada actually intended this innovation to benefit a much broader community of caregivers.¹⁰⁴

The 2006 Arthurs Report, *Fairness at Work: Federal Labour Standards for the 21st Century*,¹⁰⁵ reviewed many aspects of the *Canada Labour Code*, the federal equivalent of the *Employment Standards Act*.¹⁰⁶ The report to some extent recognized this hole in the employment law framework. It recommended that Compassionate Care Leave be redefined in the *Canada Labour Code* and the *Employment Insurance Act* to include circumstances where the recipient of care is not facing imminent death, allowing the employee to provide care for a family member who is “seriously ill or who has had a serious accident.”¹⁰⁷ Certainly this change would expand the accessibility of benefits to caregivers.

Another problem with delivering family caregiving benefits through the Employment Insurance system is that the amount of the benefit is tied to earnings, and people with non-linear, fragmented or precarious employment arrangements may have access to lower benefits or no benefits at all. Low-income earners receive less by way of financial assistance than higher income earners. While there is a rationale for partial income replacement, the implication that the caregiving labour of lower income people is worth less is problematic.

IX. International Review – Alternative Approaches

In comparison with other countries, the Canadian Compassionate Care Leave and benefit program is rather generous in terms of paid leave for palliative and end-of-life care. However, viewed through a broader family caregiving lens, where the care recipient is often

¹⁰³ Allison Williams et al., “Canada’s Compassionate Care Benefit: Views of Family Caregivers in Chronic Illness”, (2006) 12(9) *International Journal of Palliative Nursing* 438 at 444.

¹⁰⁴ The initial more restrictive definition of eligible family member is also likely partly responsible for low uptake of the benefit when it was introduced and this barrier to access has since been removed by the introduction of the more expansive current definition discussed in this chapter.

¹⁰⁵ Arthurs Report, *supra* note 29.

¹⁰⁶ The *Canada Labour Code* is much broader in application than the *Employment Standards Act* as it also governs federal labour law and health and safety standards, whereas in BC we have distinct laws, including the *Labour Relations Code* and the *Workers Compensation Act*. The *Canada Labour Code* applies to federally regulated employees such as telecommunications workers, regardless of the province or territory in which they are employed.

¹⁰⁷ Arthurs Report, *supra* note 29 at 159.

not facing imminent death, the family leave provisions, providing only two weeks of job protection and no paid leave, become comparatively weak in relation to a number of key countries, including Australia, the United Kingdom, France, the Netherlands and the U.S.

Australian employment legislation gives workers a right to two weeks paid carer's leave to support immediate family members or household members in the event of illness, injury or unexpected emergency.¹⁰⁸ This is balanced against an entitlement to only two days paid compassionate care leave each time a family member faces a life-threatening illness¹⁰⁹ and two days unpaid leave to respond to family illness, injury or emergency once paid carer's leave is exhausted.¹¹⁰ So overall, the Australian approach to leave is conservative.

In the U. K. and France there is no entitlement to paid caregiving leave; however, employment legislation grants employees the right to much more lengthy periods of time off work without pay in order to respond to caregiving obligations. A U.K. employee may take a "reasonable amount of time" in relation to dependent care and illness. The *Employment Relations Act* states:

57A Time off for dependants

- (1) An employee is entitled to be permitted by his employer to take a reasonable amount of time off during the employee's working hours in order to take action which is necessary—
- (a) to provide assistance on an occasion when a dependant falls ill, gives birth or is injured or assaulted,
 - (b) to make arrangements for the provision of care for a dependant who is ill or injured,
 - (c) in consequence of the death of a dependant,
 - (d) because of the unexpected disruption or termination of arrangements for the care of a dependant, or
 - (e) to deal with an incident which involves a child of the employee and which occurs unexpectedly in a period during which an educational establishment which the child attends is responsible for him.¹¹¹

The U.K. legislation provides a useful model for crafting broad access without relying on the term "serious". "Dependent" is also broadly defined to include a spouse, child, parent, or person who lives in the same household, including employees, tenants, lodgers and boarders.

In France, two kinds of extended unpaid family leave are available under the French labour code: the equivalent of compassionate care leave, family solidarity leave, is a three-month leave that may be renewed once and taken on a part-time basis;¹¹² family assistance leave is a three month renewable leave with a one year limit per person per working lifetime.¹¹³

The Netherlands offers employees the broadest protection in relation to paid care leave. Their equivalent to our family responsibility leave entitles employees to ten days paid leave.

¹⁰⁸ *Workplace Relations Act 1996* (cth), s.244 [WRA 1996].

¹⁰⁹ *Ibid.* s.250.

¹¹⁰ *Ibid.* s.257.

¹¹¹ *Employment Relations Act 1999* (U.K.), 1999, c. 26, Schedule 4, Part II, s.57A.

¹¹² *Code du Travail*, Article L3142-16.

¹¹³ *Code du Travail*, Article L3142-22.

The benefit is at least 70% of their wage and 100% of minimum wage.¹¹⁴ Compassionate care leave benefits are also provided for a period of six weeks at 70% of employment wages and the leave may be taken on a part-time basis and spread out over an eighteen-week period. In both cases the right is not, however, absolute, and the employer has limited discretion to deny leave for operational reasons. An approach unique to Netherlands is career interruption leave, according to which an employee may take up to six months leave for caregiving or educational purposes. If the employer is able to replace the person on leave with someone who is otherwise unemployed or excluded from the labour market, the employee will receive a benefit equivalent to 70% of their pre-leave wage.¹¹⁵

In the U.S. the state of California has taken the approach recommended by most criticisms of the Canadian Compassionate Care benefit by expanding the scope of paid leave beyond end-of-life care to include all seriously ill family members.¹¹⁶ Infant care and adult care are addressed under related provisions, with neither singled out for prioritization. However, the amount and duration of the benefit mirror the Canadian approach.

X. Conclusion

Under the provincial *Employment Standards Act*, most BC employees have the right to take a very limited amount of time off work to care for an adult family member without losing their job. In addition to maternity and parental benefits, two types of leave have been introduced into the Employment Standards framework to address the family responsibilities of employees: family responsibility leave and compassionate care leave. Although both leaves are unpaid, an employee eligible for compassionate care leave may also be entitled to Employment Insurance Compassionate Care Benefits, which provide for limited income replacement during a leave.

This international review highlights a number of the weaknesses of the current legislative regime in BC and Canada in relation to caregiving leave. The most significant is the limitation of paid leave to circumstances where the care-recipient faces a “significant risk of death within 26 weeks”. Studies of caregiving unilaterally recommend expanding the scope of paid leave entitlement to include other forms of family caregiving,¹¹⁷ a change that would

¹¹⁴ *Work and Care Act*, cited in Netherlands Ministry of Social Affairs and Employment, “SWZ – Leave – Short-term care leave” online:

<http://english.szw.nl/index.cfm?menu_item_id=14640&hoofdmenu_item_id=14632&rubriek_item=392437&rubriek_id=391971&set_id=3591&doctype_id=6&link_id=166653>. See also Canada, HRSDC, “The Netherlands Improving Work-Life Balance - What Are Other Countries Doing?” (2004) at 29, online:<<http://www.hrsdc.gc.ca/eng/lp/spila/wlb/iwlb/14netherlands.shtml>>; and National Alliance for Caregiving, “The Netherlands’ Caregiving Legislation”, online:

<<http://www.caregiving.org/intcaregiving/netherlands/netherlands2.htm>>[NAC Netherlands]

¹¹⁵ *Paid Employment and Care Act*, cited in HRSDC, “The Netherlands”, *ibid.* See also Netherlands Ministry of Social Affairs and Employment, “SWZ – Leave – Long-term care leave” online:

<http://english.szw.nl/index.cfm?menu_item_id=14640&hoofdmenu_item_id=14632&rubriek_item=392437&rubriek_id=391971&set_id=3591&doctype_id=6&link_id=123323>; and NAC Netherlands, *ibid.*

¹¹⁶ *California Unemployment Insurance Code*, §3300, online: <<http://www.leginfo.ca.gov/calaw.html>>.

¹¹⁷ See, for example: Abord-Hugon & Romanin, *supra* note 25; VON Canada, *supra* note 26; HRSDC, *supra* note 26; Janet E. Fast and Norah C. Keating, *Informal Caregiving in Canada: A Snapshot*, Report to the Health Services Division, Health Policy and Communications Branch, Health Canada, 2001; Arthurs Report, *supra* note 29.

require reform of both provincial employment standards legislation and the federal *Employment Insurance Act*. This raises the question of what should be the length of term of leave protected under provincial legislation and what portion of this leave should be linked to entitlement to corresponding EI benefits.

The question also arises as to whether it is appropriate to limit leave to intervals of one week and to full days, as is the case under current provincial law. A more flexible and responsive regime that acknowledged the fluctuating and episodic nature of some caregiving relationships would permit the employee to take single and partial days off work without prejudice. This raises challenging questions in terms of how to dovetail such protection with the EI regime in order to permit income protection. However, a responsive framework may require such flexibility in order to avoid privileging some kinds of caregiving relationships over others. Similarly, the Dutch approach of permitting a part-time leave with income replacement may be more responsive to the circumstances of some caregivers than our current system. However, an alternative to making part-time leave available is to build such rights to make work hours adjustments into work flexibility or human rights legislation. This problem is explored in the following chapter.

Finally, the linking of entitlement to income replacement to Employment Insurance will exclude the underemployed and people who have insufficient hours of insurable employment leading up to a period of intensive caregiving. Connecting entitlement to financial benefits partly subsidized by government exclusively to labour force earnings creates an inequity in the valuation of care labour: higher earnings may mean higher benefits during a period of caregiving and a poor work history means no benefits at all. In this sense EI must always be understood as a partial response to the challenge of supporting family caregivers. Chapters 5 and 6 address other approaches to income replacement for caregivers.

Jane has been an associate lawyer with a large firm for the last 5 years. Her elderly mother, Helen, who has always struggled with mental health issues, has recently become seriously mentally ill. As Jane has no siblings and her mother is divorced, the responsibility for her mother's care has fallen exclusively to Jane. Helen was living alone until Jane discovered how ill Helen had become; now Jane has moved her mother into her own home. When left alone, her mother neglects most of her basic care needs. As a function of her illness she does not trust anyone other than Jane, and will not tolerate the presence of anyone else. Thus it is not an option for Jane to hire a caregiver, in spite of her above average income. In the short-term Jane would like to reduce her hours of work and adapt her work schedule to make sure she does not have to leave her mother alone for more than 5 hours at a stretch. She would like to return to her demanding practice schedule once her mother is somewhat better, but cannot anticipate how long it will take for her mother's condition to stabilize again. If she were permitted to work some of the time from her home, she would be capable of working more hours, but in her area of work, where full-time often means 60 hours a week, full time may no longer be possible for her during her mother's lifetime. Jane is also conscious that at any time her mother's mental health could worsen again, requiring workplace accommodation of her care responsibilities.

CHAPTER 4 – Family Responsibilities Accommodation in the Workplace

I. The Meaning of Workplace Flexibility

In studies of the needs of working family caregivers, workplace flexibility consistently emerges as a measure caregivers believe would enhance their ability to balance employment and caregiving responsibilities. While the concept, being connected to flexibility, requires a certain amount of conceptual or definitional openness to retain its meaning, workplace flexibility tends to denote measures, such as opportunities to change work hours or location, telecommuting and part-time options. Such arrangements are lauded for allowing workers and employers to craft creative solutions to balancing workplace and family caregiving responsibilities which are tailored to the family and work demands of a particular employee.

The term “flexibility” is the source of some controversy amongst critics of labour policy, associated as it is with recent revisions to employment legislation aimed at increasing the ability of employers to compete in a global economy.¹¹⁸ In BC changes falling into this category include reductions in minimum shift lengths and changes to statutory holiday rules that reduced the entitlement of part-time employees to holiday pay – two of the recent revisions to the *Employment Standards Act* of BC that arguably removed legislated employee

¹¹⁸ Sylvia Fuller & Lindsay Stephens, *Women's Employment in BC: Effects of Government Downsizing and Employment Policy Changes 2001-2004* (Vancouver: Canadian Centre for Policy Alternatives, 2004) at 20.

rights. *Care/Work* does not advocate for employer flexibility in this manner. Workplace flexibility more narrowly conceived is about adjustments made at the initiative of the employee to enhance management of the dual worker-caregiver role. This is generally how the term “flexibility” is employed in family caregiving literature. However, this controversy over language points to a problem that must be kept in mind when considering legislation in relation to work flexibility: provisions must be crafted in such a manner as to prevent “flexibility” from being used in order to avoid other employee rights, such as the right to over-time pay and protections against excessive hours. That said, work flexibility may benefit employers as well – indirectly, through employee satisfaction, and directly, by meeting shared scheduling needs.

In BC and Canada, subject to limitations on hours of work imposed by provincial and federal employment standards legislation, flexibility remains at the discretion of employers. Therefore, in the absence of an understanding employer, the only forum for exercising a right to workplace flexibility is human rights. The significance of this is that where an employer rejects an employee request for workplace flexibility, the only legal recourse is a human rights argument characterizing the employer’s lack of flexibility as a form of discrimination. This is the only sense in which there can be said to be a right to workplace flexibility in BC.

For the non-unionized employee this means filing a human rights complaint. Unionized employees have recourse to labour arbitration or human rights adjudication to exercise rights enshrined in the *Human Rights Code*; however, the same human rights principles and law apply in either forum. The unionized worker has greater entitlement to workplace flexibility only if the collective agreement between the employee’s trade union and the employer contains specific language according employees a right to workplace flexibility. Based on our research, collective agreements that make explicit reference to accommodation of family caregiving obligations are rare. Similarly, a non-unionized employee may acquire a right to flexibility via contract. Remedies under the *Human Rights Code* are the primary source of entitlement to accommodation of family caregiver responsibilities under current BC law.

This chapter of *Care/Work* discusses family responsibilities discrimination and employer accommodation of family responsibilities. It examines how Canadian human rights decision-makers have framed the work-family balance issue as a human rights problem and responded to the claims of employed caregivers seeking accommodation of caregiving responsibilities by employers. It considers the challenges of using the existing human rights framework, including the family status ground, as a route for pursuing accommodation, and includes a review of both recent family responsibilities cases as well as decisions that have clarified the meaning of the family status ground. Finally, it explores options for reform by considering two directions other countries have followed in terms of legislation of a right to accommodation of family responsibilities – work-flexibility amendments to employment standards law (the U.K. approach) versus codification of a caregiver specific ground in human rights legislation (the Australian approach) – and analyzing the various strengths of these divergent approaches. As is the case in many chapters of this paper, although the focus is BC, the problems we discuss present themselves in all Canadian jurisdictions, and the potential solutions we explore apply to all regions as well.

II. Employee Access to Work Flexibility in BC

A. BC Caregivers seek Additional Workplace Flexibility

Many workers already benefit from a degree of workplace flexibility. The Statistics Canada Workplace and Employee Survey indicates that “flextime”, defined to include control over time when work starts and stops so long as the full complement of hours is maintained, is available to over one third of Canadian employees.¹¹⁹ This figure is consistent with our survey findings: close to 25% of BC caregivers believe they would benefit significantly from greater workplace flexibility, and detailed survey comments by a number of respondents betray anxiety around revealing the scope of their caregiving obligations in order to seek accommodation in the workplace. Many workers shift to self-employment and make other employment changes to manage the work/ care balance without confronting their employers.

Data also suggests that access to workplace flexibility may be in direct opposition to need. In spite of representing the majority of caregivers, women report lower participation rates in flextime arrangements, even at management levels and from within professional groups,¹²⁰ where occupational responsibilities would seem to permit greater potential for worker control over hours. Access also tends to increase with university education,¹²¹ suggesting that access may be more limited for lower income workers. The availability of flexibility may also depend on the nature of family responsibilities: the need for government intervention in the area of workplace flexibility appears to be particularly urgent for the family caregivers of older adults, who experience more work-life balance problems and benefit from less employer support than employed parents of young children.¹²²

B. Flexibility, Part-time Options and the Results of our Survey of Employers

One recurring theme in terms of responses to our survey of employers was part-time options. A number of employers indicated that they have accommodated the family responsibilities of employees by allowing them to convert to part-time status by reducing their hours of work or participating in a job-sharing arrangement. In each workplace where this is permitted or documented in policy part-time options, the ability to convert to part-time is at the discretion of the employer and it requires employee initiative. In the case of job-sharing, two employees must generally present with an interest in sharing a position. Requests are dealt with on a case-by-case basis, taking into consideration the nature of the position and whether it requires a full-time work presence. Job-shares may require consideration of the fit between the two employees as well.

A major issue that arises in relation to part-time arrangements as a solution to managing family caregiving responsibilities is the impact on benefits, and what makes such an

¹¹⁹ Derrick Comfort, Karen Johnson & David Wallace, “Part-time Work and Family-friendly Practices in Canadian Workplaces” (Ottawa: Human Resources Development Canada, 2003) Catalogue no. 71-584-MIE, at 32 and 33 [Comfort, Johnson & Wallace].

¹²⁰ *Ibid* at 34 and 36.

¹²¹ *Ibid.* at 34-35.

¹²² Duxbury, Higgins & Shroeder, *supra* note 19 at 16.

arrangement viable is the employer's willingness to provide part-time employees with benefits equivalent to what full-time employees receive. In each case where employers indicated that their practice was to provide part-time employees working a requisite number of hours with comparable or identical benefits this practice was characterized as a financial investment in good employees. However, in many instances workplace flexibility may come at no economic cost to the employer. Providing part-time employees with full benefits is one area where employers effectively help to subsidize the cost of caregiving because it supports both employee and corporate wellness.

III. The Human Rights Framework in British Columbia

Discrimination in Employment

13 (1) A person must not

- (a) refuse to employ or refuse to continue to employ a person, or
- (b) discriminate against a person regarding employment or any term or condition of employment

because of race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a summary conviction offence that is unrelated to the employment or to the intended employment of that person.¹²³

The BC *Human Rights Code* prohibits an employer from discriminating against an employee regarding any term or condition of employment based on a protected ground, unless the term is a legitimate occupational requirement for the position in question. Family status is a protected ground in BC and so an employer may not discriminate against an employee on the basis of family status.

The meaning of “family status” is not fully defined by legislation. The Supreme Court of Canada has characterised discrimination in employment on the ground of family status rather broadly. In *B v. Ontario (Human Rights Commission)*, the Supreme Court of Canada refers favourably to the following description of Justice Abella of employment discrimination on the basis of marital and family status contained in her decision of the lower court:¹²⁴

practices or attitudes that have the effect of limiting the conditions of employment of, or the employment opportunities available to, employees on the basis of a characteristic relating to their marriage (or non-marriage) or family.¹²⁵

This characterization suggests a potential application to the family caregiving context. A review of reported human rights decisions indicates that courts and tribunals have found that employment arrangements that prevent an employee from performing family caregiving responsibilities may be a form of discrimination on the ground of family status.

¹²³ *Human Rights Code*, R.S.B.C 1996, c. 210, s.13.

¹²⁴ *B v. Ontario (Human Rights Commission)*, [2000] O.J. No. 4275 (O.C.A.) at para. 54.

¹²⁵ *B v. Ontario (Human Rights Commission)*, [2002] S.C.C. No. 66 [*B. v. Ontario*].

The strong wording of the first purpose of the BC *Human Rights Code* supports this approach:

3. The purposes of this Code are as follows:

- (a) To foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia.¹²⁶

However, there are at least two barriers to using the family status ground to pursue accommodation of family responsibilities.

First, the leading BC authority on family status discrimination of caregiving responsibilities significantly raised the threshold of proof for establishing family status discrimination as compared with the general discrimination test developed and refined over the years by the Supreme Court of Canada and applied with respect to discrimination based on other protected grounds. Jurisprudence in other Canadian jurisdictions is more promising but still in its infancy. The tenor of existing case law indicates a pattern of limiting protection for caregivers seeking accommodation under the family status ground, an approach that appears to result of a concern regarding the potential universality of caregiving obligations giving rise to excessive pressure on employers to make workplace changes.

Second, the meaning of “family status” has been the subject of limited judicial interpretation as compared with other enumerated grounds, and existing legislation and case law does not make it clear that the ground includes anything other than a parent-child relationship. The meaning and scope of “family status” appears to be the source of some confusion and is subject to differential treatment across the country. Although theoretically human rights would seem to be the only available legal forum for protecting family responsibilities in the workplace, there are simply very few court or tribunal decisions that involve the accommodation of workers caring for adult family members. The following sections of this paper discuss these two problems by way of background to our analysis of options for law reform.

IV. Family Responsibilities Discrimination in BC – The Recent Legal Test

The leading authority on discrimination in employment on the ground of family status in BC is the British Columbia Court of Appeal decision in *Campbell River*.¹²⁷ This case involved a mother of a school-aged child with severe behavioural problems. The mother, a unionized employee, worked a shift that ended in the early afternoon so she could care for her son after school. Due to a reorganization of the workplace, the employer changed the employee’s shift hours to end at 6:00 p.m. instead of 3:00 p.m., thereby conflicting with her care for her son. The employee claimed that this change in shift discriminated against her on the ground of family status as it effectively prevented her from either continuing in the position or maintaining both employment and the care of her child.

¹²⁶ *Human Rights Code*, *supra* note 123 at s.3.

¹²⁷ *H.S.A.B.C. v. Campbell River & North Island Transition Society*, 127 L.A.C. (4th) 1 (B.C.C.A.) [*Campbell River*].

In Canada, including BC, prior case law had established that the discrimination argument is composed of two parts. First, the person alleging discrimination must make out what is called a *prima facie* case of discrimination based on a ground enumerated in the Code. Then the burden shifted to the respondent to establish a defense.¹²⁸

A *prima facie* case of discrimination is “one which covers the allegation 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”¹²⁹. The defense to a *prima facie* case is that the standard imposed by the employer is a *bona fide* occupational requirement. The test for establishing a *bona fide* occupational requirement has 3 parts. The employer must establish on a balance of probabilities that:

- a) the employer adopted the standard for a purpose rationally connected to the performance of the job;
- b) the employer adopted the particular standard in the honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
- c) the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show [this]... it must be demonstrated that it is impossible to accommodate the individual employees sharing the characteristic of the claimant without imposing undue hardship on the employer.¹³⁰

In its decision in *Campbell River*, the British Columbia Court of Appeal established a new test for adjudicating discrimination on the basis of family status in the employment context – ostensibly amending the first part of the duty to accommodate test for instances where the family status ground and employment intersect. The test to determine if there is *prima facie* discrimination is whether “a change in a term, or condition of employment, imposed by the employer results in serious interference with a substantial parental or other family duty.”¹³¹ The Court then referred the union grievance back to the original arbitrator to deal with the accommodation of this employee. There are no further reported decisions on this case. In its decision the judge noted that the threshold set by this test would be quite difficult to meet and that has proven to be the case in BC.

V. Recent Family Responsibilities Discrimination Cases in BC and Canada

There exist very few tribunal or court decisions dealing with family responsibilities accommodation in Canada, and virtually all of them deal with the care of young children. Moreover, reported decisions contain very little law on ongoing caregiving requirements; rather, most cases on record involve immediate and fleeting caregiving. Decision-makers

¹²⁸ *Health Employers Association of BC (Kootenay Boundary Regional Hospital) v. BC Nurses’ Union*, [2006] B.C.J. No. 262, 2006 BCCA 57 at para. 34-37; *Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115*, [2006] B.C.J. No. 263, 2006 BCCA 58 at para. 28.

¹²⁹ *Ontario (Human Rights Commission v. Simpson Sears Ltd.*, [1985] 2 S.C.R. 536 (O’Malley), at para. 28.

¹³⁰ *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees Union*, [1999] 3 S.C.R. 3 [“Meiorin”] at para. 54.

¹³¹ *Campbell River*, *supra* note 127 at 39.

have not interpreted entitlements liberally and none appear to recognize the implications of our aging population on human rights in this area. If anything, recognition of the potential scope of caregiving has precipitated a normalization of caregiving – essentially, these responsibilities are considered not sufficiently unique or extraordinary to warrant a human rights response – as well as a desire to protect against a floodgates reaction in the form of a massive number of caregiver claims. There are no cases that deal with the issue of how businesses and employees can manage the requirements for long-term, routine caregiving while addressing workplace demands. The following quotation encapsulates the general tone of arbitrations in this area:

As wrenching as the choices faced by Mr. Reynolds and his family are, they are choices; and they are not new or rare choices for family people, particularly where both spouses work. Aged parents have always been, and will continue to be, a responsibility and concern for everybody, including people in the workforce.¹³²

Most of the BC cases subsequent to *Campbell River* that raise family responsibilities discrimination involve new mothers seeking accommodation in the form of part-time work. In each case, the perception that the challenge of juggling care and work is so common appears to be a bar to a successful human rights claim. In *Evans v. University of British Columbia* the judge stated with respect to a woman who had not been able to find suitable childcare at the time of her return to work:

The tribunal concluded that an employee on maternity or parental leave knows of the responsibility to make suitable childcare arrangements by the date of return to work and that, as a result, there was nothing extraordinary about the petitioner's situation.¹³³

In another case the arbitrator expressed concern that finding discrimination on the facts of the case would create an entitlement for part-time work for every full-time employee ending maternity leave, barring undue hardship, implying that this would be a problematic outcome.¹³⁴ In *British Columbia Public School Employers' Assn. v. B.C.T.F. (Sutherland Grievance)* (2006), Arbitrator Monroe writes (at para 39):

No doubt, there are many new mothers who, like Ms. Sutherland, and for the same reasons given by her, would prefer to work part-time for some months after the conclusion of maternity leave, rather than returning right way to their full-time jobs. However, circumstances at hand fall well outside the holding in *Campbell River*.

Two federal jurisdiction decisions reject the *Campbell River* approach. In the 2006 Canadian Human Rights Tribunal decision of *Hoyt v. CNR*¹³⁵ the tribunal member stated that it was inappropriate to create a more restrictive definition for one prohibited ground of discrimination.¹³⁶ The Tribunal held that human rights legislation is “fundamental law”, and

¹³² *Canadian Staff Union v. Canadian Union of Public Employees (Reynolds Grievance)*, [2006] C.L.A.D. No. 452 (N.S. Arb. Bd.) at 143.

¹³³ *Evans v. University of British Columbia*, 2008 BCSC 1026 at para. 42, [2008] B.C.J. No. 1453.

¹³⁴ *British Columbia Public School Employers' Assn. v. B.C.T.F. (Sutherland Grievance)* (2006), 155 L.A.C. (4th) 411, [2007] B.C.W.L.D. 3277 at para. 39.

¹³⁵ *Hoyt v. CNR* [2006] C.H.R.D. No. 33 [*Hoyt*].

¹³⁶ *Ibid.* at para. 120.

as such to fulfil their objectives should be interpreted liberally.¹³⁷ Although the employee's discrimination argument was successful, the facts of the case, involving the accommodation of a pregnant woman's physical limitations, do not otherwise shed light on the accommodation of caregivers of adult family members.

The 2007 decision in *Johnstone*¹³⁸ involved an employee returning from a maternity leave who was unable to find a childcare provider that matched her or her husband's availability based on their differing shift schedules. Johnstone requested accommodation in the form of three fixed 12-hour shifts per week so that she could arrange for childcare while she was at work. The employer's accommodation policy required Johnstone to accept part-time employment in exchange for fixed shifts. Johnstone filed a complaint with the Canadian Human Rights Commission arguing that the employer's accommodation policy discriminated against her on the basis of family status.

In its findings the Federal Court remitted the decision back to the Canadian Human Rights Commission in part because they used "serious interference" language that appeared to be taken from *Campbell River*.¹³⁹ The Court stated that using "serious interference" as a standard was counter to binding jurisprudence. The judge found Hoyt's critique of *Campbell River* valid, and noted that *Campbell River* was unduly restrictive due to the fact that "the operative change typically arises within the family and not in the workplace."¹⁴⁰ The Federal Court thus supported the Hoyt analysis of *Campbell River* up to the point of actually endorsing it, although its comments that requiring "serious interference" ran counter to jurisprudence indicates what line of cases the court prefers.

The employer in *Johnstone* appealed the Federal Court decision. In its dismissal the Federal Court of Appeal refused to provide an opinion on whether the Hoyt or *Campbell River* standard is correct,¹⁴¹ leaving the state of the law somewhat unclear.

The *Campbell River* test has been followed in a couple instances in the federal jurisdiction. One case involved a conflict arising out of a change in work duties and so it does not illustrate some of the potential flaws of the narrowness of the *Campbell River* test.¹⁴² A more recent federal arbitration that followed the *Campbell River* test is the December 2008 *Re Kanayochukwu*¹⁴³ arbitration. In this grievance the employee was an owner / operator of a truck that delivered goods for Staples stores. He had to go overseas to Nigeria on short notice due to a serious medical problem of his son. He failed to find someone to perform his deliveries for him and so was fired under a "deemed termination" clause in his contract. The arbitrator followed *Campbell River* and held that *prima facie* discrimination could not be found due to the fact that there was no "action" on the part of the employer or change in the terms of the employee's contractual relationship that negatively impacted the employee's familial obligations.

¹³⁷ *Ibid.*

¹³⁸ *Johnstone v. Canada (Attorney General)*, 2007 F.C. 36 [*Johnstone*].

¹³⁹ *Ibid.* at para. 29.

¹⁴⁰ *Ibid.*

¹⁴¹ *Johnstone v. Canada (Attorney General)* [2008] F.C.J. No. 427.

¹⁴² *Canada Post Corp. v. Canadian Union of Postal Workers (Sommerville Grievance)* [2006] C.L.A.D. No. 371 (QL), 156 L.A.C. (4th) 109, (Can. Lab. Arb.).

¹⁴³ *Trans4 Logistics and Teamsters Local 847 (Re Kanayochukwu)* (2008), 96 C.L.A.S. 73, 2008 CLB 10894.

Campbell River was also followed in a 2006 Nova Scotia decision.¹⁴⁴ In that case the employee applied for job within his organization, and had the highest seniority out of the qualified candidates. The job the employee was applying for was located in Halifax, but the employee requested that he perform the job out of St John's and travel to Halifax occasionally as required. He did so due to the fact that he wanted to remain close to his elderly mother, and his children who resided with his ex-wife. Furthermore, his current partner had custody of her children from a previous relationship, and was concerned that a move to Halifax might create a custody dispute.

In his decision, the Nova Scotia arbitrator noted that he was afraid of opening the floodgates in terms of finding family status discrimination.¹⁴⁵ He followed *Campbell River*, and stated that in his opinion it was consistent with the Supreme Court of Canada's jurisprudence.¹⁴⁶ He did, however, agree with the contention that *Campbell River* conflates the first and second parts of *Meiorin* in the test.¹⁴⁷

VI. An Overview of Criticisms of the *Campbell River* Test

The *Campbell River* test revises the law in two significant respects relevant to our study. First, the language of the test indicates that discrimination will only occur where the conflict between work and family responsibilities is a function of a change in the terms or conditions of employment. Strictly interpreted, this wording excludes circumstances where the conflict arises out of a change in the circumstances of the employee's family. Therefore, if the difficulty in balancing work and family responsibility develops because of changes in the health of a family member requiring an employee to assume caregiving responsibilities, then there is no discrimination.

Second, the test requires the interference with family responsibilities to be "serious". In the past the presence of *prima facie* discrimination has been easier to establish. There is no weighing up of the significance of the trespass on human rights. Rather, the assessment of the degree of interference was built into the undue hardship prong of the three-part *bona fide* occupational requirement test, which has indeed been the subject of significant upper level court jurisprudence. As a result of this language, the BC Court of Appeal has been accused of conflating the two parts of the test in the *Campbell River* case and criticized for contradicting Supreme Court of Canada jurisprudence. For now, however, *Campbell River* is the correct test in British Columbia, and arbitrators in other jurisdictions have found it persuasive in their determinations. Although critiqued by the Canadian Human Rights Tribunal, *Campbell River* has yet to be confirmed or overturned by the Supreme Court of Canada.

The case's underlying assumption appears to be that people's personal lives are static, and that if they do not require accommodation, they will never require it. The *Campbell River*

¹⁴⁴ *Reynolds*, *supra* note 132.

¹⁴⁵ *Ibid.* at para. 134.

¹⁴⁶ *Ibid.* at para. 138.

¹⁴⁷ *Ibid.*

decision seems designed to prevent employers from changing employment terms that might affect a person's familial obligations. An increased or new need to provide care, or alternately job requirements that are discriminatory from the outset, do not appear to create a case of *prima facie* discrimination. This case thus takes a "slippery slope" view of accommodation for employee's with familial obligations, and seeks to limit a requirement to accommodate to a very narrow set of circumstances.

A less explicit but equally problematic aspect of the test as it has played out in subsequent jurisprudence is a sense that family responsibilities must be extraordinary in order to place an employee at risk of discrimination. Commonplace family caregiving is excluded – a policy rationale to limit the potential cast of the net of discrimination. This trend raises the interesting question of, why must the circumstances be unique to give rise to discrimination? Discrimination is wrong regardless of its rarity or commonness. From a public policy perspective it is rather the increasing prevalence of family caregiving, as opposed to its uniqueness, that renders this a problem calling for comprehensive solutions. From an individual perspective, the perspective from which one usually conducts the human rights analysis, the conflict between employment and caregiving responsibilities is problematic no matter how many other caregivers share the employee's struggle. The approach of the BC Court of Appeal runs counter to an earlier line of equality jurisprudence stressing the analytical value of identifying membership in a disadvantaged group to establish discrimination, for here the size of the shared group is a bar to a claim of discrimination.¹⁴⁸

Eldercare responsibilities might find greater support under the *Campbell River* analysis, assuming caring for our parents may be considered a less traditional family obligation than caring for biological children. It is difficult to say, as eldercare has not been the subject of reported decision-making on family responsibilities discrimination.

VII. The Bigger Picture – The Meaning of “Family Status”

A major source of confusion in the area of family responsibilities discrimination is the meaning of the family status ground. Neither legislation nor jurisprudence provides a comprehensive statement regarding its meaning or scope.

¹⁴⁸ The relevance of group membership to the human rights analysis is discussed in greater detail in the discussion of the Supreme Court of Canada decision in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 contained in the following section.

A. Human Rights Legislation in Canada

Although a fairly recent addition to most human rights laws in Canada, as compared with, for example race and religion, discrimination on the basis of family status is now prohibited in most Canadian jurisdictions. Although human rights protection has existed in BC since the creation of the *Fair Employment Practices Act* of 1956, family status was added to the BC *Human Rights Code* in 1992 and the Canadian *Human Rights Code* in 1984.¹⁴⁹ Only the *Human Rights Act* of New Brunswick does not include the ground of family status at the time of writing,¹⁵⁰ and a recent report of the New Brunswick Human Rights Commission recommends its addition.¹⁵¹ Quebec does not use the term family status in its *Charter of Rights and Freedoms*; however, it includes “civil status”, which has been determined by the Supreme Court of Canada to include familial relationships.¹⁵²

The meaning of “family status” is not self-evident. A number of human rights laws contain definitions of “family status”. There are two strains of definitions in Canadian legislation.¹⁵³ The laws of Saskatchewan, Ontario, Nova Scotia, Newfoundland and Labrador, and Prince Edward Island define family status as “the status of being in a parent and child relationship”.¹⁵⁴ Alberta and Nunavut define family status more broadly as “the status of being related to another person by blood, marriage or adoption”. The common reference to a parent/child relationship may exclude caregiving arrangements other than childcare, and may or may not include the converse, in the form of eldercare. At the time of writing, BC, Manitoba, Yukon, the North West Territories and the federal legislation¹⁵⁵ include family status as a protected ground without providing a definition.

B. Supreme Court of Canada Guidance on the Meaning of Family Status

Although the meaning of the term family status has evolved over the years through judicial treatment and legislation, it remains in development. One of the challenges to thinking about family status is that it has not been the source of significant litigation. The Supreme Court of Canada has to date provided only limited guidance with respect to the scope and meaning of the term. While several cases have dealt with the concept of family status discrimination, there is yet to be a case where a court has provided a detailed analysis of the definition and scope of family status. In particular, the Supreme Court of Canada has not yet addressed the question of whether family status discrimination in employment includes discrimination based on an individual’s family obligations and responsibilities, such as caring for an elderly, ailing parent.

¹⁴⁹ *Human Rights Amendment Act*, R.S.B.C. 1992, c. 43, s.6 (Statutes of B.C.); Statutes of Canada, 1980-81-82-83, c. 143.

¹⁵⁰ *Human Rights Act*, R.S.N.B. 1973, c.H-11, c.30.

¹⁵¹ New Brunswick Human Rights Commission, *Recommendations to Government*, 2008 at 4.

¹⁵² *Brossard v. Quebec (Comm. des droits de la personne)*, [1988] 2 S.C.R. 279 [Brossard].

¹⁵³ *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14, s.44(1); *Human Rights Act* S. Nu. 2003, c. 12, s.1.

¹⁵⁴ *Human Rights Code*, R.S.S. 1979, c. S-24.1, s.2(1); *Human Rights Code*, R.S.O. 1990, c. H.19, s. 10(1); *Human Rights Act*, R.S.N.S. 1989, c.214, s.3(h); *Human Rights Act*, C.H-12, R.S.P.E.I 1988, c.H-12, s. 1(1)(h.11); *Human Rights Code*, R.S.N.L. 1990, c.H-14, s.2(e.1)

¹⁵⁵ *Human Rights Code*, R.S.B.C. 1996, c.210; *Human Rights Code*, C.C.S.M. cH175; *Human Rights Act*, R.S.W.T. 2002, c.18; *Human Rights Act*, R.S.Y. 2002, c. 116; *Canadian Human Rights Act*, R.S.C. 1985, c.H-6.

The most recent Supreme Court of Canada decision that addresses the scope of family status discrimination is the 2002 decision in *B. v. Ontario*.¹⁵⁶ In that case the complainant was fired because of the actions of his daughter: the girl was a sexual abuse survivor, and, after being in therapy for a period of time, she identified one of her father's employers (her uncle) as her abuser. Her father was subsequently terminated from his position after working for the employer for 26 years. Both the appellants and the lower court argued that particular identity complaints did not amount to human rights violations on the ground of family status and that group membership was required to establish discrimination.¹⁵⁷

In terms of thinking about family responsibilities discrimination this decision is significant in two respects. First, the Court clarified that concept of family status captures both the fact of being in a particular type of family relationship (for example, being a single parent family, the status of being married or single) as well as an adverse distinction drawn based on the particular identity of a family member. The Court characterized these forms of family status discrimination as, respectively, absolute status and relative status discrimination, the most common of the latter type in the employment context being anti-nepotism policies.¹⁵⁸

The Court held that both the wording of the Ontario statute and the principles of interpretation for human rights statutes favoured a finding that "family status" applied to relative status discrimination.¹⁵⁹ In its decision the Court affirmed the often-cited principle that human rights legislation is quasi-constitutional and as such ought to be given a fairly liberal and purposive interpretation in order to advance the objectives of underlying law and policy.¹⁶⁰

Second, the court determined that while relative status discrimination may be established where a general rule results in differential treatment of a particular subgroup of people, it is not necessary to situate a person within a larger group to make out discrimination.¹⁶¹ The court stated that:

While the search for a group is a convenient means of understanding and describing a discriminatory action, it does not rise to the level of a legal requirement. In the context of equality guarantees in the Canadian Charter, this Court has stated clearly that group membership is not a necessary precondition to a finding of discrimination.¹⁶²

Quoting its decision in a previous case, the Court added that:

It will always be helpful to the claimant to be able to identify a pattern of discrimination against a class of persons with traits similar to the claimant, i.e., a group, of which the claimant may consider herself or himself a member. Nonetheless, an infringement of s. 15(1) [of the *Charter of Rights and Freedoms*] may be established by other means, and may exist even if there is

¹⁵⁶ *B. v. Ontario*, *supra* note 125.

¹⁵⁷ *Ibid.* at para 54.

¹⁵⁸ *Ibid.* at para 53.

¹⁵⁹ *Ibid.* at para 36.

¹⁶⁰ *Ibid.* at para 44.

¹⁶¹ *Ibid.* at para 53-55.

¹⁶² *Ibid.* at para 55.

no one similar to the claimant who is experiencing the same unfair treatment.¹⁶³

This language is significant given the trend in recent family responsibilities discrimination to find that there is no requirement to accommodate overly commonplace family responsibilities. In *B v. Ontario*, the Court refers favourably to Justice Abella's discussion of "grounds" versus "groups" in the Court of Appeal decision:

Discrimination is not only about groups. It is also about individuals who are arbitrarily disadvantaged for reasons having largely to do with attributed stereotypes, regardless of their actual merit... Whether or not a disadvantaged group can be fashioned out of the facts of any particular case is largely irrelevant. The *Code* stipulates grounds in s. 5(1), not groups. The question is whether an individual has been discriminated against on the basis of a prohibited ground, not whether he or she necessarily fits into a group requiring redress.¹⁶⁴

In an earlier Quebec decision the Supreme Court of Canada held that an anti-nepotism policy amounted to discrimination on the basis of family status.¹⁶⁵ In that case the court held that the town discriminated against a young person applying for a lifeguard position when, as a result of the application of an anti-nepotism policy prohibiting the employment of any member of an existing employee's immediate family, she was excluded from consideration because her mother was employed as a secretary in the police station. These two cases – *Brossard* and *R v. Ontario* – largely encapsulate the Supreme Court of Canada's guidance to date on the scope and meaning of the family status ground.

Campbell River does not exhaustively define the concept of family status. Rather, in identifying the test for *prima facie* discrimination, the Court characterized the definition as lying somewhere between the meanings proposed by the opposing parties, and the test it fashioned is intended to balance the excessive workplace disruption the Court associated with a broad interpretation against providing no protection for parents with family responsibilities. From the perspective of caregiving policy, the strength of *Campbell River* is that it clarifies that the inclusion of the ground of "family status" protects individuals against discrimination on the basis of family responsibilities, where the terms of the stringent test are meant. The language "parental or other family duty" suggests that the meaning encompasses more than the parent-child relationship. However, no case has come forward to push this interpretation. Still, it is highly unlikely that "family" status would be interpreted to include caregiving of friends and neighbours, which is a significant portion of family caregiving in Canada, given the restrictive approach taken in BC to date. In this respect "family status" remains an inadequate term for addressing family responsibilities discrimination.

C. Other Relevant Grounds: Marital Status and Sex

"Family status" is not the only ground that may be invoked by caregivers experiencing workplace discrimination. In some regions "marital status" is a protected ground as well, and that ground is referenced in some of the above-discussed family responsibilities cases. Although marital status has not been expressly defined in every Canadian jurisdiction, there

¹⁶³ *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para 66, qtd in *B. v. Ontario* at para 55.

¹⁶⁴ *Ibid.* at 56.

¹⁶⁵ *Brossard*, *supra* note 152.

seems to be general agreement that the definition of marital status includes being married, single, divorced, separated, widowed, and living in a common law relationship. It also appears to include both absolute and relative status discrimination, that is to say, both instances of discrimination based on an individual's membership to a particular group or class of persons (such as married persons) and circumstances of discrimination based on the particular identity of an individual's spouse. In *B. v. Ontario* the Supreme Court of Canada favoured "an approach that focuses on the harm suffered by the individual, regardless of whether that individual fits neatly into an identifiable category of persons similarly affected."¹⁶⁶

In practice, issues of family status and marital status regularly overlap and are often cited together in cases of discrimination in employment. Both are subject to a broad human rights approach to their interpretation; however, family status appears to be a more all-encompassing ground. In most Canadian jurisdictions family status typically refers the relationship between parent and child (including adoptive children), and in some jurisdictions also extends to other family relationships such as those between siblings, in-laws, uncles or aunts, nephews or nieces, and cousins, whereas marital status is more limited to relationships connected to spousal status.

"Sex", which benefits from greater conceptual clarity, may be an appropriate source of entitlement to protection, as family caregiving remains such a gendered form of labour; but this approach, like marital status, falls short of being able to address family responsibilities discrimination broadly.

VIII. Human Rights Approaches to Caregiver Discrimination outside Canada – Alternatives to the Family Status Ground

Although on the international front there is increasingly recognition that the employee's struggle to balance work and caregiving responsibilities may give rise to discrimination, the "family status" ground is somewhat unique to Canadian human rights legislation. Below we discuss human rights legislation in the US, New Zealand and Australia that utilizes alternative language that makes it clear family responsibilities discrimination is prohibited.

A. The United States

In the United States family responsibilities discrimination is primarily litigated as a form of sex discrimination.¹⁶⁷ However, a number of jurisdictions are considering adding family or familial status as a ground,¹⁶⁸ or building in greater human rights protection in relation to family caregiving responsibilities using other language. For example, bills have been put forward to amend the *Maine Human Rights Act* to add "family caregiver status" as a specific

¹⁶⁶ *B. v. Ontario*, *supra* note 156 at para. 46.

¹⁶⁷ Centre for WorkLife Law, "Current Law Prohibits Discrimination based on Family Responsibilities and Gender Stereotyping", Issue Brief, 2006, and "Litigating Flexibility", Issue Brief, 2007, online: <<http://www.worklifelaw.org/IssueBriefs.html>>.

¹⁶⁸ Sloan Work and Family Research Network and the Centre for WorkLife Law, "Addressing Family Responsibilities Discrimination", Issue Brief, 2008, online: <<http://www.worklifelaw.org/IssueBriefs.html>>.

ground, and add “family responsibilities” as a ground under the *New York Executive Law* and the *Civil Rights Law*. In addition, the *Human Rights Act* of the District of Columbia currently prohibits discrimination on the basis of “family responsibilities”.¹⁶⁹

B. New Zealand

New Zealand reveals another approach to legislating in relation to family responsibilities discrimination. The *Human Rights Act* of New Zealand includes “family status”, under a lengthy list of prohibited grounds of discrimination, and codifies the following definition of the ground right in the list of grounds:

Family status, which means-

- (i) Having the responsibility for part-time care or full-time care of children or other dependents; or
- (ii) Having no responsibility for the care of children or other dependents; or
- (iii) Being married to, or being in a civil union or de facto relationship with, a particular person; or
- (iv) Being a relative of a particular person...¹⁷⁰

The Act also defines marital status, disability and sexual orientation within the list of grounds.¹⁷¹ The definition of family status makes it clear that both relative and absolute status discrimination as well as instances of family responsibilities discrimination are prohibited. As the employment law section of this chapter illustrates, New Zealand has taken a dual approach to responding to family responsibilities discrimination, for it has also addressed the issue under its employment legislation.

C. Australia

Most Australian jurisdictions take an explicitly human rights approach to family responsibilities accommodation; however, the term “family status” is not used. Various more direct expressions like “carer” and “family responsibilities” appear in their human rights laws as equivalent to the Canadian version of enumerated grounds. Although all Australian jurisdictions address family responsibilities more directly than in Canada or the United States, there is variation across the Commonwealth. This section focuses on Australia because it appears to be the only English-language country to have followed this route to addressing the circumstances of family caregivers.

The New South Wales is considered to be a leader in relation to legislation of family responsibilities discrimination, its language serving as a model for other Australian jurisdictions.¹⁷² The *Anti-discrimination Act* of the New South Wales contains a specific section addressing “Discrimination on the ground of a person’s responsibilities as a carer”.¹⁷³ This 2001 addition to their human rights act requires employers to permit flexible work

¹⁶⁹ *DC Human Rights Act of 1977* § 2-1402.11(a).

¹⁷⁰ *Human Rights Act 1993* (N.Z.), s.21(1)(l).

¹⁷¹ *Ibid.* s.21.

¹⁷² Sara Charlesworth et al, *Balancing Work and Family Responsibilities: Policy Implementation Options* Melbourne: RMIT University Centre for Applied Social Research, 2002.

¹⁷³ *Anti-Discrimination Act 1977* (NSW), No. 48, PART 4B.

arrangements that do not impose unjustifiable hardship on the employer. The definition of discrimination includes discrimination resulting from both differential and similar treatment:

49T What constitutes discrimination on the ground of a person’s responsibilities as a carer

(1) A person (the perpetrator) discriminates against another person (the aggrieved person) on the grounds of the aggrieved person’s responsibilities as a carer if, on the ground of the aggrieved person having responsibilities as a carer, the perpetrator:

(a) treats the aggrieved person less favorably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person who does not have those responsibilities, or

(b) requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons who do not have such responsibilities comply or are able to comply, being a requirement that is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply.

The Act further defines discrimination against employee caregivers as follows:

49V Discrimination against applicants and employees

(1) It is unlawful for an employer to discriminate against a person on the ground of the person’s responsibilities as a carer:

(a) in the arrangements the employer makes for the purpose of determining who should be offered employment, or

(b) in determining who should be offered employment, or

(c) in the terms on which the employer offers employment.

(2) It is unlawful for an employer to discriminate against an employee on the ground of the person’s responsibilities as a carer:

(a) in the terms or conditions of employment that the employer affords the employee, or

(b) by denying the employee access, or limiting the employee’s access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment, or

(c) by dismissing the employee, or

(d) by subjecting the employee to any other detriment.¹⁷⁴

Like the BC Code, the law contains a legitimate occupational requirement exception. In this heavily codified jurisdiction, aspects of human rights law that have been defined by jurisprudence in Canada, such as the meaning of unjustifiable (undue is the Canadian equivalent term) hardship, are spelled out in the *Act*. “Responsibilities as carer” is defined to include children for whom the carer has parental responsibility and immediate family members including the carer’s spouse, former spouse, grandchild, step grandchild, parent, step-parent, grandparent, step-grandparent, brother, sister, step-brother, step-sister, as well

¹⁷⁴ *Ibid.* The *Equal Opportunity Act 1984* (WA) s. 35A contains similar language.

as the carer's spouses's immediate family members, and former spouse's immediate family members, and all family members include relationships by adoption, guardianship, fostering, and half siblings.¹⁷⁵ Caregivers who are not family members in some sense, such as close friends, community volunteers and neighbours, appear to be excluded from protection.

The *Equal Opportunities Act* of Victoria requires an employer to accommodate an employee's responsibilities as carer and uniquely goes so far as to insert examples of accommodation into the language of the legislation, thereby setting out unequivocally that work flexibility requests raise human rights issues. The Act states:

14A Employer must accommodate employee's responsibilities as parent or carer

(1) An employer must not, in relation to the work arrangements of an employee, unreasonably refuse to accommodate the responsibilities that the employee has as a parent or carer.

Example An employer may be able to accommodate an employee's responsibilities as a parent or carer by allowing the employee to work from home on a Wednesday morning or have a later start time on a Wednesday or, if the employee works on a part-time basis, by rescheduling a regular staff meeting so that the employee can attend.¹⁷⁶

There is also no limitation of caring to family members under the Victorian law. Rather, a "carer" is defined as "a person on whom another person is wholly or substantially dependent for ongoing care and attention, other than a person who provides that care and attention wholly or substantially on a commercial basis."¹⁷⁷

The states of Queensland and Tasmania prohibit family responsibilities discrimination by including it in a list of grounds without delineating the nature of this form of discrimination in a separate section of the Act.¹⁷⁸

Other Australian jurisdictions address family responsibilities discrimination in the context of sex discrimination legislation. The *Sex Discrimination Act* of the Australian Capital Territory prohibits discrimination on the ground of family responsibilities, again capturing discrimination based on both similar and differential treatment:

7A Discrimination on the ground of family responsibilities

For the purposes of this Act, an employer discriminates against an employee on the ground of the employee's family responsibilities if:

- (a) the employer treats the employee less favorably than the employer treats, or would treat, a person without family responsibilities in circumstances that are the same or not materially different; and
 - (b) the less favorable treatment is by reason of:
 - (i) the family responsibilities of the employee; or
 - (ii) a characteristic that appertains generally to persons with family responsibilities; or

¹⁷⁵ *Ibid.* s.49S.

¹⁷⁶ *Equal Opportunity Act* 1995 (Vic).

¹⁷⁷ *Ibid.* s.4(1).

¹⁷⁸ *Anti-Discrimination Act* 1991 (Qld) and *Anti-Discrimination Act* 1998 (Tas).

(iii) a characteristic that is generally imputed to persons with family responsibilities.¹⁷⁹

In the Australia Capital Territory family responsibilities are defined to include “care and support for” a dependent child, or “any other immediate family member who is in need of care and support” including a spouse, as well as a child, parent, grandparent, grandchild or sibling of the employee or the employee’s spouse, where spouse includes former spouse, de facto partner and former de facto partner.¹⁸⁰

The federal sex discrimination law prohibits direct discrimination on the ground of family responsibilities through dismissal or constructive dismissal, whereas other grounds are subject to broader human rights protection.¹⁸¹ Its limited characterization of discrimination does not apply to neutral terms and conditions of employment that may have an adverse impact on caregivers, as compared with the more comprehensive language contained in the human rights legislation of the New South Wales, Victoria and the Australian Capital Territory, and thus provides little support for work flexibility claims.¹⁸²

D. Discussion

The comparison with the Australian framework is complicated by key differences between the Australian and Canadian human rights systems that are worth noting at the outset. First, as is the case in Canada, as a function of federalism each member state has passed unique discrimination legislation. While in Canada this has resulted in discrete terminology distinctions, such as the meaning of “family status” discussed in the previous section of this report, on the Australian front a number of quite different approaches have emerged that encompass more fundamental differences, such as varied definitions of discrimination.

Second, unlike the Canadian approach, according to which each province and territory has enacted a single unified Human Rights Code, in Australian jurisdictions human rights law is often fragmented into multiple laws, dealing with, for example, sex or disability discrimination under particularized statutes.¹⁸³

Third, the Australian approach is heavily codified, leaving less to the interpretation of the courts. So whereas Canadian human rights law has evolved significantly through judicial interpretation, many concepts like the meaning of discrimination and unjustifiable or undue hardship are defined by statute in Australia, granting less discretion to the courts in shaping discrimination law. This difference in approach has been characterized as evidence of closed (Australia) versus open (Canada) models of discrimination.¹⁸⁴

¹⁷⁹ *Sex Discrimination Act 1984* (ACT) s.7A.

¹⁸⁰ *Ibid.* s.4A.

¹⁸¹ *Sex Discrimination Act 1984* (Cth)

¹⁸² This inequity in the characterization of family responsibilities discrimination was highlighted in a recent report of the Human Rights and Equal Opportunity Commission of the Commonwealth of Australia into work-life balance as an aspect of the Commonwealth framework that ought to be revised. See Human Rights and Equal Opportunity Commission, *It's About Time: Women, men, work and family*, Final Paper, 2007 at 47 [*It's About Time*].

¹⁸³ The exception to this in Canada is the *Ontarians with Disabilities Act, 2001*, S.O. 2001, c.32, which exists in addition to the province’s more general *Human Rights Code*, R.S.O. 1990, c. H.19.

¹⁸⁴ Belinda Smith, “Models of Anti-Discrimination Laws – Does Canada offer any lessons for the reform of Australia’s laws?” at 1, Paper presented at the Law and Society Association Australia and New Zealand Conference, 2008, ‘W(h)ither Human Rights’, December 10-12, 2008, University of Sydney, relying on Aalt

The placement of family responsibilities within sex discrimination legislation identifies caregiver discrimination as a form of sex discrimination. This approach certainly reflects the Canadian jurisprudence on family responsibilities discrimination, which is composed largely of mothers seeking arrangements that allow them to schedule work around the demands of parenting infants and young children with disabilities. In practice, in many instances it may be difficult to separate sex and family responsibilities discrimination. However, this is not a unique feature of family responsibilities discrimination. Experience is particularized. A victim of discrimination experiences discrimination as the sum total of her personal characteristics, which may involve multiple grounds, such as race and disability. The intersectionality of protected grounds has been the subject of significant academic discussion.¹⁸⁵

The sex discrimination approach followed in some Australian jurisdictions is at least in part a function of the fact that family responsibilities discrimination was added to existing legislation as a step toward implementing the International Labour Organization *Convention (156) Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Worker with Family Responsibilities*.¹⁸⁶ This Convention, adopted in 1981, states that:

Article 3

1. With a view to creating effective equality of opportunity and treatment for men and women workers, each Member shall make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities.¹⁸⁷

Article 4 obliges signatories to enact measures that take account of the needs of workers with family responsibilities in terms and conditions of employment, social security and community planning.¹⁸⁸ Canada has not ratified the Convention.¹⁸⁹ However, Canada has ratified a number of the documents set out in the preamble of Convention 156 as precursors to this Convention¹⁹⁰ and Canada remains a member of the ILO.

The family responsibilities approach does appear to have achieved some success in shaping a more progressive understanding of the impact of caregiving responsibilities on labour force participation. Although, similar to the Canadian context, the complainants tend to be mothers seeking a reduction in hours, even where the complainants' children did not possess special needs, decision-makers have recognized a refusal to accommodate a request to shift

Willem Heringa, "Standards of Review for Discrimination: the Scope of Review by the Courts" in Titia Loenen & Peter R. Rodrigues, eds., *Non Discrimination Law: Comparative Perspectives* (Cambridge: Kluwer, 1999) at 25.

¹⁸⁵ See Nitya Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6 Canadian Journal of Women and the Law 25-51.

¹⁸⁶ *It's About Time*, *supra* note 182 at 47.

¹⁸⁷ International Labour Organization, *Convention (156) Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Worker with Family Responsibilities*, Article 3. ILOLEX Database of International Labour Standards, online: <<http://www.ilo.org/ilolex/english/convdisp1.htm>>.

¹⁸⁸ *Ibid.* articles 4 and 5.

¹⁸⁹ *Ibid.*

¹⁹⁰ For example, the Equal Remuneration Convention, 1951 (ILO C100) and the Discrimination (Employment and Occupation) Convention, 1958 (ILO C111); Human Rights and Equal Opportunity Commission, *supra* note 186 at 283 and 284.

to part-time status as discrimination.¹⁹¹ This is in stark contrast with Canadian jurisprudence discussed earlier in this chapter. Refusal to accommodate a request for tele-working has also been found to be discrimination.¹⁹² In an Australian case that framed the accommodation of a new mother as a form of sex discrimination, the magistrate concluded that by refusing the request for part-time work after the conclusion of her maternity leave the employer “made it impossible for [her] to return to work at all,” resulting in discrimination by constructive dismissal.¹⁹³ He states:

I need no evidence to establish that women per se are disadvantaged by the requirement that they work full time. As I observed in *Escobar v. Rainbow Printing* [(no 2) [2002] FMCA 122] and as Commissioner Evatt found in *Hickie v Hunt & Hunt* [[1998] HREOCA 8], women are more likely than men to require at least some period of part time work during their careers, and in particular after maternity leave, in order to meet family responsibilities.¹⁹⁴

Unlike the Canadian context, the normality of family caregiving responsibilities does not appear to be a bar to a discrimination claim.

The report of the Human Rights and Equal Opportunity Commission of the Commonwealth of Australia into work-life balance reviewed community needs in relation to work and existing support in law and policy for Australian carers and their families. Its examination of human rights in the federal jurisdiction approved of the human rights approach but the final report recommends both greater protection for family caregivers facing discrimination in the workplace as well as a movement away from addressing carer’s rights as a form the sex discrimination. Neither issue appears to be a problem in Canada. The concern with respect to the scope of protection is not relevant to a review of Canadian law: the problems with the Australian federal code – a limitation of protection to dismissals and to instances of direct discrimination – do not apply to Canadian laws. The concern that their current approach of legislating family responsibilities discrimination may further entrench the notion that caring is women’s work again does not apply to the Canadian context.¹⁹⁵

However, one recommendation in the area of human rights is worth mentioning. The Human Rights and Equal Opportunity Commission of the Commonwealth recommends the creation of a separate specialized law protecting for the right to flexible work arrangements: the *Family Responsibilities and Carers’ Rights Act*.¹⁹⁶

This recommendation reflects the Australian approach of fragmenting human rights into multiple particularized statutes. (The federal jurisdiction has disability, sex and race anti-discrimination legislation already.) However, it does create a potential for greater clarity if there is a will in BC to support family responsibilities through human rights law. Unfortunately, aside from the emphasis on work flexibility accommodation for carers, the

¹⁹¹ See the discussion in Juliet Bourke, “Using the Law to Support Work/Life Issues: The Australian Experience (2004) 12(1) American University Journal of Gender, Law and Social Policy 19.

¹⁹² *Ibid.*

¹⁹³ Belinda Smith & Joellen Riley, “Family-friendly Work Practices and the Law” (2004) 26 Sydney Law Review 1 at 19.

¹⁹⁴ *Mayer v. Australian Nuclear Science and Technology Organisation*, [2003] FMCA 209, at para. 70, cited in Belinda Smith & Joellen Riley, *supra* note 193 at 19.

¹⁹⁵ *It’s About Time*, *supra* note 186 at 59.

¹⁹⁶ *Ibid.*

report does not map out the language of this proposed new law or set out its content in any detail.

The separation of the human rights of caregivers may not make sense in the Canadian context, where human rights laws are more general in scope. This approach could ghettoize caregiver discrimination, separating from a strong history of support for human rights, and further rationalize the *Campbell River* approach of subjecting family status discrimination in the employment context to a different, and more stringent, test. One of the strengths of the human rights approach is the elevation of the issue of accommodating family caregivers to quasi-constitutional status. Human rights principles may also have a normative effect given their association with moral values. There is a danger that situating the rights of family caregivers in a separate law would diffuse these benefits.

The Australian and New Zealand context reveals a number of potential questions with respect to legislating human rights protection of family responsibilities:

- Should family responsibilities discrimination be characterized as a form of sex discrimination?
- Is there any reason to limit family responsibilities discrimination to direct discrimination, thereby excluding workplace flexibility opportunities?
- Should family responsibilities discrimination be addressed by adding a new protected ground to the existing enumerated grounds?
- Does the challenge of addressing family responsibilities discrimination require a separate section that delineates the characteristics of family responsibilities discrimination?
- Is it useful to include examples of discrimination to clarify unequivocally that family responsibilities discrimination is invoked by a request for workplace flexibility?
- Is the broader language of carer or caregiver more appropriate than language that involves the word “family”?
- Is there any value in inserting into the *Human Rights Code* a definition of family status that defines it to include protection for caregiving relationships?

IX. Employment Standards and the Duty to Accommodate

The United Kingdom and New Zealand protect the right to accommodation of family responsibilities under employment standards legislation. In 2003 the U.K. parliament passed the *Flexible Working (Eligibility, Complaints and Remedies) Regulation 2002*, which required employers to consider employee requests for contract variations where the employee had the responsibility for the care of a child.¹⁹⁷ In 2007 an amendment to the regulation took effect which broadened the scope of family responsibilities protected under employment legislation to include adult care as well where the adult was a relative, a spouse or living at the employee’s residence.¹⁹⁸

¹⁹⁷ *Flexible Working (Eligibility, Complaints and Remedies) Regulation 2002*, S.I. 2002/3236.

¹⁹⁸ *Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulation 2006*, S.I. 2006/3314.

Similarly, the objectives of the 2007 New Zealand *Employment Relations (Flexible Working Arrangements) Amendment Act* include the object “to provide certain employees with a statutory right to request a variation of their working arrangements if they have the care of any person.”¹⁹⁹ “Working arrangements” are defined to mean hours, days and place of work.²⁰⁰ The law is notable in that it imposes no limitations on what kind of caregiving relationship are covered by the law. In this sense both the U.K. and the New Zealand work flexibility laws address the care of both family and friends.

Both laws also set out the potential grounds for refusal based on the impact of accommodation on the employer’s business, effectively limiting and defining what amounts to undue or unjustifiable hardship. This aspect of the employer’s decision is not reviewable providing timelines for response are met. However, the grounds for rejection under the New Zealand law are very broadly defined to include:

- (a) inability to reorganize work among existing staff:
- (b) inability to recruit additional staff:
- (c) detrimental impact on quality:
- (d) detrimental impact on performance:
- (e) insufficiency of work during the periods the employee proposes to work:
- (f) planned structural changes:
- (g) burden of additional costs:
- (h) detrimental effect on ability to meet customer demand.²⁰¹

Employment legislation of flexibility has been characterized as providing slightly weaker rights than those attached to human rights protection in the sense that they provide a “right to request” rather than a “right to” flexible work arrangements.²⁰² In the human rights context there exists a right to accommodation that can be exercised through a complaint and pursued via appeal. In the employment context, if the employer considers the request then there is no forum to challenge the adequacy of consideration or the balancing of the employer and employee’s needs. In a sense employer discretion is built into the legislation.

This employment law model is precisely the approach recommended in the recent final report of the Commission on Federal Labour Standards. By far the largest chapter of the report deals with control over time for working families. The tenor of the chapter on striking a balance between the competing needs of employees and employers for both predictability and flexibility in a manner that respects both the current *Canadian Labour Code* framework and changing social and labour demographics. Recommendation 7.44 of the Report states:

Employees should be provided a right to request, in writing, that their employer decrease or increase their hours of work, give them a more flexible schedule or alter the location of their work. The employer would be required to give the employee an opportunity to discuss the issue and provide reasons in writing if the request is refused in whole or in part. There would

¹⁹⁹ *Employment Relations (Flexible Working Arrangements) Amendment Act* 2007 (N.Z.), 2007/105, s.69AA/

²⁰⁰ *Ibid.* s. 69AAA.

²⁰¹ *Ibid.* s.69AAF.

²⁰² Ariane Hegewisch & Janet C. Gornick, *Statutory Routes to Workplace Flexibility in Cross-National Perspective* (Washington D.C.: Institute for Women’s Policy Research, 2008) at 21.

be no appeal of an employer's decision on the merits, although an employee could file a complaint if the employer has failed to adhere to the procedure.²⁰³

In spite of wide discretion accorded to the employer the work flexibility amendments appear to have had some positive impact on family responsibilities accommodation. In the first year after the first U.K. amendment becoming law, out of 900,000 requests, close to 800,000 parents of preschool children successfully requested schedule modifications,²⁰⁴ suggesting significant voluntary compliance on the part of employers. This group represents close to one quarter of the group of eligible employees,²⁰⁵ but only three and a half percent of U.K. employees - arguably a manageable level of demand.²⁰⁶ On this basis many sources consider this approach to have been successful.

X. The European Union and Part-Time Employment Rights

A third approach to flexibility has been followed in Germany and the Netherlands. In these countries legislation has been passed granting workers the right to request to convert to part-time status. Coupled with the European Union Directive on discrimination against part-time employees this creates an entitlement to reduce hours without the limited benefits typically associated with part-time employment in BC.

In Germany, a law on part-time work came into force in 2001.²⁰⁷ Similarly, in the Netherlands the *Working Time Adjustment Act* came into Force in 2000, granting employees a right to request a decrease in the number of hours they were working.²⁰⁸ The law includes a right to convert to part-time status, regardless of the rationale for the request, unless there are significant business grounds to refuse the request.

The European Union *Part-Time Work Directive* grants part-time workers the right to claim equal treatment with full-time workers. In addition to generally fostering a labour climate in which requests to convert to part-time status are received favourably, the Directive requires all member states of the European Union prohibits discrimination against part-time employees:

Clause 4: Principle of non-discrimination

1. In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds.

²⁰³ Arthurs Report, *supra* note 29.

²⁰⁴ Ariane Hegewisch, "Individual Working Time Rights in Germany and the UK: How a Little Law Can Go a Long Way" in *Working Time for Working Families: Europe and the United States* (Washington D.C: Friedrich Ebert Stiftung, 2005) 103 at 104 & 109 [*Working Time*].

²⁰⁵ *Ibid.* at 109.

²⁰⁶ Ariane Hegewisch, "Employers and European Flexible Working Rights: When the Floodgates Were Opened", Issue Brief (San Francisco: WorkLife Law, 2005) at 1.

²⁰⁷ The German Act on Part-time work and Fixed Term Contracts (*Teilzeit und Befristungsgesetz*): BGBl 2000 I, 1966, cited in Suzanne Burri, "Working Time Adjustment Policies in the Netherlands" in *Working Time*, *supra* note 204, 55 at 56. See also Doris Barnett, "Legislative Innovation and the Family Responsive Workplace in Germany: What is Being Done and Why", in *Working Time*, 11 at 13.

²⁰⁸ *Wet verbod van onderscheid naar arbeidsduur*, Stb. 1996, 391, cited in Burri, *ibid.* Also translated as the *Adjustment of Hours Law*.

2. Where appropriate, the principle of *pro rata temporis* shall apply.²⁰⁹

Effectively, the Directive prohibits direct discrimination and provides for a legal right to claim comparable benefits.²¹⁰ This agreement was concluded in 1997 and extended to the UK and Ireland the following year.²¹¹

These part-time laws are both broader and more narrow than the UK and New Zealand work flexibility approach discussed earlier in this chapter: in Germany and the Netherlands the right to modify work hours is more widely available in that it is not limited to workers who request the change of hours in order to address family responsibilities; however, work hours legislation provides a more limited solution to work and family balance in that it focuses strictly on the number of hours of work, whereas the UK and New Zealand approach encapsulates flexibility options more generally (location, start and finish times, teleworking).

XI. Conclusion: Employment Standards vs. Human Rights

The above discussion raises the question of, assuming an impetus toward law reform to increase employer accommodation of family caregiving responsibilities, whether the appropriate forum for reform is employment law or human rights.

There are significant drawbacks associated with using human rights to address the accommodation of family caregiving obligations. While one of the express legislative purposes of human rights legislation is to prevent discrimination, it is in actual application reactive as it operates on a complaint-driven system. The forum is somewhat akin to a private civil remedy, and thus poses significant barriers to access: the process can be time-consuming and costly; it may require a lawyer; delays and appeals can mean years before the employee has a resolution to address her circumstances, whereas family caregiving demands tend to be urgent. Human rights may be financially inaccessible to employees who do not have the support of a trade union behind them. In practice, an employee must become the “difficult employee” who complains about her treatment in order to seek accommodation.

Another problem is that the human rights approach requires a certain amount of sophistication and rights awareness not likely found in the general population. To claim discrimination an employee must identify her treatment as not only unfair but also as a form of discrimination. The presence of direct discrimination, where a person is denied a benefit or treated differently based on a characteristic, (for example, the women denied a position because she is female) may be commonly understood as discrimination; requests for work

²⁰⁹ European Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on Part-Time Work concluded by UNICE, CEEP and the ETUC, online: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0081:EN:NOT>>.

²¹⁰ Alexandra Heron, “Promoting and Protecting Reduced-Hours Work: European Union Law and Part-Time Work” in *Working Time*, *supra* note 204, 35 at 37.

²¹¹ Council Directive 98/23/EC of 7 April 1998 on the extension of Directive 97/81/EC on the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC to the United Kingdom of Great Britain and Northern Ireland, online <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998L0023:EN:NOT>.

flexibility, hinged as they are on a request for variation of a facially neutral rule that produces a disadvantage, are less easily identified by non-experts as raising human rights issues.

This last problem points to one of the strengths of the employment law approach: the notion of flexibility is built right into the purpose of the provision. BC human rights law, which is framed by broad goals, does not spell out employer or other obligations explicitly. One of the strengths of the employment standards approach, which slots family responsibilities accommodation clearly within the employment environment, is that it makes it very clear that it is an employer's responsibility to consider employee requests to adapt their work patterns. It removes the hurdle of proving discrimination in order to get a remedy. There also may be a normalizing effect of legislating work-flexibility accommodation into employment law. Accommodation becomes less a matter of creating an exception for a disadvantaged employee and more a matter of considering all requests.

As was discussed earlier in this paper, in Canada one of the problems with the human rights approach lies in the language of "family status" which, due to its definitional ambiguity, has evolved to capture very different types of problematic treatment. In its consultation on family status discrimination the Ontario Human Rights Commission confirmed that "family status" appears to be one of the least understood grounds of the Code.²¹² The current jurisprudence tells us in that, in its present incarnation, the term "family status" may not be able to respond to the work-life balance problems facing increasing numbers of employees.

The Australian approach suggests that greater clarity in legislative drafting may enhance the capacity of human rights law to respond to family responsibilities claims. The idea of adding a ground to enhance the responsiveness of human rights legislation is not novel. This approach is consistent with Canadian law reform in the area of equality rights protection. The language of Canadian human rights legislation has not remained static over the years. It has evolved to respond to the discrimination of groups of people not initially protected under enumerated grounds. In BC, the original human rights law, the *Fair Employment Practices Act, 1956*, included race, creed (religious belief) and colour as protected grounds. The *Human Rights Code* of 1973 added the grounds of marital status, sex, ancestry, place of origin, political belief, criminal conviction and age. Disability was added in 1984 and sexual orientation and family status were added in 1992. In 2008 age discrimination protection was extended to include adults over age 65. Adding a "family responsibilities" ground is consistent with the expansive Canadian approach to enumerated grounds and human rights law reform.

The Canadian system of human rights, which is governed by broad legislation that sets out protected grounds, may not lend itself to such a particularized response to family responsibilities discrimination. Aside from the *Ontarians with Disabilities Act*, broad human rights codes and judicial interpretation of these laws are the source of human rights in Canada.

There may be merit in pursuing the human rights route further. One of the strengths of the human rights approach is the elevation of the issue of accommodating family caregivers to quasi-constitutional status. Human rights principles may also have a normative effect given

²¹² Ontario Human Rights Commission, *The Cost of Caring: Report on the Consultation on Discrimination on the Basis of Family Status* (2006) at 4.

their association with moral values. The *Human Rights Code* approach would also make the right to flexibility more universally available. Whereas the Code applies to all employment relationships in BC, a significant number of workers are not covered by the *Employment Standards Act*. The Employment Standards Regulation contains a long list of excluded occupations and professions that includes architects, chartered accountants, lawyers, chiropractors, dentists, engineers, doctors, naturopaths, optometrists and veterinarians.²¹³ In BC the employment standards framework will provide protection to only a sub-class of workers. The other issue is that family responsibilities accommodation has already been to some extent framed as a human rights issue by decision-makers. Employment legislation may supplement, but cannot remove, human rights. In this respect it may be important to amend human rights legislation to clarify the family caregiving responsibilities that may trigger a human rights violation and the caregiving relationships that ought to be granted human rights protection in BC.

If the human rights approach is to be further explored in BC, this raises the question of whether it would be useful to either add a separate protected ground such as “family caregiver” or “caregiving responsibilities” to the list of enumerated grounds, or a definition of family status that includes a broad range caregiving relationships. The latter approach would reconcile human rights law with the more expansive approach to defining family relationships that has been followed in employment legislation in relation to Compassionate Care Leave.

The complete absence of clear legislative support for workplace accommodation of employee family responsibilities highlights the need for law reform in this area. The question of whether to take an employment law or human rights approach is a complex problem that raises the potential limitations of either approach. A comprehensive solution may require a twofold response.

²¹³ *Employment Standards Regulation*, B.C. Reg. 423/2008, s.31.

Ingrid is a single parent. She lives alone with her daughter, who has a disability, and their primary ongoing source of income over the years has been provincial income assistance (welfare) and tax benefits (child tax benefits). Like many parents of children with disabilities, Ingrid was terminated from employment positions many times as a result of work disruptions associated with responding to her daughter's care needs. Ingrid earns irregular income providing childcare and housework, receiving income assistance some months. Her daughter is now an adult but she continues to require ongoing support from her mother such that Ingrid cannot work traditional full-time hours. She is looking for part-time flexible work that will allow her to continue to be there for her daughter when needed and finding it challenging to locate suitable work. As a low-income caregiver, who pays very little if any income tax, many tax measures are not helpful to Ingrid.

CHAPTER 5 – Indirect Compensation of Caregivers through the Tax System

I. The Financial Consequences of Family Caregiving on the Caregiver

For the caregiver, the financial consequences of family caregiving can be significant. The majority of respondents to our caregiver survey identified a reduction in income as one of the most significant work-related consequences of caregiving. This response is consistent with studies and consultations on caregiving, all of which highlight the financial consequences of caregiving and the lack of government initiatives to address this problem as a key barrier to the quality of life of caregivers.

In addition to out-of-pocket expenses associated with care, assuming caregiving responsibilities often necessitates a reduction in hours of employment, depending on the scope of care required by the care recipient. One of the barriers to balancing family caregiving and work in a healthy manner is the loss of income that usually accompanies employment changes that support caregiving. The consequences of this are that caregivers must make a difficult choice: sustain full-time employment while fulfilling significant caregiving, often to the detriment of their own health; reject caregiving as incompatible with the other demands work, family and community collectively impose on their lives; take on caregiving at the expense of short or long-term poverty.

As discussed in earlier parts of this paper, for many caregivers there is no practical alternative to becoming a caregiver. For many people, caregiving is a labour of love, and they could not fathom leaving this work to a paid professional. However, it can also be challenging to locate appropriate care. For others, professional care is not affordable, especially in the context of smaller families, in which the responsibility for caregiving is concentrated on fewer family members, and the costs of a caregiving service cannot be shared. Others, such as parents of adult children with disabilities, are lifelong caregivers. They assume their obligations in the same manner as any parent; however, their child's needs may be greater, more complex and more sustained.

It is a question of public policy how the costs of caregiving are to be distributed amongst families, employers, caregivers, care recipients and the larger community, and an international comparison reveals very diverse responses to this problem. There exist essentially three different public policy approaches to compensation of, or income support for, caregivers: indirect compensation through tax policy; direct compensation through stipends and wages paid to the caregiver through various government programs; and pensions initiatives that recognize caregiving labour and the long term financial consequences of caregiving on pension security.²¹⁴ In Chapter 7 we discuss pension income and family caregiving. The following two chapters explore law and policy measures directed at responding to the short-term loss of income that often accompanies caregiving. Chapter 6 discusses direct subsidies for caregivers, an approach that has not been followed in BC. This chapter addresses indirect compensation of caregiving labour through taxation.

In Canada, the income tax system is increasingly the tool the government uses to address the financial circumstances of people with disabilities and their family caregivers.²¹⁵ Respondents to our caregiver survey confirmed that tax credits represent the most available form of financial assistance: over 85% indicated they had received tax credits; however, close to 65% of respondents indicated that greater access to tax credits would significantly improve their lives as caregivers. This chapter presents existing tax measures in BC and Canada that may recognize the costs of caregiving for the individual, and considers the strengths and weaknesses of both available tax incentives and the overall tax approach to compensation.

It is important to keep in mind that tax is but one available instrument through which to recognize the financial cost of caregiving on the family caregiver and deliver financial benefits to caregivers. To the extent that family caregiving implicates many areas of law, each chapter of this study provides but a very partial view of family caregiving policy in BC. This is especially true of the tax chapter of *Care/Work*. Caregiving policy with respect to

²¹⁴ A fourth approach is the direct provision of services, such as respite for the caregiver, and most provincial Ministries of Health currently administer limited respite programs through which some family caregivers may have access to substitute care in order to take a break from caregiving. See Janet Dunbrack, *Respite for Family Caregivers: An Environmental Scan of Publicly-Funded Programs in Canada* (Health Canada, 2003), online: <http://www.hc-sc.gc.ca/hcs-sss/pubs/home-domicile/2003-respite-releve/index-eng.php>. Primary caregivers of former members of the military may also be eligible for housekeeping and grounds maintenance services through the Federal Veterans Independence Program. See Veterans Affairs Canada, Veterans Independence Program, online: http://www.vac-acc.gc.ca/clients/sub.cfm?source=services/vip/vip_care_eligible.

²¹⁵ Claire F. L. Young, *Women, Tax and Social Programs: The Gendered Impact of Funding Social Programs Through the Tax System* (Ottawa: Status of Women Canada, 2000) at 57 [Young].

financial compensation of caregivers emerges out of the interplay between tax, pensions, social assistance and health policy. Any conclusions to this chapter must be provisional, subject to analysis of the interaction between tax, pensions and other potential measures for income redistribution. In Chapter 8 we summarize the collective impact of the various laws that address the circumstances of caregivers and put forward a number of options for reform that would address the financial circumstances of family caregivers.

II. An Overview of the Tax Approach

Tax measures are a form of “indirect” compensation of caregiver costs in that for the most part they provide relief by reducing the taxable income of caregivers in prescribed circumstances. However, they do not compensate caregiving labour directly. What they do is acknowledge the taxpayer’s reduced ability to pay tax that arises out of costs associated with caregiving and other activities considered of social value under tax policy. Although the ostensible purpose of income tax is to raise revenue, taxation is increasingly being used to achieve other goals including redistributing income, encouraging certain kinds of economic and social behaviour, and subsidizing social programs.²¹⁶ Caregiving policy reflects this approach.

It is widely acknowledged that income tax legislation contains two types of provisions: technical tax provisions and tax expenditures.²¹⁷ The technical tax rules set out the basic structural elements of an income tax system: each system has to define a unit, base, period, rate, and contain rules governing its administration. In evaluating the technical tax system, tax policy analysts generally turn to three criteria: equity, neutrality, and simplicity.

However, at least since the mid-1960s, tax scholars have appreciated that there are a large number of provisions in income tax legislation that have nothing to do with defining the unit, base, period, rate, or administration of income tax based upon the three traditional tax evaluative criteria. These provisions are usually referred to as “tax expenditures” since, although they are found in the tax system, they are analogous to direct government spending in terms of the impact of government revenue. As one source explains:

Each tax concession, whether in the form of a deduction or a credit or a rate reduction or an omission from income, has a cost to the government, namely, the amount of revenue foregone by the concession. Its effect on the government revenue is the same as if the tax system lacked that particular concession, and the government made a direct expenditure of the cost of the concession to those persons who would have benefitted from it. The effect of a tax concession is thus no different from that of an expenditure.²¹⁸

As a classic illustration, in the 1970s mothers received a regular cheque from the government. This spending program was usually referred to as the child allowance program. That program has since been disbanded and converted into the child tax benefit.

²¹⁶ *Ibid.* at 5.

²¹⁷ See, for example, the discussion in Law Commission of Canada, *Beyond Conjuality: Recognizing and Supporting Close Personal Relationships* (Ottawa: Law Commission of Canada, 2001) at 64 [*Beyond Conjuality*].

²¹⁸ Peter W. Hogg, Joanne E. Magee & Jinyan Li, *Principles of Canadian Income Tax Law*, 6th ed. (Toronto: Thomson Carswell, 2007) at 50.

The function of these two programs is the same – to assist parents with the costs of raising children – but the delivery mechanism has changed. The early version of the program was designed as a universal subsidy provided directly to mothers; the current version provides a tax credit to families that is clawed back as income rises.

Tax expenditures may be delivered in three ways: as tax credits, as deductions, or as exemptions. Tax credits are the primary design mechanism for delivering tax subsidies to family caregivers. This chapters explores some of the tax credits that might be understood as tax expenditures designed, at least in part, to compensate caregivers or recognize the value of their labour in some manner.

A tax credit is an amount that is subtracted from an individual’s tax payable. Tax credits come in two main forms: refundable and non-refundable. When tax credits are refundable, it means that an individual receives the value of the credit from the government whether or not she actually has taxes owing, as long as she files a tax return. This is how tax credits become a form of government subsidy. When tax credits are not refundable, an individual who does not have any or sufficient taxable income does not receive all or possibly any of the value of the credit.

III. Tax Credits Available to Family Caregivers

There are several tax credits that are relevant to the family caregiving context. The main credits stem from the Canadian *Income Tax Act*.²¹⁹ Parallel credits are available under the British Columbia *Income Tax Act*²²⁰ for several of the credits. Both the federal and the BC acts are discussed below. In later sections of this chapter tax measures existing in other provinces and countries are reviewed where they suggest alternative approaches.

A. Personal Credits

The following are personal tax credits available under the federal Act that may be relevant to taxpayers in relation to family caregiving activities.

(i) Wholly dependent person

This credit is available to a taxpayer who is not entitled to the spousal credit but who supports another person living in the taxpayer’s residence.²²¹ This credit is often called the “equivalent to spouse credit”. To be eligible, the taxpayer must meet the following criteria:

- (a) The taxpayer who is claiming the credit must maintain a self-contained domestic residence in which a dependent person resides.

²¹⁹ *Income Tax Act*, R.S.C. 1985 (5th Supp.), c.1, s. 81(1)(e), online: <<http://laws.justice.gc.ca/en/I-3.3/>> [Federal Act].

²²⁰ *Income Tax Act*, R.S.B.C. 1996, c. 215, online: <<http://www.bclaws.ca/Recon/content/site?id=freeside&xsl=/Recon/template/toc.xml/group-A/>> [BC Act].

²²¹ Federal Act, *supra* note 219 at s. 118(1)(a) and (b).

- (b) The taxpayer must not be in a marriage or common law relationship. Alternatively, if the taxpayer is married or in a common law relationship, they must neither live with, nor support, or be supported, by their partner or spouse.
- (c) The dependent person must be all of the following: related to the taxpayer; resident in Canada (unless the recipient is a child of the taxpayer); and “wholly dependent for support” on the taxpayer (or the taxpayer’s household).
- (d) The dependent person must be either: mentally or physically infirm; under 18; or the taxpayer’s parent or grandparent.

The taxpayer will only be eligible for this credit if the dependent person’s income is less than \$10,320.²²² This figure is the benchmark for 2009; as with all quoted amounts, it will change with indexing.

If a taxpayer claims this credit in respect of a person, they cannot claim the two following credits for that person.²²³ However, if the amount under either following credit would be greater on its own than the wholly dependent credit, the difference is added to the wholly dependent credit.²²⁴

Depending on the overall tax situation of the persons in question, a taxpayer may take advantage of the unused portion of this credit for which their spouse is eligible.²²⁵ In this sense the value of the credit is transferable.

(ii) In-home care of a relative [Caregiver Tax Credit]

Generally known as the Caregiver Tax Credit, this credit is available to taxpayers who have dependent relatives or parents living in the taxpayer’s residence.²²⁶ A taxpayer may claim the credit for each relative who meets the criteria and for whom the wholly dependent relative credit is not claimed. To be eligible the taxpayer must meet the following requirements:

- (a) The taxpayer who is claiming the credit must maintain a self-contained domestic residence in which the care recipient resides.
- (b) The care recipient must be either the adult child or grandchild (*i.e.* over the age of 18) of the caregiver, or the parent, grandparent, sibling, aunt, uncle, nephew or niece of the individual or of the individual’s spouse or common law partner. If not the child or grandchild of the caregiver, the care recipient must be a resident of Canada.

²²² KMPG LLP, *Provincial and Federal (Except Québec) Personal Non-refundable Tax: Credit Rates and Amounts*, online <http://www.kpmg.ca/en/services/tax/taxratesPersonal.html> [KMPG].

²²³ Federal Act, *supra* note 219 at s. 118(4)(c).

²²⁴ *Ibid.* s. 118(1)(e).

²²⁵ *Ibid.* s. 118.8.

²²⁶ Federal Act, *supra* note 219 at s. 118(1)(c.1).

- (c) The care recipient must be dependent on the caregiver due to a mental or physical infirmity. However, if they are the parent or grandparent of the caregiver, they need only be aged 65 or older – no infirmity is required.

For 2009, \$4,198 is the maximum claimable amount,²²⁷ making the Federal credit worth \$629.70. The cared-for relative's income must be below \$13,726 for the taxpayer to claim the full credit. If the cared-for relative's income is between \$13,726 and \$17,745, the taxpayer may be eligible for a partial credit. If the cared-for relative's income exceeds \$18,534 no credit is available.²²⁸

(iii) Dependents

A taxpayer may claim this credit for each person she supports who has an infirmity.²²⁹ However, the wholly dependent credit cannot have been claimed in respect of the dependent. The specific requirements for eligibility for this credit are:

- (a) The dependent must depend on the taxpayer because of a mental or physical infirmity and be at least 18 years of age. Determining whether or not an individual is dependent on the taxpayer is a question of fact that will vary with the circumstances of each individual case.
- (b) The dependent must be related to the taxpayer. That is, the child or grandchild of the taxpayer or of the taxpayer's spouse or common-law partner; or the parent, grandparent, brother, sister, uncle, aunt, niece, or nephew of the taxpayer or the taxpayer's spouse or common-law partner.²³⁰

The maximum value of the credit is \$4,198 for 2009.²³¹ For the taxpayer to claim the full amount, the dependent's income must be below \$5,956.²³² If the dependent's income is slightly above \$5,956 the taxpayer may be eligible for a partial credit.²³³

(iv) BC Act – Personal Credits

Directly importing the relevant personal credit criteria of the federal Act, the BC Act includes tax credits that parallel those found in the federal Act. The values of the credits differ from those of the federal Act. This section lists the personal tax credits available under the BC Act. As with the federal personal credit system, personal credits are totalled and multiplied by the lowest tax rate. The BC credits are:

- (a) Equivalent to spousal credit;²³⁴

²²⁷ KMPG, *supra* note 222.

²²⁸ Canada Revenue Agency, T-1 General 2009, Federal Worksheet, online: <<http://www.cra-arc.gc.ca/E/pbg/tf/5000-d1/README.html>> [Federal Worksheet].

²²⁹ Federal Act, *supra* note 219 at s. 118(1)(d).

²³⁰ *Ibid.* s. 118(6).

²³¹ KMPG, *supra* note 222.

²³² *Ibid.*

²³³ Federal Worksheet, *supra* note 227.

²³⁴ BC Act, s. 4.3(1)(b). The taxpayer must be eligible for the Wholly Dependent Person Tax Credit under s. 118(1)(b) of the federal Act to be eligible for the BC Spousal Equivalent Credit. For 2009, this credit is worth

(b) In-home Care of Relative Credit;²³⁵ and

(c) Infirm Dependent Credit.²³⁶

B. Medical Expenses Credit

A tax credit is available for certain medical expenses of the taxpayer. A taxpayer may also be eligible for a credit for certain medical expenses of the taxpayer's dependents: the child or grandchild of the taxpayer or the taxpayer's spouse or common-law partner; or the parent, grandparent, brother, sister, uncle, aunt niece, or nephew of the taxpayer or the taxpayer's spouse or common-law partner.²³⁷ Therefore, a caregiver may be eligible for a credit due to medical expenses incurred by a relative in their care. This credit is calculated separately from other personal tax credits that may be available. The requirements for eligibility are the following:

- (a) The expense in question must be enumerated in the federal Act.²³⁸ Certain expenses related to attendant care and nursing home costs are included as medical expenses.
- (b) Medical expenses must be proven by receipts²³⁹ that are not included in determining another tax deduction for this year, not included in a tax deduction for another year, and not included by another taxpayer.²⁴⁰
- (c) The medical expense must have been actually or deemed to be paid during the relevant tax year, and cannot be reimbursable or reimbursed by another party.²⁴¹

Effectively, the credit is worth 15% of the total of the following.

The qualifying medical expenses of the taxpayer, their spouse, common-law partner and children over the lesser of \$2,011, or 3% of the taxpayer's income. Effectively, this limits the availability of the tax credit to medical costs of over \$2,011, unless the taxpayer's income is below \$64,200.00.

\$8,026. Based on the lowest provincial tax rate of 5.06%, the credit becomes worth \$406.12. See KMPG, *supra* note 222.

²³⁵ BC Act, s. 4.3(d). In terms of value, for 2009, the equation is \$13,881 minus the dependent's net income, up to a maximum of \$4,101 such that the maximum value of the credit is \$207.51. See KMPG, *ibid*.

²³⁶ BC Act, s. 4.3(e) BC Act. For 2009, the credit is worth \$4,101 and so the maximum value of the credit is \$207.51. *Ibid*.

²³⁷ Federal Act, *supra* note 219 at s. 118(6).

²³⁸ *Ibid*. s. 118.2(2). The list of qualifying expenses is meticulous and complex. For a full explanation of the list, see Interpretation Bulletin 519-R2, Paragraphs 18 – 71, online: <<http://www.cra-arc.gc.ca/E/pub/tp/it519r2-consolid/README.html>>.

²³⁹ *Ibid*. s. 118.2(1)(a).

²⁴⁰ *Ibid*. s. 118.2(1)(b) and (c).

²⁴¹ *Ibid*. at s. 118.2(3).

The qualifying medical expenses of a dependent of that taxpayer that exceed the lesser of \$2,011 and 3% of the dependent's income, up to a maximum claim of \$10,000.²⁴²

(i) BC Act – Medical Expenses Credit

If the taxpayer is eligible for a Medical Expenses credit under the federal Act, the taxpayer will be eligible for a further credit under the BC Act.²⁴³ The calculation for the BC credit is identical to the federal formula, except the indexed numbers are different. The threshold for medical costs is \$1,949 (or 3% of the taxpayer's income).²⁴⁴

C. Disability Tax Credit

A taxpayer who has a disability as defined by the Federal Act may be eligible for this tax credit. Below are the general guidelines for eligibility:

- (a) The taxpayer must have a “severe and prolonged” mental or physical disability – one that has lasted or is predicted to last over 12 months.²⁴⁵
- (b) That disability must impact the individual's ability to perform more than one “basic activity of daily living... but for therapy” that maintains a “vital function” of the individual. The therapy must total at least 14 hours a week and be performed at least three times a week. The definition of “therapy” is heavily limited.²⁴⁶
- (c) The following functions are listed as basic activities of basic living: conducting everyday mental tasks (including memory, and the cognitive set of problem-solving, goal setting and judgment); feeding or dressing oneself; communicating in a quiet setting; performing excretory functions; and walking.²⁴⁷
- (d) If the taxpayer can accomplish the above list, but with significant difficulty, then impairment in two of the above fields will constitute a disability for the purposes of claiming the disability credit.²⁴⁸
- (e) The disability must be confirmed in writing by an appropriate medical practitioner.²⁴⁹
- (f) The credit may not be claimed if the credit for an attendant or nursing home is claimed under s. 118.2 Medical Expenses credit.²⁵⁰

²⁴² KMPG, *supra* note 222.

²⁴³ BC Act, *supra* note 220 at s.4.5.

²⁴⁴ KMPG, *supra* note 222.

²⁴⁵ Federal Act, *supra* note 219 at s. 118.3(1)(a).

²⁴⁶ *Ibid.* s. 118.3(1.1).

²⁴⁷ *Ibid.* s. 118.4(1).

²⁴⁸ *Ibid.* s. 118.3(1)(a.3).

²⁴⁹ *Ibid.* s. 118.3(1)(a.2).

²⁵⁰ *Ibid.* s. 118.3(1)(c).

The credit is worth the lowest taxation rate multiplied by an indexed figure.²⁵¹ For 2009, that is 15% x \$7,196, for an actual credit of \$1,079.40.²⁵²

The disability tax credit can be transferred to a support person.²⁵³ The support person must either have claimed a personal tax credit under s. 118(b) or (d), or have been able to claim a personal credit if the support person was not married to the taxpayer. The transferrable portion is the amount by which the tax credit available exceeds the disabled person's income.²⁵⁴

If more than one person is entitled to a transfer of the credit (*i.e.* if the disabled person is dependent on two or more persons), the total claimed cannot exceed the amount that the person with the disability could initially claim.²⁵⁵

IV. Criticisms of Existing Tax Credits in BC and Canada

When the Federal Government introduced the Caregiver Tax Credit it was presented as a measure that would accord value to women's unpaid labour.²⁵⁶ Although ultimately named the In-home care of a relative credit, Bill C-72 retains the title Caregiver Tax Credit in its opening summary.²⁵⁷ A number of criticisms have been levied against this tax credit and related non-refundable tax credits potentially available to caregivers. Some of these criticisms relate to the nature of all non-refundable tax credits; others pertain to the eligibility requirements for the existing tax credits.

First, one of the problems from the perspective of compensating caregivers is that the value of existing credits is so low that they operate as a poor vehicle for recognizing the often intense and time-consuming demands of caregiving. For example, although the amount of each credit is subject to change due to indexing, the Caregiver Credit is worth \$627.70 in 2009. The combined value of the federal and provincial credit is \$837.21 in 2009. In this sense the credit becomes but a "symbolic gesture" in terms of valuing unpaid caregiving labour.²⁵⁸

Second, from the perspective of equity and income redistribution, another problem with the structure of the credit is its regressive nature. The Canadian income tax system to some extent reflects a commitment to equity. However, although the current tax system is progressive in that the existence of various tax brackets means higher income earners are

²⁵¹ *Ibid.* note 219 at s. 118.3(1)(c).

²⁵² KMPG, *supra* note 222.

²⁵³ Federal Act, *supra* note 219 at s. 118.3(1)(2).

²⁵⁴ *Ibid.* s. 118(2)(c) and (d).

²⁵⁵ *Ibid.* s. 118.3(3).

²⁵⁶ Lisa Philipps, "Tax Law and Social Reproduction: The Gender of Fiscal Policy in an Age of Privatization" in *Privatization, Law, and the Challenge to Feminism*, Brenda Cossman & Judy Fudge, eds. (Toronto: University of Toronto Press, 2002) 42 at 63 [Philipps, "Tax Law"].

²⁵⁷ Bill C-72, *An Act to amend the Income Tax Act*, 1st Sess., 36th Parl., 1999, (assented to 17 June, 1999).

²⁵⁸ Paul Kershaw, "Beyond the Spousal Tax Credit: Rethinking Taxation of Dependency and Caregiving (Again!) in the Light of the Law Commission of Canada Report" (2002) 50(6) *Canadian Tax Journal* 1949 at 1959 [Kershaw].

impacted by higher rates of taxation, tax credits tend to provide greater benefit to higher income earners. For only a person with sufficient income to result in tax liability can take advantage of a non-refundable credit. In this sense, the non-refundable nature of the credit fails to recognize that caregivers are often lower income earners, producing the “anomalous result that only 1% of tax filers can use the credit, and 75% of these are male.”²⁵⁹ Thus in practice, although women are disproportionately the majority of caregivers, the Caregiver Tax Credit has been claimed primarily by men and is completely inaccessible to low income caregivers.

As a result of the above dynamic, where it is available, rather than improve the financial independence of a low income caregiver, the credit effectively reduces the tax liability of a spouse or other co-resident family member, thereby undermining independence further and reinforcing the breadwinner/caregiver dyad that underlies much public policy. In other words, the credit “relies on the traditional reasoning that the primary caregivers will be looked after privately by male breadwinners and legitimizes policy makers’ assumptions that public health care, elder care, and other services can be replaced by women’s unpaid work.”²⁶⁰ This approach also presumes that caregivers do not maintain an ongoing labour force attachment.

Third, one of the most problematic and in some ways ironic aspects of the Caregiver Tax Credit is that it is not structured to deliver the benefits to the person engaged in the caregiving labour. Rather, it is available to any taxpayer who resides with the low-income dependent person receiving care and meets other specific non-caregiving criteria. In terms of eligibility requirements, the tax credit does not require any caregiving work. The requirements are attached to the characteristics of the recipient of care; they include dependence, co-residency, infirmity, familial relationship and a reduced income. There is thus a disconnect between the ostensible purpose of the measure and its function as manifest in the eligibility criteria. The reduction in value of the Caregiver Tax Credit if the care recipient earns an income reinforces the notion that the credit is designed to recognize the financial support of care recipients rather than the provision of caregiving labour.²⁶¹ The Wholly Dependent Person Credit and the Dependent Credit are based on similar criteria; however, from a public policy perspective, the disconnection from caregiving labour is less problematic because the purpose of these credits is more clearly related to the costs of supporting financially dependent family members.

Fourth, the relationships of dependency recognized under the eligibility criteria for the Caregiver Tax Credit imports a narrow definition of family that includes only biological and conjugal relations of the caregiver and those of her spouse or common-law partner, as well as people who reside within the caregiver’s residence, excluding relationships of care between people such as friends and other connections akin to family. Permitting greater self-selection of qualifying relationships of dependency would result in more equal treatment of diverse family structures and relationships of intimacy and care. As the Law Commission of Canada concluded in its review of various legislative provisions that recognize

²⁵⁹ Richard Shillington, *Policy Options to Support Dependent Care* (Nova Scotia: Healthy Balance Research Program, 2004) at xii.

²⁶⁰ Philipps, “Tax Law”, *supra* note 256 at 65.

²⁶¹ Kershaw, *supra* note 258 at 1959.

relationships of dependency, if the purpose of the Caregiver Tax Credit is to recognize the value of unpaid caregiving labour, there is “no justification for limiting entitlement to [this] credit to persons with dependants who are relatives, or to dependants with whom a taxpayer lives.”²⁶²

A tax measure that is designed to compensate caregiving should recognize the socially useful care that individuals provide even in the absence of a familial connection. This is the approach the province of Manitoba has taken by making the credit available regardless of a family relationship. The savings to the health and welfare systems are no less real because the care recipient is not related to the caregiver by blood or conjugality.²⁶³ This also appears to be the direction employment legislation is now taking in terms of addressing caregiving responsibilities. Although early employment leave provisions similarly suffered from an overly narrow definition of family, a more expansive approach to defining family is now taken in most jurisdictions in terms of eligibility criteria for compassionate care leave. In many Canadian jurisdictions, leave is available to care for any individual a person considers to be “like a close relative.”²⁶⁴

Ultimately, although tax policy remains the primary vehicle in BC and Canada for compensation of the costs of caring for a family member with an illness or disability, no federal or BC tax measure is directly linked to caregiving labour. Financial dependency of a person with disabilities is the focus of each tax incentive and the people who benefit from existing tax credits relevant to caregiving are higher income families. In this sense tax policy does little to address the financial circumstances of family caregivers who require income support to sustain caregiving. With this in mind, the remaining sections of this chapter consider potential revisions of the tax system that would render it more responsive to the problem of compensating caregivers and valuing caregiving labour, and begins to explore the larger policy question of whether tax policy is the appropriate route for addressing the poverty of family caregivers.

V. The Refundable Caregiver Tax Credit: An Option for Reform

Literature on family caregiving almost universally advocates for converting existing tax credits into refundable tax credits in order to render them more meaningful and accessible to low-income family caregivers. Refundable tax credits are applied at the end of the calculation of taxable income. They are able to result in a payment from the government to the “taxpayer” where taxable income is very low. In this respect a refundable tax credit is arguably a kind of social assistance payment administered by the government through the income tax system. Refundable tax credits are the only tax measure that can result in a payment to individual tax filers with no tax liability.²⁶⁵ They are thus the most appropriate tax instrument for targeting people with lower incomes.

²⁶² Law Commission of Canada, *Beyond Conjugality*, *supra* note 217 at 73.

²⁶³ Kershaw, *supra* note 258 at 1961.

²⁶⁴ See the BC *Employments Standards Act*, *supra* note 74 at s.52.1(5)(b) and the Employment Insurance Regulations, *supra* note 92 at s.41.11(1).

²⁶⁵ Philipps, “Disability, Poverty, and the Income Tax: The Case for Refundable Credits” (2001) 16 *Journal of Law and Social Policy* 77 at 90 [Philipps, “Disability”].

In BC and Canada, the Caregiver Tax Credit and related credits are non-refundable. However, in two provinces the caregiver credit is now refundable. In Quebec there exist two refundable tax credits for caregivers: one credit allows tax-filers to claim up to \$1,033 for each eligible relative, and a second tax credit, worth up to \$1,560, is for respite for caregivers.²⁶⁶ The respite credit allows the tax-filer to claim up to 30% of the total expenses incurred for respite care of a person with a significant disability. These are progressive credits and their value is reduced for higher income families.

Manitoba recently introduced the refundable Primary Caregiver Tax Credit, which allows tax-filers to claim up to \$1,020 if they provide sufficiently comprehensive care.²⁶⁷ Like the Quebec credit, the full credit may be claimed in respect of more than one care recipient: Manitoba caregivers can claim the credit with respect to up to three care recipients, including the broad category of family and friends. This credit became available for this first time in respect of 2008-2009 return, and, as will be discussed in the following section of this chapter, it is notable in that eligibility criteria are expressively linked to caregiving labour.

In the United States, tax law is also a major aspect of caregiving policy; however, the approach is largely to refund elder and childcare expenses. The federal Child and Dependent Care Credit, available to employed people with dependents (defined to include children, siblings, parents and other family members) is designed to offset dependent care expenses that enable the caregiver to continue to work.²⁶⁸ A number of states offer additional benefits with a similar purpose.²⁶⁹ Like the federal Dependent Care Assistance Program, the federal Child and Dependent Care Credit is a tax incentive intended to help the taxpayer to maintain labour force attachment and earning power by assisting her to pay for dependent care provided by a third party; it is not responsive to the circumstances of the family caregiver who forgoes employment income in the interests of engaging in caregiving herself. Other US tax credits are generally not focussed on caregiving labour, nor are they refundable. The exception is the state of California, which has created a refundable tax credit for dependent care.²⁷⁰

Outside North America, refundable tax credits for caregivers are also relatively uncommon. As is the case in the US, the purpose of existing tax incentives is generally to allow caregivers to deduct a portion of caregiving related medical expenses.²⁷¹ However, this approach must be understood in the context of European and Australian caregiving policy more broadly. As will be discussed in greater detail in Chapters 6 and 7, in these countries caregiving labour is recognized more directly through direct stipends and pensions, rather than indirectly through tax expenditures.

²⁶⁶ *Taxation Act*, R.S.Q.C., c.I-13, s.1029.8.61.61.

²⁶⁷ Manitoba Finance, Primary Caregiver Tax Credit, online <http://www.gov.mb.ca/finance/tao/caregiver.html>.

²⁶⁸ *Internal Revenue Code*, 26 U.S.C. §21.

²⁶⁹ See for example, Dependent Care: Tax Assistance, Vermont at V.S.A. §5828c. This credit is technically refundable but designed to reimburse the taxpayer for child or dependent care expenses.

²⁷⁰ Cal Rev & Tax Code § 19354.

²⁷¹ For example, the Netherlands: *Act of Income Tax 2001 (Wet Inkomstenbelasting 2001)* cited in NAC Netherlands, *supra* note 114, online:

<<http://www.caregiving.org/intcaregiving/netherlands/netherlands.htm>>. This also appears to be the tax approach taken in Germany and France.

Refundability raises the issue of whether the ideal solution is to add refundability to the existing tax credits that benefit caregivers or create a distinct refundable tax credit for family caregivers.²⁷² The former approach is more straightforward, calling for less complex reform of federal and provincial income tax law;²⁷³ however, it ignores the fundamental problem that no existing federal tax credit is designed to specifically support family caregiving activity or recognize caregiving labour.

VI. Tax Incentives and Caregiving Labour

The new Manitoba Primary Caregiver Tax is both refundable and attached to the labour of a caregiver. It uses the language of caregiver rather than dependency, and defines a primary caregiver as follows:

"primary caregiver", in relation to a taxation year, means an individual who

- (a) is resident in Manitoba at the end of the taxation year;
- (b) without any remuneration other than the tax credit under this section, personally provides care or supervision to a qualified home care client;
- (c) is designated in the client's official home care plan as the client's sole primary caregiver for the purpose of the tax credit under this section; and
- (d) has acknowledged in writing to the responsible regional health authority, in a form acceptable to that authority, his or her role as the client's primary caregiver. (« soignant primaire »).²⁷⁴

The credit is available in respect of individuals requiring daily care, and the value of the credit is calculated by multiplying the base rate by the proportion of days of the year for which the caregiver provided care.²⁷⁵ Manitobans were able to claim the Primary Caregiver Tax Credit in their 2009 return if they had been providing care since October 1, 2008.

In terms of the relationship to caregiving labour, the eligibility requirements dovetail with the provincial home care program guidelines. The care recipient must be assessed at Level 2 or higher and the client must complete a form designating the family caregiver as her sole primary caregiver.²⁷⁶ Caregiving is defined rather broadly. Level 2 care and above is characterized as follows:

Levels 2, 3 and 4 mean that the person requires care and assistance on a daily basis in at least three of the following categories due to significant physical, cognitive or behavioral barriers:

- Assistance or supervision with routine activities like shopping, meal preparation, laundry, or transportation;

²⁷² Lisa Philipps raises this problem in relation to the taxation of people with disabilities, but the same dilemma exists with respect to the design of a caregiver tax credit. See Philipps, "Disability", *supra* note 265 at 105.

²⁷³ *Ibid.* at 107.

²⁷⁴ *Income Tax Act*, S.M. 1988, c. 110, s. 511(1).

²⁷⁵ *Income Tax Act*, S.M. 1988, c. 110, s. 511(2).

²⁷⁶ Manitoba Finance, *supra* note 267.

- Assistance or supervision with personal care tasks like bathing, eating, grooming and hygiene, dressing and medication;
- Arranging for supports and community access like recreational activities, support groups, counseling, or medical appointments; or
- Requiring regular and sustained advice, assistance in decision-making or emotional support.²⁷⁷

If the care recipient is not already a home care client then receipt of the tax credit requires an assessment by the regional health authority under the tax credit's *Level of Care Equivalency Guidelines*.²⁷⁸

The Manitoba approach is in stark contrast with other income tax measures that target the family members of adults with disabilities. In the rest of North America, where tax expenditures appear to form a significant component of caregiving policy, income tax incentives that could benefit caregivers use the language of “dependency” over care, and dependency is defined in monetary terms, by virtue of the low income of the care recipient or the amount of financial support the taxpayer provides to the care recipient.

If the caregiver credit is to be conceived as a measure that is attached to the labour of family caregivers, as according value to caregiving labour in more than symbolic terms, or compensating family caregivers for a loss of employment income, then the Manitoba approach is worth consideration. However, then amount of the credit must be reconsidered with this goal in mind. In Manitoba and Quebec the caregiver tax credit is worth more than in other provinces – \$1,020 and \$1,033, respectively, compared with \$209 in BC – but even these higher numbers may be low in relation to the value of the labour of family caregivers in terms of lost employment earnings, loss of freedom and compromises in their own health and the corresponding benefit to other family members, the health care system and the province.

VII. Reflections on the Income Tax Approach to Compensation

A key question is whether the tax system is the ideal instrument for addressing the compensation of caregivers. One of the reasons tax is an effective vehicle for the administration of benefits and income redistribution is that there are relatively low administration costs associated with this method of benefit delivery.²⁷⁹ This route relies on the existing personal income tax return and the government infrastructure associated with tax filing. In the digital age, application is increasingly simplified from the perspective of tax-filers, insofar as the process requires no attendance at an office. However, the strength of this method depends on the faith one has in the effectiveness of the tax system and its ability to administer caregiving specific benefits – a purpose for which the system was never intended.

²⁷⁷ Manitoba Finance, *supra* note 267. Online at <<http://www.gov.mb.ca/finance/tao/faq.html - question20>>

²⁷⁸ Manitoba Finance, Primary Caregiver Tax Credit, Level of Care Equivalency Guidelines, online <<http://www.gov.mb.ca/finance/tao/caregiver.html>>.

²⁷⁹ Philipps, “Disability”, *supra* note 265 at 92.

The tax method keeps caregiving and any income support provided by the government invisible. Although the federal government has begun to publish an accounting of the revenue forgone with respect to various tax expenditures,²⁸⁰ tax expenditures are not generally conceived as social programs. This invisibility may be a strength or a weakness of the approach. It is a strength in that it insulates the program from public criticism. As Lisa Philipps writes, “[p]olitically tax-based programs are often more viable than direct spending initiatives because they are widely, if wrongly, perceived to involve less government interference in the economy.”²⁸¹ Whereas welfare programs are characterized as government spending to address poverty, and often criticized as expensive and unsuccessful interventions utilizing public funds, tax measures are not considered public expenditures in the same manner, even though they impact significantly on government revenue.

However, the invisibility of social spending to support caregiving is also part of the longer and larger history of the invisibility of unpaid labour in Canada. Although invisibility may appear to be of strategic value in a climate of fiscal restraint and from within a culture that values independence over community and interdependency, it may be a problematic direction to recommend in terms of law reform. Indeed this invisibility is a problem this report seeks in part to address by raising the issue of supporting caregivers and recognizing the value of their labour.

A related problem is that delivering financial benefits to caregivers through income tax means that access to benefits requires a certain amount of tax literacy. Just as the tax approach obscures expenditures in relation to caregiving from public scrutiny, it also adds a layer of inaccessibility. Social assistance and health programs are the more intuitive sites of financial assistance for individuals seeking benefits for supporting people with disabilities, and thus people are more likely to seek support from those government agencies.

At the same time, addressing caregiving as part of the income tax framework has the conceptual advantage of connecting income replacement of caregivers to income. It divorces caregiver support from the welfare system, which is stigmatized in a culture that values independence, financial autonomy and paid employment.

Another problem in terms of timely financial support is that tax measures provide slightly delayed compensation for the short-term financial consequences of caregiving. Compensation is delayed because the vehicle for compensation, the personal income tax return, is generally filed annually, at which time compensation is realized. This delay undermines the system’s capacity to deliver timely assistance to very low-income earners. However, a refundable tax credit could provide more timely compensation depending on the intervals of payment. The child tax benefit could serve as a model.

In addition, the income tax approach may render benefits largely inaccessible to First Nations people living on reserves. Under the *Indian Act*,²⁸² the income that a person who

²⁸⁰ See Department of Finance, *Tax Expenditures and Evaluations 2008*, online: <<http://www.fin.gc.ca/taxexp-depfisc/2008/taxexp08-eng.asp>>

²⁸¹ *Ibid.*

²⁸² *Indian Act*, R.S.C. 1985, c. I-5, s. 87.

meets the definition of Indian under the Act earns on reserve is exempt from federal tax.²⁸³ Consequently, First Nations people in these circumstances may not have any or sufficient taxable income, and thus may not receive all or any of the value of a federal tax credit. Further, there may be no motivation to file a personal income tax return, and in this sense any tax credits may be inaccessible. Tax thus becomes a poor vehicle for assisting this community of caregivers. An argument could therefore be made that the current method of delivery of indirect financial support to caregivers discriminates against First Nations people living and working on reserve.

Insofar as it operates as a disincentive to paid employment, the concept of monetizing care labour through tax policy also presents the danger of ghettoizing caregivers into positions that are not attached to other benefits, such as employment insurance and pensions.²⁸⁴ However, this problem could be addressed through other reform measures that may be required if public policy is to become responsive to the long-term income security of family caregivers (see chapter 7). As one critic has argued with respect to women and tax credits:

A refundable tax credit to compensate unpaid social reproduction labour might enhance women's economic equality and autonomy, but only if it is designed far more carefully than existing proposals. Certainly the credit would have to be substantial, at least approaching the real value of the work being compensated, and it should be conceived as 'essential social infrastructure for the household economy, rather than as 'welfare handouts'.²⁸⁵

VIII. Conclusion

If the goal of the federal Caregiver Tax Credit is to value or recognize the unpaid labour of family caregivers, then this legislative provision completely misses its target. As eligibility is linked to co-residency, disability status and financial dependency rather than caregiving labour specifically, this measure compensates for financial dependency. Financial dependency represents at most one aspect of a caregiving relationship, and as this study and many others point out, caregivers themselves are often in a financially difficult position.²⁸⁶ As long as the credit is non-refundable, it will remain inaccessible to low-income caregivers, arguably the group most in need of support. These characteristics of the tax credit may not make public policy sense in the context of current socio-demographic trends and they highlight potential areas for law reform.

As a result of these and other problems with both the Caregiver Tax Credit and income tax measures more broadly, some sources recommend delivering financial assistance to family caregivers directly, outside the tax system.²⁸⁷ This approach is explored in the next chapter.

²⁸³ Canada Revenue Agency, Information for Status Indians, online: <<http://www.cra-arc.gc.ca/brgnls/stts-eng.html#heading1>>.

²⁸⁴ Kathleen Lahey, *Women and Employment: Removing Fiscal Barriers to Women's Labour Force Participation* (Ottawa: Status of Women Canada, 2005) at 26.

²⁸⁵ Philipps, "Tax Law", *supra* note 256 at 69.

²⁸⁶ Abord-Hugon & Romanin, *supra* note 25; Canadian Home Care Association, *supra* note 26; HRSDC, *supra* note 26; Rajnovich et al, *supra* note 26; *Creating Strategies to Support Canada's Family Caregiver: 2007 and Beyond*, a discussion paper for a consultation meeting hosted by the J.W. McConnell Family Foundation (Ottawa: J.W. McConnell Family Foundation, 2007).

²⁸⁷ See *Beyond Conjugalinity*, *supra* note 217, at 72-74.

John and his partner have three adopted children. Their eldest son has been subject to many different diagnoses over the years as health professionals attempted to characterize the source of his behavioural problems and developmental delays. He is unable to read and write, and he has been expelled from many schools over the years. At the age of 20 their son has been diagnosed with schizophrenia, and he appears to be unable to take care of himself. John's partner has steady employment that involves a great deal of overnight travel, and so John is the primary caregiver for the boys. However, he must work outside the home as well in order to meet the family's financial needs. The couple is concerned about leaving their son either home alone, or with the younger children. John would like to take four to six months leave from work to help his son to develop a routine to manage his illness. John is a non-unionized employee. He does not appear to be eligible for Compassionate Care Leave or benefits. His employer has denied his request for an unpaid leave, and John is afraid of losing his job.

CHAPTER 6 – Direct Payments to Caregivers

I. Income Support for Family Caregivers

In this brief chapter we summarize international innovations in caregiver compensation. A number of countries compensate family caregivers directly for their labour. This is an approach that has never been explored in British Columbia and has been investigated extremely rarely in other parts of Canada. This chapter of *Care/Work* briefly outlines various legislative regimes in other countries that provide caregivers with a right to direct financial compensation. The purpose of this chapter is to present alternatives to the existing Canadian approach of responding to the dependency of adult family members through income tax policy that was reviewed in Chapter 5.

In some Canadian jurisdictions, family care recipients may be able to access financial benefits to pay for caregiving through the provincial Ministry of Health and transfer these funds to family caregivers. In this chapter Ministry of Health policies permitting payments to care-recipients will be reviewed briefly, largely to illustrate that they are ineffective vehicles for caregiver support, and again to place caregiver compensation within the larger framework of public policy in the area of family caregiving.

Each province and territory administers a general social assistance program through which unemployed low-income family caregivers, like all provincial residents meeting income assistance eligibility requirements, would have access to minimal welfare benefits. As a social

welfare state, Canada also requires the provinces and territories to maintain an income assistance benefits program.²⁸⁸ This is the closest thing to direct payments to caregivers that exists in Canada. However, this chapter will not evaluate the BC welfare system as a current source of support for caregivers: the efficacy of this infrastructure is an enormous project beyond the limited scope of this study.

We do note, however, that the social assistance regime replicates the lack of value attached to unpaid caregiving embedded within most legislative regimes in BC, for social assistance recipients must have a recent employment history and be actively in pursuit of “work” in order to be eligible for income assistance.²⁸⁹ Adult family caregiving is not considered work. We mention the welfare system strictly to dispel the impression that the absence of a caregiver support program leaves caregivers without any alternatives to zero income, and also to situate caregiver compensation within broader social policy in Canada. Social assistance payments to which caregivers have access in Europe and Australia are mentioned in this chapter only where they target caregivers specifically.

Direct compensation programs must be understood in the context of caregiver social policy more broadly. To this end Appendix C of to this paper provides country profiles for each of the countries mentioned in this chapter.

II. British Columbia Programs for Self-managed Care

British Columbia does not have a program designed to deliver payments to family caregivers in recognition of their labour. What exists in BC, like most Canadian provinces, is a self-managed care program according to which eligible individuals can receive funds directly from the Ministry of Health in order to purchase their own home support services.²⁹⁰ This is as an alternative to an agency or health care professional conducting an assessment to determine what care needs are required and funding service agencies to deliver this care.²⁹¹ Under the terms of these programs funds are provided to a care recipient, characterized as a consumer, and in some jurisdictions the funds may be used to pay for the services of a family caregiver.

The BC self-managed care program is called Choice in Supports for Independent Living (CSIL).²⁹² Under this program, which has been in existence for more than twenty years,²⁹³

²⁸⁸ The Canada Health and Social Transfer is a block of funding the federal government provides to the provinces to subsidize spending in the areas of health care, post-secondary education, early childhood development, social assistance and social services. Discretion in spending has resulted in differing access to services between provinces. See Department of Finance, Canada Health and Social Transfer, online: <http://www.fin.gc.ca/transfers/transfers_chst-eng.asp>.

²⁸⁹ *Employment and Income Assistance Act*, R.S.B.C. 2002, c.40, s.8 -10, s.13. Some individuals are excluded from the requirements in relation to recent employment history and the ongoing requirement to be seeking work under the regulation: Employment and Income Assistance Regulation, B.C. Reg 263/2002.

²⁹⁰ Karen Spalding, Jillian R. Watkins & A. Paul Williams, *Self-Managed Care Programs in Canada: A Report to Health Canada*, Report to the Home and Continuing Care Unit of the Health Care Policy Directorate (Ottawa: Health Canada, 2006) at 4 and 5 [Spalding, Watkins & Williams].

²⁹¹ *Ibid.* at 9.

²⁹² Ministry of Health, “Community Care Services”, online: <<http://www.health.gov.bc.ca/hcc/csil.html>>.

²⁹³ Spalding, Watkins & Williams, *supra* note 290 at 14.

consumers essentially become an employer of a caregiver, and assume responsibility for hiring, training and administering payroll.²⁹⁴ The CSIL program is administered by regional health authorities, and each authority determines the amount of funds available to a consumer to pay for care. A second option in BC is for a person requiring care to assemble a group of at least five individuals to form a non-profit society called a Microboard and access funding through the Ministry of Health and other branches of government.²⁹⁵ Receiving funds through a Microboard thus requires the group to assume all the legal responsibilities associated with running a non-profit society.

A report completed for Health Canada in 2006 indicated that few self managed care programs permit consumers to use funds to compensate family caregivers for their labour, concluding that only Vela Microboards allow general freedom, by virtue of allowing the society's board to choose the care provider, and identifying only three provincial programs that allow payments to family caregivers in exceptional circumstances: BC, Manitoba and Nova Scotia.²⁹⁶

Current BC Ministry of Health policy with respect to payments to family caregivers is that “[a] family member, except an immediate family member, may be paid to provide care for a CSIL or family care home client.”²⁹⁷ The immediate family member restriction is defined to exclude parents, children and spouses from receiving government funds. This policy took effect in 2007 subsequent to a review of the CSIL program that took place after the greater restriction on hiring family members was found to be discriminatory by the BC Human Rights Tribunal.²⁹⁸ According to the policy, an exception may be made to hire a family member in the following limited circumstances:

1. the client or client support group wishes to pay an immediate family member to provide assessed services that the health authority would otherwise provide either through CSIL or a family care home.
2. the health authority has determined there is no appropriate and available caregiver to provide for any extraordinary or unique needs of the client for one or more of the following reasons:
 - nature and degree of care required.
 - rural or remote location.
 - cultural barriers.
 - communication barriers.
3. the family circumstances of the client have been considered.
4. the client's care plan includes appropriate respite for the immediate family member.²⁹⁹

At the time of writing, the government of Nova Scotia has announced the creation of the only existing direct allowance for family caregivers in Canada. The Allowance to Aid Caregivers is a \$400 monthly benefit for eligible caregivers who perform 20 hours or more

²⁹⁴ Ministry of Health, *supra* note 292.

²⁹⁵ Spalding, Watkins & Williams, *supra* note 290 at 15.

²⁹⁶ *Ibid.*

²⁹⁷ Ministry of Health, *Home and Community Care Policy Manual*, Chapter 8, Section H [*Home and Community Care Policy Manual*].

²⁹⁸ *Hutchinson v. British Columbia (Ministry of Health)*, 2004 [B.C.H.R.T] No. 55, upheld by the Supreme Court of BC.

²⁹⁹ *Home and Community Care Policy Manual*, *supra* note 297.

of care per week.³⁰⁰ This is an income-tested benefit that will only be available to caregivers earning less than \$18,785 and the benefit is a form of taxable income.³⁰¹

III. International Innovations in Direct Compensation of Family Caregivers

Direct compensation programs are a common aspect of caregiving policy in a number of countries we reviewed. Australia, the United Kingdom, France, Germany, the Netherlands, Sweden and Norway all maintain some kind of program that can be accessed by family caregivers. The programs vary significantly in terms of the monetary value of the payment, the eligibility requirement for benefits, and the framework within which they are situated. Some programs are framed as social assistance and income security measures; others are aspects of health and home care policy – the latter is usually the case with payments to care recipients for caregiving services which may be used to fund informal family care or professional assistance.

A. Care Allowances

Direct financial support has been a component of the U.K. government's National Carers' Strategy, for over a decade.³⁰² The U.K. supports its family caregivers directly through its social security program and has not created a caregiver specific tax incentive. Like the Australian system discussed below, the caregiver support program and the disability assistance system are interwoven in terms of eligibility criteria. The U.K. Carer's Allowance³⁰³ is a payment to caregivers of individuals who qualify for state-funded benefits designated for people with disabilities.³⁰⁴ The caregiver must provide at least 35 hours per week of care and earn no more than £95.00 per week from paid work.³⁰⁵ In this sense the benefit targets low income caregivers who are essentially working full-time as unpaid caregivers as an alternative to paid employment. The benefit is valued at £53.10 per week;³⁰⁶ however, a low-income caregiver may be entitled to an additional Carer Premium.³⁰⁷ The

³⁰⁰ Department of Health, Government of Nova Scotia, "Caregiver Allowance", online: <http://www.gov.ns.ca/health/ccs/caregiver_allowance.asp>.

³⁰¹ *Ibid.*

³⁰² U.K. Government, Department of Health, National Carers' Strategy, *Carer's at the heart of 21st –century families and communities: 'A caring system on your side. A life of your own'* (2008), Summary, online: <http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085345> [2008 Strategy].

³⁰³ The benefit was referred to as the "Invalid Care Allowance" in the *Social Security Contributions & Benefits Act 1992* (U.K.), which created the benefit. However, the title of the benefit was changed to 'Carer's Allowance as per *Regulatory Reform (Carer's Allowance)*, S.I. 2002/1457. Office of Public Sector Information, *Regulatory Reform (Carer's Allowance)*, S.I. 2002/1457, online: <<http://www.opsi.gov.uk/si/si2002/20021457.htm>>.

³⁰⁴ *Regulatory Reform (Carer's Allowance)*, *ibid.*

³⁰⁵ *Social Security Contributions & Benefits Act 1992* (U.K.), c. 4 and *Social Security Benefits Up-rating Order 2008*, S.I. 2008/632, Sch. 1 Part III.

³⁰⁶ This is equivalent to the cost of purchasing one week of groceries in London for a family of three: Andreas Hofert, Daniel Kalt & Christian Hilberath, *Prices and Earnings: A Comparison of Purchasing Power around the Globe*, 9th ed. (Vancouver: UBS Wealth Management Research, 2009) online <<http://www.ubs.com/research>> [*Prices and Earnings*]. See Appendix D for more information on the comparative methodology used in this report.

³⁰⁷ *Social Security Contributions & Benefits Act 1992* (U.K.), c. 4, s. 124 and *Income Support (General Regulations) 1987*, S.I. 1987/1967, Sch. 2, Part III, 14ZA.

state also funds respite for the caregiver, initially through the *Community Care (Direct Payments) Act 1996*. This program has included eldercare since 2000 and the care of disabled children since 2001.³⁰⁸

Australian caregiver policy constitutes one of the most longstanding and comprehensive responses to the challenge of caregiver support. Its payment program recognizes both low-income and higher-income caregivers through separate initiatives. The Carer Pension, renamed the Carer Payment in 1997, provides a bi-weekly benefit to caregivers.³⁰⁹ As with the U.K. allowance, caregivers must be full-time caregivers prevented from engaging in full-time employment as a result of the demands of care. The Carer Payment is a means-tested benefit that targets low-income caregivers. It provides AUD \$569.80 to single caregivers³¹⁰ and AUD \$475.90 to each spouse³¹¹ of a couple engaged in constant caregiving. Caregivers performing up to 20 hours per week of care are eligible for the Carer Allowance, a bi-weekly payment of AUD \$105.10.³¹² The Carer Allowance is not a means-tested benefit. Recipients of the Carer Payment or the Carer Allowance are entitled to an annual Carer Supplement of AUD \$600; more financially needy caregivers, who are receiving both benefits, are entitled to a payment of AUD \$1,200.³¹³

Australian payments to carers, delivering approximately AUD \$1,450 in monthly support plus an annual bonus to the most financially needy caregivers, provide significant compensation to caregivers compared with most of the countries we reviewed. Assuming a family size of three, the payments would cover the costs of rent, groceries and transportation.

In contrast, in the U.S., there exist extremely modest direct payment programs in the states of Maryland and Virginia. Both grant caregivers \$500 annually.³¹⁴

³⁰⁸ *Health and Social Care Act 2001*. See U.K., Directgov, “Direct Payments for Carers”, online: <http://www.direct.gov.uk/en/CaringForSomeone/MoneyMatters/DG_10018517> and *Explanatory Notes: Health and Social Care Act 2008 (U.K.)*, c.14 at 57 & 60, online: <http://www.opsi.gov.uk/acts/acts2008/en/ukpgaen_20080014_en_1>.

³⁰⁹ *Social Security Act 1991 (Cth.)*, s. 197. See also Centrelink, *Guide to Australian Government Payments Booklet*, “Carer Payment”, online: <<http://www.centrelink.gov.au/internet/internet.nsf/publications/co029.htm>> [Carer Payment].

³¹⁰ This is equivalent to the cost of purchasing six weeks groceries in Sydney for a family of three.

³¹¹ This is equivalent to the cost of purchasing one month of groceries for a family of three plus three train tickets in Sydney (1 journey of 200 km).

³¹² *Social Security Act 1991*, No. 46, 1991 at s. 952 (Volume 2), online: <<http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/D4FCFC450AB7DB74CA25760B0001DDB9?OpenDocument>>. See Centrelink, “Carer Allowance”, online: <http://www.centrelink.gov.au/internet/internet.nsf/payments/carer_allow_adult.htm> [Carer Allowance].

This benefit’s value is equivalent to the cost of purchasing one month of groceries for a family of three in Sydney or two, three course restaurant meals.

³¹³ Centrelink, “Carer Supplement”, online: <http://www.centrelink.gov.au/internet/internet.nsf/individuals/ssp_carer.htm#>. The dollar amount is equivalent to the cost of one month’s rent for a family of three in Sydney.

³¹⁴ Md. Ann Code art. HU, §10-701 et seq.; Va. Code Ann. §63.2-2201 et seq.

B. Family Caregiver Wage

In Northern European social democracies the approach is to provide the family caregiver with a payment that more approximates the wage provided to paid caregivers; however, the eligibility criteria limit access to the benefit to a subset of caregivers. In Norway, the Care Wage is a taxable wage available to caregivers who are providing extraordinarily burdensome care to severely disabled persons.³¹⁵ The amount of the wage is based on care needs but the average pay is kr. 4600/month.³¹⁶ However, this salary would purchase one month's groceries plus seven train tickets in Oslo but is not adequate to cover the cost of rent in Norway.³¹⁷

The Swedish *Care for the Elderly* law, entitles caregivers to an allowance and social security protection comparable to what exists for care personnel in the formal caregiving sector.³¹⁸ The municipality reimburses the caregiver of an elderly dependent with a salary equal to that of municipal formal home care worker. This salary is subject to income taxes. In addition, the Attendance Allowance is an untaxed cash payment to a care recipient to compensate a family caregiver.³¹⁹ Eligibility is usually based on level of dependence/amount of caregiving (calculated care hrs/week) and payment is around kr. 5000/month (~550 Euro).³²⁰ Each municipality has authority over the Attendance Allowance and whether and how it is offered is within their discretion – there is no federal or state regulation – and availability, payments, eligibility criteria, and maximum payment vary by municipality.

Based on our research, although all the sources we reviewed described the northern European approach as providing family caregivers with a wage comparable to that of a paid formal home care worker, the actual value of the wage translated into purchasing power suggests that this approach may be problematic. Home care may be an extremely low-paying occupation, delivering a salary inadequate to cover housing costs in an urban centre. Translated into purchasing power the Australian payment system may be more generous. In any event our findings in this area are very preliminary. They caution us that the language of a wage versus a social assistance payment that appears in international caregiving literature may be misleading, and remind us that the amount of a benefit provided to caregivers must be determined taking into consideration both the goal of the benefit and the actual cost of living in the province, which varies across BC.

C. Transferable Payments to Care-Recipients

Germany and the Netherlands have put in place care recipient benefit programs that acknowledge the role of family caregiving in health policy by permitting recipients to use the

³¹⁵ Janice Keefe, *Policy Profile for Compensating Family Caregivers: Norway* (Halifax: Maritime Centre for Aging Research & Policy Analysis, 2004) [Keefe, PP Norway].

³¹⁶ *Ibid.*

³¹⁷ *Prices and Earnings, supra* note 306.

³¹⁸ *Care for the Elderly 1990*, cited in Interministry Committee on Compensation for Family Caregivers, *Public Funds, Family Commitment: A review of Government policy concerning public compensation to family caregivers in British Columbia* (2002) [ICCFC].

³¹⁹ *Care Leave Act (1989)*, cited in National Alliance For Caregiving - A National Resource on Caregiving, online: <www.caregiving.org/intcaregiving/sweden/sweden1.htm>

³²⁰ This is 75% of the cost of rent for a family of three in Stockholm or 6 weeks of groceries.

benefits to compensate family caregivers. In 1995, Germany adopted a compulsory Long Term Care Insurance (LCTI) scheme, which provides long-term care allowance benefits to persons who are “frail”, as defined in the Social Security Code “as a person who requires for a minimum period of approximately six months, permanent, frequent or help in performing a special number of ‘Activities of Daily Life’ and ‘Instrumental Activities of Daily Life’ due to physical, mental or psychological illness or disability”.³²¹ LCTI pays monthly care allowances. There are 3 levels and kinds of care (family care, professional homecare, informal care).³²² Individuals who choose informal care receive a cash allowance; otherwise the allowance is paid by the care insurer directly to the professional care provider. Caregivers can register as employees under the employment category “Informal Caregiver”. Registration through the LCTI entitles the caregiver to an allowance, respite coverage, and statutory pension contributions (see below for details). Family caregivers who have provided home care for at least one year are entitled under the LCTI to 4 weeks paid respite.³²³

The Home Care/Domiciliary Care Benefit is a monthly payment to care-receivers that may be transferred to family caregivers. The value of the benefit is:

- Level 1 - € 205 – 90 min. average care every day (1/2 must be basic care)³²⁴
- Level 2 - € 410 – 3 hrs. average care every day (2 hrs. must be basic care)
- Level 3 - € 665 – 5 hrs. average care every day (4 hrs. must be basic care)³²⁵

In the Netherlands, the *Exceptional Medical Expenses Act (AWBZ)* provides persons who are entitled to care under the Act, with the option of a personal care budget, which allows the care recipient the freedom to choose how, when and from whom they obtain care (such as an individual care provider, including a caregiver of their choice (ex. care organization, family member)).³²⁶ A professionally developed care plan is created with set hours, and the care recipient is paid based on the prescribed hours at standard nationally set rate.

In France, the *Personalized Allowance of Autonomy (Allocation personnalisée d'autonomie)* (APA) is a payment for caregivers of eligible adults over age 60.³²⁷ The *Prestation de compensation du handicap* (PCH) is a payment to care-recipients that may be used to compensate caregivers.³²⁸

³²¹ Institute for the Study of Labor, “The German Social Long-Term Care Insurance: Structure and Reform Options”, IZA DP No. 2625 (Germany: February 2007) at 2-5.

³²² Melanie Arntz, Ralf Sacchetto, Alexander Spermann, Susanne Steffes & Sarah Widmaier, *The German Social Long-Term Care Insurance: Structure and Reform Options* (March 2007) IZA Discussion Paper No. 2625, online: <<http://ssrn.com/abstract=944780>> at 6 & 9 [Arntz et al].

³²³ Netherlands Ministry of Health, Wellbeing and Sports, “Summary and Overview of Care Allowances in Seven Countries” (Survey, 1 May 2007), online: <<http://www.minvws.nl/en/reports/lz/2007/summary-and-overview-of-care-allowances-in-seven-countries.asp>>.

³²⁴ This is equivalent to the cost of three weeks of groceries in Munich.

³²⁵ Arntz et al, *supra* note 322. One month’s rent for a family of three in Munich is approximately € 880.

³²⁶ Netherlands Ministry of Health, Welfare and Sport, Host Country Report, “Long-term care in the Netherlands - The Exceptional Medical Expenses Act”, online: <<http://www.minvws.nl/en/folders/lz/2009/host-country-report.asp>>.

³²⁷ France, Code de l’action sociale et des familles, *Article L232-1, Allocation personnalisée d’autonomie*, Légifrance, online: <http://www.legifrance.gouv.fr/affichCode.do?sessionId=358FF38B378E5ECD5C6ACA4E72A7467B.tpdjo16v_1?idSectionTA=LEGISCTA000006174428&cidTexte=LEGITEXT000006074069&dateTexte=20090820>.

IV. Conclusion

The most direct method of providing financial assistance to volunteer family caregivers or recognizing the value of caregiving labour is for the state to make payments to caregivers. In Canada only the province of Nova Scotia currently follows this approach by providing eligible caregivers with a \$400 monthly benefit.

An international review reveals very divergent approaches, ranging from the US states of Maryland and Virginia, which have created a \$500 annual caregiver allowance, to Australia, which provided significant social assistance payments to caregivers, to Norway and Sweden, which provide caregivers delivering significant care with a wage equivalent to the salary of a paid caregiver, as well as pensions benefits, the latter of which is discussed in the following chapter.

Payments to caregivers may be appropriate for those family caregivers whose circumstances cannot be addressed through leave and work flexibility options discussed in, respectively, Chapters 3 and 4 of this paper. However, the notion of direct government payments to caregivers raises a number of challenging questions:

- Considering the array of approaches described in this chapter, do any approaches fit the Canadian context in terms of prevailing community values and the existing government infrastructures available benefit administration?
- What is the appropriate approach for Canada to take, e.g., a living wage versus a nominal allowance?
- What is the appropriate method of administration and delivery?
- Is it appropriate to relegate volunteer unpaid family caregivers to relying on income assistance, given the benefits families, communities and the government gain from this pool of labour?
- Is a caregiver allowance an appropriate way to supplement the income of family caregivers compelled to reduce their employment to part-time work?

These problems and other dilemmas remain, many of which present difficult questions that may require further study as they involve consideration of notions of work, volunteerism and the role of the state in supporting families.

³²⁸ France, Code de l'action sociale et des familles, *Article L245-1 (2007), Prestation de compensation*, Légifrance, online:

<http://www.legifrance.gouv.fr/affichCode.do;jsessionid=2256F8F99C821606150D1E973A7EAB48.tpdjo16_v_1?idSectionTA=LEGISCTA000006157603&cidTexte=LEGITEXT000006074069&dateTexte=20090825>.

The PCH replaced the *Compensatory Allocation for Third Person Benefits (L'Allocation Compensatrice Tierce Personne)* (ACTP) in 2006. At the time recipients of the ATCP were able to choose whether to continue with the old ATCP benefits or switch to the new PCH compensation benefits.

Farnaz and Niloo have been best friends most of their lives. In university Farnaz was in a car accident in which she suffered a spinal cord injury, as a result of which she became paralyzed from the waist down. The women were room-mates throughout university and continue to live in close proximity. It is an arrangement that makes it easier for Niloo to support her friend, which has become especially important now that the women are in their mid-forties and Farnaz is experiencing many secondary health problems associated with her spinal cord injury. Both women have attended school or worked for much of their adult lives, and Farnaz's ability to maintain employment has often been possible as a result of Niloo's willingness to reduce her own hours of work to assist her friend. As Farnaz's functional abilities have become more and more restricted, Niloo is increasingly reducing her time at work. She is realizing that her commitment to caring for her friend not only has a significant impact on her standard of living, but will also have huge implications for her retirement income, and as a single woman, she now risks poverty in her old age.

CHAPTER 7 – Pension Reform to Address the Long-Term Financial Consequences of Family Caregiving

Reduced participation in paid employment has significant consequences for the family caregiver's pension security. Lower income earnings undermine the caregiver's ability to save for retirement and reduce accumulated pension credits.

This chapter describes the existing BC pensions system, considers its impact on family caregivers, and summarizes how other countries have responded to the pension security needs of family caregivers. The focus of this chapter is the Canada Pension Plan system (CPP), because it covers the largest number of employees and is the aspect of the public pensions system that recognizes work. However, our overview includes a broader outline of the pension regime, largely to situate CPP within the broader pensions framework.

As is the case in other areas of law, our research reveals that the pension regime currently provides little or no recognition to the unpaid family caregiving of adults. The CPP regime addresses low-income earning years through various drop-out provisions, none of which target adult caregiving labour. Private pensions do not directly recognize any kind of caregiving labour. Our international review highlights three possible approaches to take in pension reform: expansion of the drop-out provision approach; government-subsidized pension credits for caregivers that treat care labour akin to paid labour; and pension income entitlements for caregivers in respect of previous or ongoing caregiving.

I. An Overview of the Pensions System in BC

Canada's retirement system is generally considered to have three-pillars: Old Age Security (OAS), the Canada Pension Plan (CPP), and Private Pensions and Savings (PPS). The federal government is responsible for the administration of OAS and CPP, while PPS plans, although regulated by provincial and federal legislation, are administered privately.

Although, for discussion purposes, tax policy and pensions benefits are addressed in separate chapters of this report, from a public expenditures perspectives there is a great deal of overlap. The OAS pension system is financed by the Government of Canada, through general tax revenues. Moreover, private pension plan savings are heavily subsidized by the income tax system, by virtue of tax incentives that allow individuals to invest earned income for retirement and delay paying income tax on this income until retirement years, when they are likely taxed at lower rates. Forgone tax revenue with respect to RRSP contributions will exceed \$12 billion in 2010.³²⁹ Further, forgone revenue with respect to employer contributions to occupational pensions plans and the exemption from taxation of investment income of pension plans will exceed \$16 billion in 2010.³³⁰ Neither CPP, nor the parallel pension plan in Quebec, is funded by the government; however, taxfilers do receive a credit with respect to CPP/QPP contributions.³³¹

A. Old Age Security (OAS)

OAS benefits are governed by the *Old Age Security Act*³³² and essentially provide a minimal monthly pension once a person has reached 65. OAS is designed to provide individuals who are not otherwise entitled to a pension with an annual income during standard retirement years. In BC it provides an income only slightly above income assistance rates.

In order to qualify for OAS a person must be:

1. Over 65 years of age and,
2. A Canadian citizen or legal resident; or
3. If no longer living in Canada, must have been a Canadian citizen on the day preceding the day he or she stopped living in Canada; and
4. Have been a resident in Canada for 10 years after reaching 18.

Although, subject to the above-noted requirements, there is universal entitlement to OAS, payments are taxable benefits. Higher-income earners essentially lose the benefit through a "clawback": individuals with a net income over \$66,335 in 2009 will find they are entitled to

³²⁹ Department of Finance, Canada, *Tax Expenditures and Evaluations*, 2008 at 19.

³³⁰ *Ibid.*

³³¹ Monica Townson, *Reducing Poverty among Older Women: The Potential of Retirement Income Policies* (Ottawa: Status of Women Canada, 2003) at 7 [Townson, *Reducing Poverty*].

³³² *Old Age Security Act* R.S., 1985, c. O-9, online: <<http://laws.justice.gc.ca/en/showtdm/cs/O-9>>.

only part of the benefit; the amount clawed back increases with income such that individuals earning over \$107, 692 in net income will not benefit from the OAS.³³³

The amount of pension that a person is entitled to is determined by how long that person has lived in Canada.

The Act was amended in 1967 to include a Guaranteed Income Supplement (GIS). This is an additional monthly sum paid on top of the OAS to residents of Canada who have little or no other income.

B. Canada Pension Plan (CPP)

The *Canada Pension Plan*³³⁴ forms the second tier of public retirement income and provides a retirement pension for those who have contributed to the plan through paid employment. In addition to a monthly pension, the plan also provides disability benefits and survivor benefits. The latter can include a lump sum death benefit, a survivor pension for a spouse or common law partner, and certain benefits for dependent children under the age of 25.

Subject to a few exceptions, every person in Canada over the age of 18 who earns a wage must pay into the CPP. The amount payable is determined by salary subject to a set minimum and maximum level (25% of the average wage), with half of the contributions being paid by the employer. In contrast with Employment Insurance, CPP is accessible to self-employed workers, who may pay both the employer and the employee contributions in order to acquire pension entitlement.

The CPP retirement pension normally begins the month after a person's 65th birthday; however, a person can apply for a reduced pension as early as age 60.

C. Private Pensions and Savings

The third tier of the Canadian pension system is private savings. Broadly speaking, there are two types of private pensions: (1) individual retirement savings plans and (2) employer-sponsored occupational pensions.

Privately funded retirement savings plans may accumulate funds as a result of the contributions by workers, employers or others. Funds are essentially invested in a financial instrument, which increases in value until retirement, at which time the funds begin to be withdrawn. Although ostensibly a privately-funded aspect of the Canadian pension regime, Registered Retirement Savings Plans (RRSPs) and employer-sponsored plans are subsidized by the government in a number of respects through the income tax system: income invested into plans is excluded from taxable income; investments increase in value without tax implications; and taxation of the income invested in RRSPs is deferred until the retirement

³³³ Monica Townson, "A Stronger Foundation: Pension Reform and Old Age Security", Policy Brief (Toronto: Canadian Centre for Policy Alternatives, 2009), online:

<<http://www.policyalternatives.ca/reports/2009/11/article2354/?pa=BB736455>>.

³³⁴ *Canada Pension Plan* S.C., 1985, c. C-8, online: <<http://laws.justice.gc.ca/en/showtdm/cs/C-8>> [CPP].

years when the worker's income is likely lower and subject to lower rates of taxation.³³⁵ The payment of income tax is both deferred and reduced.

Occupational plans, also known as employer-sponsored or workplace pensions, include both defined-contribution and defined-benefit plans. Under defined-contribution plans, the employer makes weekly or monthly contributions toward the employee's pension, and these contributions are invested on the employee's behalf.³³⁶ Some plans also permit employees to make contributions. The total proceeds – contributions and investment income – are drawn upon to provide the employee with a pension upon retirement.³³⁷ In contrast, defined-benefit plans guarantee the employee a specific amount of pension, and, for the most part, the employer must contribute any shortfall on pension funds invested.³³⁸ Like RRSPs, employer-sponsored plans are private pension sources and funds are invested to create pension savings; however, occupational plans differ in that in addition to government regulation regarding features such as the sufficiency of the employer's investment,³³⁹ occupational plans “operate through collective pooling of contributions and assets over a long period”.³⁴⁰

II. The Canada Pension Plan Drop-out Provision: A Model for Reform

A. CPP - Child Rearing Provision

As the value of the pension and other benefits paid to a CPP member is based on how long and how much they have contributed to the plan, a contributor who “drops out” of the labour force for a period of time will end up with a smaller monthly pension. Parents who leave the paid workforce for a period of time to care for one or more children might fit into this class of individuals. To reduce this disadvantage to parents of young children, s.48(2) of the CPP includes a child rearing provision (“CRP”), which allows a parent to exclude time spent out of the paid workforce caring for children (under seven years of age) from the time used to determine pension entitlement. The result is that the CPP will not count the years when a person is raising children under the age of seven when calculating the amount of benefit.

In terms of eligibility, the CRP can only be used for months when:

- A contributor or their spouse/common law partner received Family Allowance payments or were eligible for the Canada Child Tax Benefit, and

³³⁵ Freya Kodar, “Pension (In)Securities: Unpaid Work, Precarious Employment and the Canadian Pension System” (2004) 28.2 *Atlantis* (Special Issue, *Never Done: The Challenge of Unpaid Work*) 93 at 97 [Kodar].

³³⁶ Expert Committee on Pensions, *A Fine Balance: Safe Pensions, Affordable Plans, Fair Rules* (Toronto, 2008) at 16.

³³⁷ *Ibid.*

³³⁸ *Ibid.*

³³⁹ Edward Tamagno, *The Management and Regulation of Occupational Pension Plans in Canada* (Ottawa: Caledon Institute of Social Policy, 2006) at 5.

³⁴⁰ *Ibid.* at 33.

- The contributor's earnings were lower because she stopped working or worked fewer hours to be the primary caregiver of a dependant child under the age of seven who was born after December 31, 1958.³⁴¹

It is open to either spouse or common law partner to apply for the CRP, but it cannot be used by both individuals to cover the same time period.

B. CPP – Low earnings drop-out provisions

In addition to the CRP, there are several other dropout provisions within the CPP. The most relevant to family caregiving is likely the 15% dropout for low earning years, which applies to everyone who has contributed to the CPP for at least 10 years.³⁴² After the number of months in a person's contributory period is determined, 15% of the person's lowest earning years can be deducted (or "dropped out" of) from the contributory period for the purposes of the benefit calculation. The benefit received is therefore calculated on the earnings and contributions recorded in the remaining 85% of the contributory period.

Deductions allowed for low-income months after the age of 65 may also be of interest to family caregivers.³⁴³ Individuals with higher earnings after age 65 can use those earnings to replace months of low earnings earlier in their contributory period.³⁴⁴

The CPP also includes a disability drop-out provision. The months in which a person receives CPP disability benefits are excluded from his or her contributory period when benefits are calculated.

III. Problems with the Drop-out Provision Approach

One option for reform is to expand the existing Child Rearing Provision into a general caregiving provision such that years of caregiving labour could be excluded from the calculation of pension entitlement. A similar option is to create a parallel drop-out provision focussed on adult caregiving.

Currently no existing drop-out provisions explicitly recognize the impact of unpaid *adult* family care on pension income. Drop out provisions in relation to care are limited to the first seven years of caregiving in a child's life; "there are no provisions for care of older children, other family dependants, or for volunteer care work."³⁴⁵ Such caregivers may be able to make use of low-income drop-out provisions; however, these provisions were originally developed in recognition of the lower income earnings of younger adults; applying

³⁴¹ Service Canada, "Do you have children born after December 31, 1958? The CPP Child Rearing Provision", online: <<http://www.servicecanada.gc.ca/eng/isp/pub/factsheets/chidropout.shtml>>.

³⁴² CPP, *supra* note 334 at s. 48(4). See also Service Canada, *Guide to Canada Pension Plan Disability Benefits*, online: <<http://www.hrsdc.gc.ca/eng/isp/pub/cpp/disability/guide/sectionb.shtml>> [Service Canada].

³⁴³ CPP, *ibid.* at s.48 (3). Online: <<http://laws.justice.gc.ca/fr/ShowDoc/cs/C-8/bo-ga:l I:bo-ga:l II/20090825/fr?page=3&isPrinting=false#codese:48-ss: 2>>.

³⁴⁴ Service Canada, *supra* note 342.

³⁴⁵ Kodar, *supra* note 335 at 95-96.

these provisions to caregiving years effectively deprives caregivers of a benefit available to all other Canadians, replacing one inequity with another.

As a result of these deficiencies, a number of sources recommend that the CRP be expanded to include eldercare and other forms of adult caregiving or that a parallel adult care drop-out provision be created.³⁴⁶ This is a reform that will be helpful to some caregivers. It will not, however, address the pension security of all family caregivers.

While the CPP dropout provisions may provide some financial recognition of caregiving labour, they do little to assist caregivers who, as a result of caregiving duties, live on very low-incomes or become unemployed for lengthy periods of time. This is because the drop-out provision approach relies on the existence of a significant number of years of “adequate” income during which pension entitlement is accumulated. The drop-out provision approach works well for those caregivers who can concentrate their caregiving within a limited number of years and otherwise earn a decent income. This model does not work well, for example, for the caregiver who spends most of her working years engaged in part-time employment in order to balance caregiving and work. An individual who is a caregiver for most or all of her life cannot benefit from a drop-out provision, will be reliant on OAS in her old age, and will be consigned to poverty.

In May 2009, the Canadian Department of Finance released an information paper proposing changes to the CPP, including a proposed increase to the general drop-out provision from 15% to 16% in 2012 and to 17% in 2014.³⁴⁷ The intention of the proposed changes is to “increase the average retirement benefit of virtually all contributors,” but in particular, “those whose careers suffer more work interruptions. For instance...those who reduce their participation in the labour force to provide care to a family member...”³⁴⁸ Like other recent reforms examined in this paper, this change is largely of symbolic value. It does little to increase the income security of caregivers. For example, for an individual who works for 20 years and then experiences a reduced income for 25 years as a result of caregiving, adding 2% of the lowest earning years to the drop-out means less than one additional year is removed from the equation. Again, this reform would not assist the long-term unemployed caregiver at all.

IV. International Innovations in Pension Security for Family Caregivers

Given the scope and diversity of family caregiving relationships, a number of pension reforms may be required to address the long-term financial consequences of caregiving for the family caregiver. An international comparison reveals two approaches to pension

³⁴⁶ See, for example, Townson, *Reducing Poverty*, *supra* note 331 at 62; WE*ACT, *Pension Reform: Policy Reform Because Women Matter* (Vancouver, 2004); Rajnovich and Keefe, “To Pay or Not to Pay: Examining Underlying Principles in the Debate on Financial Support of Family Caregivers” (2007) *Canadian Journal on Aging* 26 [Rajnovich and Keefe]; Janet Fast, Jacque Eales and Norah Keating, *Economic Impact of Health, Income Security and Labour Policies on Informal Caregivers of Frail Seniors* (Ottawa: Status of Women Canada, 2001); Duxbury, Higgins & Shroeder, *supra* note 19.

³⁴⁷ Department of Finance Canada, *Information Paper: Proposed Changes To The Canada Pension Plan* (May 25, 2009), online: <http://www.fin.gc.ca/n08/data/09-051_1-eng.asp>.

³⁴⁸ *Ibid.*

security for family caregivers. Some countries provide “retired” caregivers with pension income during the years for which they earn an inadequate pension and are involved in caregiving. This payment operates like an income assistance supplement. In other countries the state makes pension contributions on behalf of caregivers in respect of the years during which they are part or full-time caregivers. Caregiving labour is thus treated like paid employment for the purpose of pension entitlement. In some of these countries this is part of a larger approach, discussed in the previous chapter, in which family caregivers are paid by the state. Most countries discussed in the section adopt the latter approach.

A. Carer Pensions

(i) Australia

Up until 1997, Australia provided a “Carer Pension” as an income and asset-tested income support payment (under the *Social Security Act 1991* to individuals who were unable to support themselves through paid employment due to substantial, full-time care responsibilities.³⁴⁹ As of July 1997, the Carer Pension was renamed the Carer Payment in an effort to recognize caregiving as work.³⁵⁰

The caregiver must meet the income and asset test for a retirement pension (Age Pension) and cannot be receiving another income support payment such as an Age Pension. However, the caregiver may still be entitled to additional payments if the care recipient is assessed as having a physical, intellectual or psychiatric disability under the Adult Disability Assessment Tool, is in receipt of an income support payment or a service pension, and meets income and asset tests.³⁵¹

Once a caregiver who receives the Carer Payment reaches the Age Pension eligibility age, she may choose to transfer to the Age Pension or remain on the Carer Payment, depending on which is more advantageous.³⁵² In this sense this innovation is not strictly speaking a pensions measure but actually addresses ongoing income security for young and aged caregivers. Adult family caregivers receive the same government subsidy, regardless of their age.

(ii) Norway

Former unmarried family caregivers whose ability to support themselves is impaired by long-term caregiving for parents or other close relatives are eligible for state pension benefits.³⁵³ This measure addresses the circumstances of individuals released from their caregiving responsibilities by the death or institutionalization of a care recipient.

³⁴⁹ Australian Government, Attorney-General’s Department, ComLaw, *Social Security Act 1991*, No. 46, 1991 at s. 197 (Volume 1), online: <<http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/D4FCFC450AB7DB74CA25760B0001DDB9?OpenDocument>>.

³⁵⁰ Carer Payment”, *supra* note 309.

³⁵¹ *Ibid.*

³⁵² Centrelink, “Carer Payment or Age Pension”, online: <<http://www.centrelink.gov.au/internet/internet.nsf/publications/cd002.htm>>.

³⁵³ ICCFC, *supra* note 318.

B. Pension Plan Contributions for Family Caregivers

(i) France

In France, eligible caregivers receive contributions to their old age insurance during the period of caregiving.³⁵⁴ The caregiver must live with the person for whom they are providing care and the care recipient must be assessed to have a minimum of 80% permanent disability. In addition, the caregiver's income must be below a threshold that varies based on a number of factors, such as the number of income earners and children in the household.

(ii) Germany

Germany's Long Term Care Insurance (LCTI) scheme, introduced in 1994,³⁵⁵ entitles registered caregivers to statutory pension contributions paid from the LCTI. To be eligible, the caregiver must provide a minimum of 14 hours of unpaid care in the home of the care recipient and can only be otherwise employed for less than 30 hours a week.³⁵⁶ Contribution amounts are linked to the number of hours of care provided by the caregiver and the level of dependence of the care recipient.

(iii) Norway

In Norway, caregivers earn three pension credits per year.³⁵⁷ This is comparable to the pension benefits accrued by an individual earning an average annual income. Caregivers who receive the Care Wage (a payment, based on care needs, that is available to caregivers providing extraordinarily burdensome care to severely, disabled persons) automatically receive the three annual pension credits. Other caregivers must make an annual application and provide 22 hrs/week of care for at least six months of the year.

(iv) Sweden

In Sweden, caregivers who receive either a Carer's Allowance or Care Leave, as discussed in previous chapters, are entitled to pension credits.³⁵⁸

(v) United Kingdom (U.K.)

As of 2002, low and moderate-income earners and certain caregivers and people with long-term illness or disability in the U.K. can build up additional State Pension through the State

³⁵⁴ France, Code de la sécurité sociale, *Article L351-1*, Légifrance, online:

<<http://www.legifrance.gouv.fr/affichCode.do?idArticle=LEGIARTI000006742622&idSectionTA=LEGISC TA000006156096&cidTexte=LEGITEXT000006073189&dateTexte=20090911>> [*Article L351-1*].

³⁵⁵ OECD, *supra* note 22 at 70.

³⁵⁶ See Janice Keefe, Pamela Fancey & Sheri White, *Consultation on Financial Compensation Initiatives for Family Caregivers of Dependent Adults* (Halifax: Maritime Centre for Aging Research & Policy Analysis, 2005) at 6 [Keefe, Fancey & White].

³⁵⁷ Government of Norway, "Chapter 1 Government White Paper No.5 (2006-2007)" at 19, online:

<http://www.regjeringen.no/upload/AID/temadokumenter/pensjon/2007/Chapter1_Governmental_White_Paper_No_2006-2007.pdf>.

³⁵⁸ Douglas A. Wolf & Sonali Ballal, *Family Support for Older People in an Era of Demographic Change and Policy Constraints* (2006) 26 *Aging & Society* 693 at 701.

Second Pension under the *Social Security Contributions & Benefits Act*.³⁵⁹ The State Second Pension supplements the basic State Pension. The amount received is dependent on income and the amount of National Insurance contributions that have been paid by the pension recipient. Caregivers can accrue State Second Pension if they:

- Have been a caregiver throughout the tax year
- Are not working at all or earning less than a set amount (£4,940 in 2009-2010)³⁶⁰ and they are:
 - caring for a child aged six or less, and are the person who claims and receives the Child Benefit;
 - caring for someone who is ill or disabled and receiving Home Responsibilities Protection; or
 - entitled to the Carer's Allowance, even if they are not receiving it.

As of April 2010 entitlement will be expanded to include individuals who care for children (up to the age of 12), foster carers and people who spend at least 20 hours a week caring for one or more disabled people.³⁶¹

V. Conclusion

The current Canadian pension regime does not accord value to the unpaid caregiving of family members. As a result of this, many lower income caregivers face significant consequences for their pension security when they make changes in their employment circumstances in order to balance work and care. This international review highlights three options for reform in order to render the public pensions system more responsive to the challenges facing family caregivers:

1. "Drop-out" the caregiving years – develop a family caregiving drop-out provision modelled on the Child Rearing Provision, or expand this provision to include the care of adult family members;
2. Government CPP contributions in respect of unpaid family caregiving – amend the *Canada Pension Plan Act* such that unpaid caregiving labour attracts value comparable to paid work in the form of the government making pensions contributions on behalf of caregivers;
3. Caregiver pension – create a caregiver-specific pension.

³⁵⁹ *Social Security Contributions & Benefits Act 1992 (U.K.)*, c. 4 online: <http://www.opsi.gov.uk/acts/acts1992/Ukpga_19920004_en_1>. See U.K., Directgov, "Understanding the additional State Pension", online: <http://www.direct.gov.uk/en/Pensionsandretirementplanning/StatePension/AdditionalStatePension/DG_4017827>; U.K. Department of Work and Pensions, Pension Service, "State Pensions: Your Guide", online: <<http://www.thepensionsservice.gov.uk/pdf/pm/pm2jan09.pdf>>.

³⁶⁰ This is equivalent to about 6 months rent for a family of three in London.

³⁶¹ U.K. Department for Work and Pensions, The Pension Service, *Pension Act 2007*, online: <<http://www.thepensionsservice.gov.uk/pensions-reform/act.asp#carers>>.

The diversity of caregiving relationships and employment circumstances is such that a number of reforms may be required to respond to pension security issues in a comprehensive manner.

This review considers public pensions. Occupational pensions may require additional regulation in order to address the circumstances of employees who are caregivers. As private pension plans become a more significant aspect of pension savings it will become more crucial to consider amendments to the federal Pensions Benefits Standards legislation and provincial and territorial equivalents to mirror CPP provisions that respond to the circumstances of family caregivers.

Emil and Sonja are in their late-fifties. They immigrated to Canada from Yugoslavia in the 1970s, shortly after they were married. Until recently they rented and managed a small grocery store that they had planned to run until their old age; however, changes in Sonja's health have necessitated a change of plans. Over the last year Sonja has become increasingly forgetful. She has recently been diagnosed with early onset Alzheimer's disease and is showing many signs of dementia. The couple has no children and Emil has thus become Sonja's primary caregiver. For part of this year Emil continued to work at the store on his own. Sonja's dementia has now progressed such that it is neither possible to leave her alone at home for lengthy periods of time nor bring her to the store. Emil has made inquiries regarding a long-term care facility for Sonja, but he has not been able to find suitable care for his wife, who has lost her ability to speak English and now only understands the Slavic languages of her childhood. The cost of private care may be more than Emil can afford on his current income, as he will have to hire another employee to help with the store as well. The couple is now facing a complete loss of employment income, as Emil contemplates entering early retirement in order to care for Sonja full-time. The couple is financially unprepared for these circumstances.

CHAPTER 8 – Conclusion

I. Overview

This study considers the needs of a broad community of unpaid family caregivers. It analyzes to what extent existing laws in BC assist caregivers to balance paid employment and unpaid caregiving labour. In doing so, this project investigates whether current public policy recognizes the social and economic value of family caregiving to families, communities, the health care system, employers and the economy.

Care/Work surveys approaches taken to respond to the needs of caregivers in other jurisdictions in order to shed light on options for reform in Canada. This is because the ultimate purpose of this paper is not only to provide a thorough summary of the current law, but also to lay a foundation for law reform. The underlying concern is that many changes have occurred in social and labour demographics over the last century, and that the law, which has been revised in a piecemeal fashion, has not evolved sufficiently to respond to the challenges facing family caregivers.

The bulk of this paper is comprised of chapters that consider different aspects of the legal system and assess their responsiveness to the needs of family caregivers. *Care/Work* reviews employment law, human rights, tax law, health policy on caregiver allowances, as well as the pension regime. This structure is a useful strategy in terms of narrowing down a broad subject for the purpose of analysis. However, this fragmentation obscures the reality that

caregivers experience the legal system as a network of intersecting areas of law. An accurate and comprehensive portrait of how the law impacts caregivers requires us to consider the legal framework as a whole. It is for this reason that each chapter of this paper concludes with problems to consider rather than formal recommendations. To attach specific recommendations to each chapter would in a sense mimic the problematic piecemeal approach to law reform that has been taken to date.

The other challenge we must meet in this conclusion is the impossibility of making sense of family caregiving policy in the abstract. Reflecting on the strengths and weaknesses of the legal system requires some insight into the practical reality of how balancing care and work impacts caregivers. However, a comprehensive analysis is difficult given the diversity and variety of both caregiving and employment relationships.

As we discussed in chapter 2, caregiving relationships vary greatly. Some, such as those involving a child with disabilities, may be sustained throughout the working life of a caregiver. In comparison, a caregiver assisting a friend or family member after surgery or in recovery from an illness may require accommodation for days, weeks or months. Some caregivers experience the employment consequences of caregiving on an episodic basis, as a loved one may be quite independent when a health condition is in remission. People providing care for someone with a degenerative condition may experience increasing caregiving demands until the context becomes palliative. Caregiving relationships are short and long-term, caregiving is non-linear, and caregiving needs fluctuate even within a single relationship. Caregivers also maintain different kinds of employment relationships including self-employment, unionized and non-unionized work, part-time and full-time work, casual and long-term arrangements, and precarious labour attachment characterized multiple part-time, short-term positions.

The goal of this final chapter is to provide a summary of our research and identify some options for reform that will both respond to a variety of caregiving and employment circumstances, and consider the impact of multiple areas of law. This paper provides a starting place for more detailed law reform work in each of the areas we explore: in some areas further study will be required to clarify the best method for implementing our suggestions. In some areas the next step may be to develop draft legislation. In other areas, the question of valuation of caregiving labour requires further consideration of the appropriate dollar amount to attach to tax credits and allowances accessible to, and pension contributions made on behalf of, unpaid family caregivers.

With the above commitment to holism in mind and a sense that analysis must as much as possible be embedded in the practical reality of caregiving, this conclusion frames options for reform in relation to the caregiver portraits that introduce each chapter. This final chapter integrates the portraits and the various summaries of areas of law to explore how each of these caregivers fares in terms of access to rights and benefits under the current legal system. Given the infinite specificity of caregiving relationships our eight caregivers by no means represent all caregivers or encompass all the consequences of juggling work and care; however, this approach should ground our thinking in the lived experience of caregiving and ensure a degree of comprehensiveness.

This conclusion contains an overview of existing rights under BC current legislation,

a recapitulation of the circumstances of our eight caregivers, an analysis of how these caregivers fare under the existing regime, and a discussion of options for reform that would render the system more responsive to the challenges facing family caregivers. This conclusion is both a complement to this paper and a self-contained reference tool. Though mentioned briefly in aspects of this analysis, the international research is described in greater detail in the appendices to this paper: appendix B contains a comparative table and appendix C provides more lengthy country profiles.

II. The Law of Family Caregiving

There is no single law in BC or Canada that addresses the circumstances of working caregivers. Rather, this area is primarily impacted by legal provisions found in employment and labour law, human rights, pensions, tax policy and health law. Existing legal recognition of the circumstances of family caregivers falls into roughly three categories: (a) employment leave provisions; (b) family responsibilities accommodation; and (c) measures that offset income loss.

A. Employment Leave Provisions

Under the British Columbia *Employment Standards Act*, eligible employees are entitled to five days unpaid family responsibility leave to address the care needs of children and other immediate family members (s.52), and eight weeks unpaid compassionate care leave to provide end-of-life care to family members (s.52.1), the latter of which also may also trigger entitlement to six weeks of employment insurance benefits under the federal employment insurance system. Our review of this area of law identifies BC and Canada as leaders in providing workers with income replacement for end-of-life caregiving as well as maternity and parental leave benefits, but providing little recognition of other forms of family caregiving.

B. Family Responsibilities Accommodation and Workplace Flexibility

Family responsibilities accommodation in the workplace is a somewhat uncertain area of law in Canada. Subject to the prohibition against discrimination against employees in the terms and conditions of employment contained within the BC *Human Rights Code*, there is no employee right to work flexibility in relation to family caregiving obligations. Accommodation of caregiving responsibilities is generally at the discretion of employers, unless the employee makes a successful human rights claim.

The leading BC case on when a conflict between workplace and family responsibilities will give rise to discrimination under the *Human Right Code* has established a test that is very difficult for employees to meet.³⁶² Although there exist very few cases that deal with the caregiving of adult family members – most cases pertain to childcare – recent case law indicates a pattern of controlling the floodgates and limiting human rights protection to extraordinary, not common, caregiving responsibilities. In practice, while human rights

³⁶² *H.S.A.B.C. v. Campbell River & North Island Transition Society*, 127 L.A.C. (4th) 1 (B.C.C.A.).

provides the only legal framework for accessing work flexibility and accommodation of family responsibilities, it has proven itself to be a poor vehicle for exercising these rights.

C. Measures that Offset Income Loss

Measures to offset income loss include tax incentives, as well as pensions and direct stipends or wages paid to the caregiver in recognition of caregiving labour. This is an area Canada has not explored significantly. The last ten years has witnessed a proliferation of studies on the needs of caregivers, all of which highlight the financial strain associated with caregiving and indicate a need for reform to address the short and long-term income security of caregivers; however, few programs exist in BC to support family caregivers.

(i) Income Tax Measures

The tax system currently includes a number of tax credits that are available to taxpayers who reside with family members who have a physical or mental disability and are dependent on the taxpayer for financial support. A major problem is that due to the non-refundability of existing tax measures – including the Caregiver Tax Credit – most are accessible only to higher income earners. One of the other problematic features from the perspective of caregiver policy is that eligibility is linked to financial dependency rather than caregiving labour. There is no BC or federal tax credit that compensates or recognizes caregiving labour.

(ii) Payments to Caregivers

In BC, payments to caregivers are only possible indirectly and by way of exceptions to health policy. The Choice in Supports for Independent Living program provides eligible people with disabilities with access to funds that they may spend at their discretion on their own care; however, payments to caregivers who are also family relations are permitted only in very limited circumstances. No BC program provides direct payments to family caregivers in recognition of their labour.

(iii) Pension Security

Public pension measures that take into account the impact of caregiving activity on earnings and pension security exclusively address the care of young children. The Child-Rearing Provision permits a parent to exclude years during which she was not engaged in paid employment in the determination of Canada Pension Plan entitlement. This measure allows an individual to discount her earnings during the first seven years of a child's life. There is no parallel measure with respect to other forms of caregiving. In BC there is also no caregiver-specific pension. Caregivers who reduce their earnings in order to provide caregiving possess no pension security protection.

The Current Legislative Regime At a Glance

LEGISLATION	BENEFIT	DETAILS	LIMITATIONS
<i>Employment Standards Act</i> , s.52	Family Responsibility Leave	5 days unpaid leave per year May take 1 day at a time	* Many workers are not covered by the Act * Narrow definition of family excludes some caregiving relationships
<i>Employment Standards Act</i> , s.52.1	Compassionate Care Leave	8 weeks unpaid leave per year to care for a family member with a serious medical condition if a significant risk of death within 26 weeks	* Many types of workers are not covered by the Act * Limited to end-of-life caregiving
<i>Employment Insurance Act</i>	Compassionate Care Leave Benefits	6 weeks of income replacement benefits during the 26 week window of caregiving	* Must be eligible for EI * Excludes many work arrangements (self-employed individuals) * Benefit amount is tied to employment earnings
<i>Human Rights Code</i> s. 13(1)	Protection against discrimination in a term or condition of employment based on family status	An employer's unwillingness to allow an employee to change working arrangements in order to balance work and care may amount to discrimination. If so, an employer may be required to accommodate schedule or other changes.	* Strict legal test * Must frame employer rule as discrimination * Must file a complaint (cost, time, litigation) * Currently seems to apply only to extra-ordinary or unusual caregiving obligations
Federal <i>Income Tax Act</i> , s.118(1)(c.1) & BC <i>Income Tax Act</i> , s. 4.3(d)	Caregiver Tax Credit (In-home Care of a Relative Credit)	May deduct \$627 (federal credit) plus \$209 (provincial credit) from income tax payable (amount changes over the years)	* Care recipient must reside with caregiver but in a separate suite * Excludes care of friends * Value of credit is low * Non-refundable, regressive measure * Eligibility is tied to financial dependency not caregiving labour
<i>Canada Pension Plan</i> , s.48(2)	Child Rearing Provision	May exclude time spent out of the paid workforce caring for children (under 7 years of age) from the time used to determine pension entitlement	* There is no parallel provision with respect to caregiving for adults * A drop-out provision is not helpful to caregivers whose reduced income is not temporary

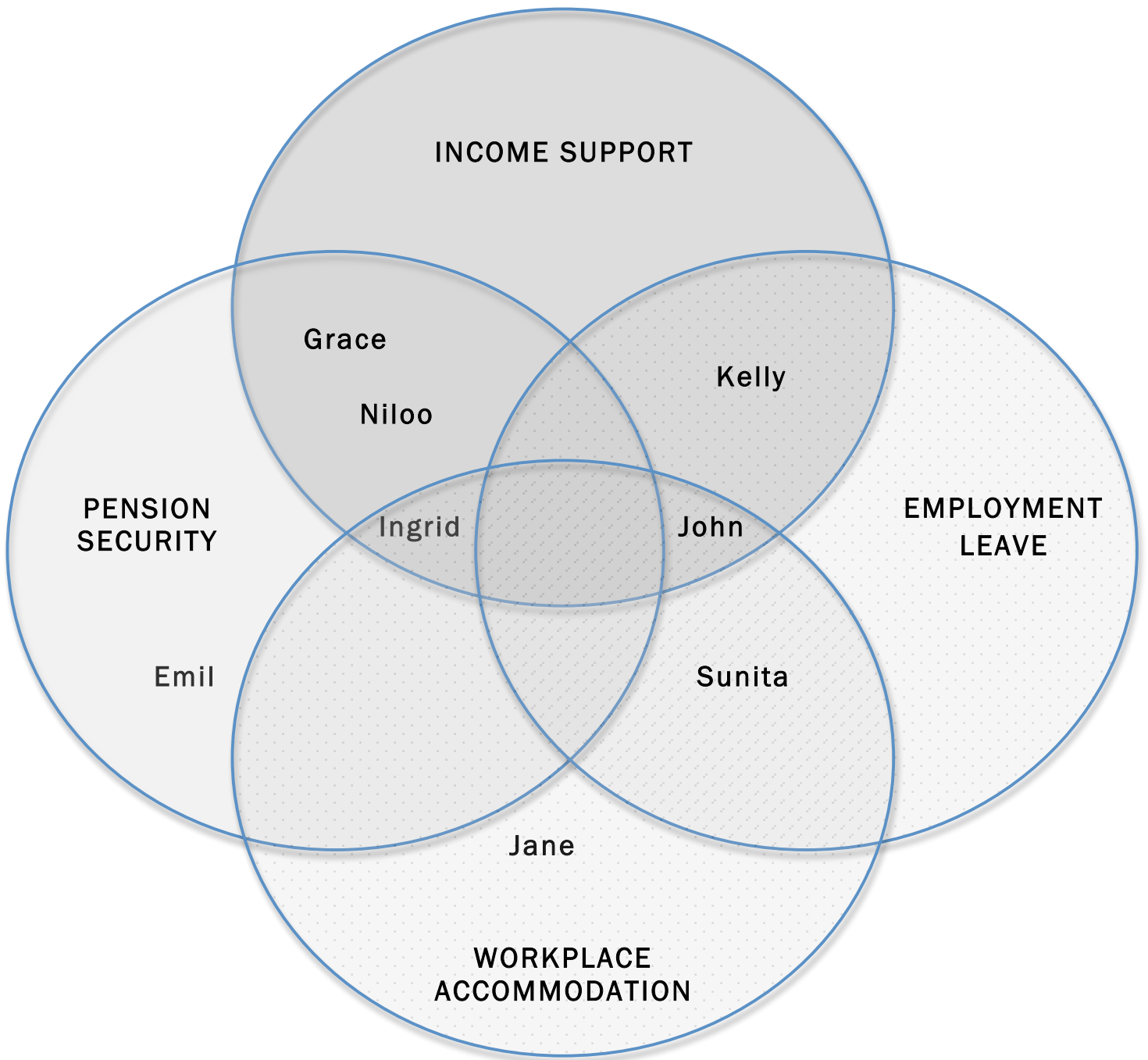
III. Recap: Summary of our “Fictitious” Caregivers

How do our eight caregivers fare under the current regime? First, to refresh your memory, the following table summarizes the varied circumstances of the caregivers introduced in this paper.

CAREGIVER	CAREGIVING RELATIONSHIP	EMPLOYMENT CIRCUMSTANCES
Grace	Divorced woman caring for both school-aged children and aging mother. Long-term caregiving required for her mother.	Works part-time due to caregiving responsibilities. Short-term work history: out of the paid work force until her divorce.
Sunita	Caring for her father-in-law following a stroke. Likely long-term care.	Unionized employee working a full-time rotation that includes nights. Requires schedule changes to maintain caregiving (e.g. no night).
Kelly	Assisted her sister until her cancer was in remission. Short-term care (8 months). Could become her sister’s caregiver again if she goes through another period of treatment	Precarious employment. She is a non-unionized teacher without employment benefits and an artist. Must negotiate her course load every school term. Income is an erratic combination of employment and grant income.
Jane	Caregiver of an aging mother with a mental illness. Care needs are fluctuating, episodic and unpredictable.	Earns significant salary as a lawyer. Work culture expects significant hours – 60 hours/week – which is incompatible with care needs when her mother is particularly ill.
Ingrid	Single, low-income parent of an adult child with a disability. Long-term caregiving needs.	Income is a mix of welfare and occasional part-time work in child care and housecleaning.
John	Primary caregiver and parent of young children and an adult child with disabilities. Long-term care needs uncertain. Short-term care needs demanding.	Family requires his income. Non-unionized employee without job security. Requires short-term leave and long-term accommodation.

Niloo	Life-long caregiver of a close friend with a physical disability. Long-term and increasing care needs.	“Chosen” low-income and reduced standard of living in order to make caregiving possible. No retirement savings.
Emil	Sole caregiver of his wife, who has a degenerative condition. Is himself close to retirement age.	Self-employed with little prospect of continuing employment due to his wife’s caregiving needs. Financially unprepared for early retirement.

As the following diagram illustrates, given the current legal framework, each caregiver presents a unique mix of unmet needs:



IV. Impact of Current Laws on our Caregivers

A. Leave

Kelly, John and Sunita would benefit from access to paid leave. However, only Kelly will have access to paid leave under the *Employment Insurance Act*, and the nature of EI is such that Kelly's employment circumstances trigger entitlement to minimal benefits.

Although the Canadian Compassionate Care leave program characterizes Canada as an international leader in palliative and end-of-life family caregiving, provincial and federal employment standards and employment insurance legislation provide no recognition of economic consequences of other ongoing and short-term caregiving on the worker. In BC, family responsibility leave, allowing workers to take up to five days off work per year, falls far short of the reality of the demands imposed by most caregiving relationships.

B. Workplace Accommodation

Jane, Sunita, John and Ingrid require accommodation of their caregiving obligations by their employer (potential employer in the case of Ingrid) in order to effectively balance work and care. Each of them foresees long-term caregiving needs on the part of the family member for whom they provide care. As a result of this challenge, Ingrid is only periodically employed. Jane, Sunita and John must negotiate alternative working arrangements and may have to find alternative employment if their employers are not supportive. No law exists to require an employer to consider flexible working arrangements. These workers would have to pursue their right to accommodation via a human rights argument, if their employers are not supportive. Given the state of the law it is not clear that any of them would be successful.

C. Income Support

The financial consequences of caregiving are significant for most of our eight caregivers. This is particularly the case for: Grace, who must support and care for school-aged children and her mother simultaneously; Ingrid, who has been unable to secure ongoing employment given her child's significant care needs and as a result has largely relied on welfare as a means of support; and Farnaz, who has chosen to reduce her hours and work in a flexible, low-paying position in order to free up her time to provide ongoing support to her friend.

Tax incentives are most accessible to our least needy caregiver, Jane, due to her elevated income, and indirectly to John, who is the lower income-earner of a spousal partnership, via his partner. Due to non-refundability, tax measures are effectively unavailable to Ingrid, whose income is so low that she does not pay taxes, and to Farnaz, who does not live with Niloo, the care recipient, and also because Niloo earns a reasonable income and is not financially dependent on Farnaz. Grace's tax payable may also be too low, and to access the credit she would be required to build a separate self-contained suite in which her mother would reside. Only Farnaz, as a non-biological family member, may have some success accessing the funds indirectly: if Niloo were able to access self-managed care funds through the Ministry of Health, Niloo may be able to use these funds to hire Farnaz as a caregiver.

However, in BC no provincial or federal program provides caregivers allowance in recognition of the social value of their unpaid labour.

D. Pension Security

Grace, Ingrid and Farnaz face the prospect of poverty in their old age. Given Ingrid's patchy work history, she will likely be completely reliant on publicly funded old age security, thereby surviving on little more than provincial welfare levels during her retirement years. Farnaz and Grace will receive very little by way of Canada Pension Plan benefits due to poor contributions caused by reductions in wage and hours of employment. The child-rearing drop out provision – the only pensions measure that addresses caregiving labour – is inadequate to address their circumstances as their caregiving encompasses more than the first seven years of a child's life. Emil will commence an unplanned early retirement at a substantially reduced standard of living due to the unexpected nature of his early retirement. There is no income-replacement program in Canada that recognizes the value of his care for his wife at a time when he had anticipated that he would be working and saving up for late life.

V. Options for Reform

Based on the above analysis, we put forward the following options for reform for consideration:

1. Employment Leave

The current compassionate care leave benefits could be expanded to include more than end-of-life and palliative care, and the duration of benefits could be lengthened such that part of the leave would trigger income replacement benefits. The following framework illustrates one approach to this problem:

- Amend the requirements for eligibility to compassionate care leave under the *Employment Standards Act* to include circumstances where a family member requires time off work to care for a family member who suffers from a serious illness or other serious health condition, regardless of the likelihood of death.
- Similarly amend the requirements for eligibility to compassionate care leave benefits under the *Employment Insurance Act*.
- Extend the duration of compassionate care leave under the *Employment Standards Act* to one year, in order to parallel the duration of leave available in the case of the birth of a child, subject to a requirement to periodically confirm the ongoing serious nature of the condition, for example, every three months.
- Extend the period of entitlement to benefits under the compassionate care leave program to up to 15 weeks under the *Employment Insurance Act*.

2. Workplace Accommodation of Family Responsibilities

Consistent with recent amendments to employment legislation in the U.K. and New Zealand, the BC *Employment Standards Act* could be amended to create a right to request variations in the location and hours of work, including changes to part-time status, where an employee requires these changes in order to manage family caregiving obligations.

We also encourage consideration of amending the *Human Rights Code* by inserting a definition of family status. This definition could characterize family status as including the care of family members including children of any age, parents, persons related by biology, adoption, marriage or common law partnership, and anyone else a claimant considers to be like a close relation. The purpose of such an amendment would be to clarify that family caregiving responsibilities discrimination may arise as a result of the impact of family responsibilities on an individual's ability to meet terms and conditions of employment, and to define caregiving to include a diversity of caregiving relationships. This amendment would also reconcile the *Human Rights Code* with the expansive definitions of family member contained in the BC *Employment Standards Act* and the federal *Employment Insurance Act*.

3. Caregiver Tax Credit

In order to create a tax credit that is accessible to low-income people and properly targets individuals who provide caregiving labour, we encourage the federal government to create a refundable tax credit that references the provision of caregiving labour as an eligibility criterion. Consideration should also be given to the value of the credit, currently very low in relation to the social and economic worth of caregiving labour, especially if this credit is to continue to be viewed as a measure, let alone the primary measure, to recognize the value of caregiving labour.

4. Direct Income Support

We encourage the provincial and federal government to explore income replacement for low-income family caregivers either through the creation of a caregiver allowance payable both into the typical years of retirement and during the years of the life course when a caregiving maintains paid employment. As is the case with the tax credit, the determination of the amount of this allowance requires further study.

5. Pension Security

In recognition of the impact of family caregiving on pension security we propose consideration of amending the *Canada Pension Plan Act* to include a drop-out provision parallel to the Child-Rearing Provision that would be applicable to all years of full-time family caregiving. In addition we encourage the federal government to commit to toping-up the contributions made on behalf of family caregivers where reduced hours of employment would otherwise result in a reduction in contributions and consequent pension entitlement. Under this latter proposal unpaid family caregivers would be treated like government employees with respect to the accumulation of public pension benefits.

6. Valorization of Caregiving Labour

A number of the reforms described above – the Caregiver Tax Credit, direct income support for caregivers, government pension contributions payable on behalf of unpaid caregivers – require further consideration of the value attached to caregiving labour. The question of what dollar amount to attach to each of these reform options is a complex question requiring further study.

VI. Final Words: Law Reform to Support Family Caregiving

The above reforms would have a significant impact on our caregivers. Employment leave would become available to Sunita and John. It would become easier for Sunita, John and Jane to access workplace accommodation of their family responsibilities. Ingrid would be in a better position to negotiate work flexibility with a new employer. Ingrid, John, Grace, Kelly and Niloo would likely have access to a tax credit. Niloo, Ingrid and Emil could apply for a caregiver allowance to supplement or replace employment income. Jane, Kelly and Sunita could make use of a drop-out provision to reduce the impact of caregiving intensive years on their public pension income. Ingrid, Niloo and Emil could supplement their otherwise very minimal retirement income with a caregiver allowance.

The burden of care is unique for each individual circumstance. What is certain is that caregivers need flexibility and support to manage their unique caregiving situations. There must be short-term, long-term and crisis-type solutions for employed caregivers in order for caregivers to balance work and care in a healthy and sustainable manner, and to mitigate against the financial consequences of caregiving for the individual and her family.

This paper works forward from the proposition that, given recent social and demographic changes, it is timely to consider law reform measures that will support family caregivers to balance work and caregiving responsibilities and provide greater recognition of the social value of unpaid family caregiving labour. The question of how the costs of our aging population should be distributed between and amongst family, community, employers and the state raises complex public policy issues based in understandings of paid and unpaid work.

Historically family responsibilities accommodation has been constructed as a private issue to be addressed by individuals within the family sphere. However, this approach may no longer be tenable, if it ever was. Combined with an increasing life expectancy and a declining birth rate, the evolution in the characteristics of Canadian families over the last century, including the division of domestic labour, and the more recent impact of technological change on health care delivery and workplace structure, may require us to consider a paradigm shift in our thinking about the value of family caregiving and the role of legislation in supporting caregiving labour.

Problem solving in relation to family caregiving requires much more than law reform: while the law and policy inform our values, they form only a piece of the social and moral infrastructure that informs practices in relation to caregiver support. Still, the growing role

and impact of family caregiving makes this a pressing area for law reform. We invite you to consider the problems and solutions discussed in this paper and use this report as a springboard for further study.

The topic of caregiver support is vast, encompassing a number of complex areas of law, and so to some degree, although this report is lengthy, it remains but an early step in the law reform process. Greater research and analysis will be required to explore how to put the content of this study's conclusions into practice. *Care/Work* should provide a foundation of research to direct this next phase in the process and indicate other areas where amendments to legislation should be developed without delay.

APPENDICES to this STUDY PAPER

Please see the enclosed CD-Rom or the BCLI website for the following appendices:

- A. Family caregiving leave legislation in Canada – comparative table
- B. International comparative table
- C. Country profiles for countries referenced in the main report
- D. Methodology for comparison of the value of payments to caregivers in different countries
- E. Summary of results of our survey of BC family caregivers
- F. English language version of the survey
- G. Annotated bibliography of select materials
- H. Paper presented on family responsibilities discrimination at the BC Human Rights CLE, Day 1, 2009
- I. Powerpoint presentation (BC human rights CLE, 2009)
- J. Paper on the Family Caregiving Legal Research Project published in *Sage Advice*, the newsletter of the National CBA Elder Law Subsection, and presented at the CBABC subsection meeting in November 2009
- K. Powerpoint presentation – overview of the Family Caregiving Legal Research Project
- L. Carework Study Paper – presentation

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