Digital Companion

Windsor Review of Legal and Social Issues
Revue des Affaires Juridiques et Sociales de Windsor

Volume 1 (2014) Article 2

TAKING (JUDICIAL) NOTICE OF WORKPLACE PRECARITY: SINGLE MOTHERS AND THE RIGHT TO CHILDCARE ACCOMMODATION

Craig Mazerolle

Citation Information

Craig Mazerolle, "Taking (Judicial) Notice of Workplace Precarity: Single Mothers and the Right to Childcare Accommodation"(2014) 1 Windsor Rev Legal Soc Issues—Digital Companion 19.

TAKING (JUDICIAL) NOTICE OF WORKPLACE PRECARITY: SINGLE MOTHERS AND THE RIGHT TO CHILDCARE ACCOMMODATION

Craig Mazerolle*

Familial relationships have been a growing topic of interest for human rights jurisprudence in the employment context. While lone-parent families are far from unique, courts and tribunals have yet to comprehensively address the interaction of family status discrimination and the childcare needs of lone-parent families. Using a feminist and historical framework, this paper analyzes the growing field of law concerning childcare accommodation and working parents. I argue that, by crafting jurisprudence within the context of two-parent households, courts and tribunals risk inadvertently silencing the unique childcare issues of lone-parent families, especially those families led by single mothers. To better address these issues, lawyers must encourage courts to issue judicial notice of the interaction between lone-parent families, gender, and precarious work.

A PERSONAL PERSPECTIVE

Maria Menendez[1] worked for many years cleaning one of Toronto's glass-covered condominium buildings. Beginning at 8:30 am and ending just before dinnertime, Maria would clean several floors and lobbies of this busy downtown building before heading off to her son's suburban daycare centre. The schedule was tight, but her employer, Clean Lines Janitorial Services, never had any issues with the quality of her work.

Maria was left in a state of shock when her supervisor took her aside one Monday morning to discuss a letter that had been sent from head office. The letter, sent by the company president, informed her of scheduling changes. For Maria, this meant that she would be taken off the day shift and moved to the night shift. There was no explanation for the scheduling change, and her supervisor could not explain why she was taken off a shift she had successfully worked for so many years. There would be no change in pay or total hours, but the new start time meant an end to her carefully crafted childcare schedule.

After receiving the letter, Maria excused herself to the staff washroom, and immediately had a panic attack. The panic attack became so intense that a fellow co-worker had to rush her to a nearby hospital. The doctors decided to keep her overnight to ensure that her condition did not worsen. She would later describe this overnight stay as one of the loneliest moments of her life.

Maria went into work the following day and informed her supervisor that she could not continue to work with Clean Lines if the president insisted she be on the night shift. The company refused to change the schedule, and Maria was subsequently fired.

When Maria first came in to see me at Parkdale Community Legal Services, we attempted to resolve the issue by filing a claim under the Ontario *Human Rights Code*[2], using the

---

* Craig is a third-year student at Osgoode Hall Law School. Next year, he will be clerking with the Divisional Court branch of the Ontario Superior Court of Justice. This paper was prepared for the Intensive Program in Poverty Law at Parkdale Community Legal Services in the Fall Semester of 2013. Craig presented this research at the 7th Annual Canadian Law Student Conference, held in Windsor, Ontario, in March 2014.

[1] Biographical details have been altered to protect the identity of the actual client. This paper is dedicated to her.

[2] RSO 1990, c H.19 [*Code*].

protected ground known as "family status". Family status is defined in the *Code* as "the status of being in a parent and child relationship".[3] Familial relationships have been a growing topic of interest for human rights jurisprudence in the employment context. However, as my case law research soon revealed, relevant jurisprudence to Maria's circumstances was unexpectedly absent from a growing collection of court and tribunal decisions.

Dramatic scheduling changes can be detrimental to any working parent. But, as a "lone-parent family",[4] Maria and her son get by with little help from an absent father; Maria's inability to negotiate alternative childcare arrangements with a spouse adds another layer of stress to an already precarious work-life balance. While the Menendez family arrangement is far from unique, courts and tribunals have yet to comprehensively address the interaction of family status discrimination and the childcare needs of lone-parent families.

The seemingly common facts of Maria's story highlight a jurisprudential silence. If judges and adjudicators are not sensitive to the needs of lone-parent families, especially those led by single mothers, workplace accommodations will be out of reach for an already marginalized group. The practice of divorce required explicit judicial intervention to give voice to the feminization of poverty and the traditional family structure. A similar pronouncement is needed to ensure that employment law's regulation of domestic affairs does not perpetuate patterns of female poverty and precarity. I argue that lawyers must push for judicial notice of the interaction between lone-parent families, gender, and precarious work arrangements.

THE *ONTARIO HUMAN RIGHTS CODE* AND CHILDCARE ACCOMMODATIONS

Considering the threshold that must be met to access childcare accommodations under the *Code*, the absence of case law relating to the childcare needs of lone-parent families is glaring. The current test requires the applicant demonstrate that they made reasonable efforts to self-accommodate a substantial childcare need, before asking the employer for help. If both self-accommodation and substantial need is proven, the applicant is able to claim workplace accommodation up to the point of undue hardship. While the test may seem comparatively innocuous, by allowing this jurisprudence to develop through the lens of two-parent families, the threshold of reasonable efforts may be too high for single parents. This standard is particularly concerning for women, who head up a disproportionate number of Canada's lone-parent households.[5]

Women, Precarity, and Lone-Parent Families

Of the twenty employment law files that I managed during my time at Parkdale Community Legal Services, twelve of the clients were women.[6] Though often spoken about in passing, these workers would occasionally reflect on their role as women in the workplace. Some would speak about the stress of raising children while unemployed. Others would discuss the explicit gendering of workplace tasks. There were also stories of husbands and boyfriends whose

[3] *Ibid*, s 10(1).
[4] Statistics Canada, *Fifty years of families in Canada: 1961 to 2011*, Catalogue No 98-312-X2011003 (Ottawa: Minister of Industry, 2012) at 2 (lone-parent families now make up 16.3% of all family units, a near doubling in size since the early 1960s).
[5] *Ibid*.
[6] The other student caseworkers in the clinic's Workers' Rights Division had similar percentages of female clients.

heavy workloads required the uncompensated labour of my female clients. Their experiences as women in the workplace were as diverse and complex as the clients themselves, but the one common theme was intense and pervasive precarity in the workplace. All of my clients worked in low wage, temporary positions that provided little to no benefits or job security. Whether it was cleaning high-rise buildings, taking care of children, or working contract to contract for a fly-by night company, these jobs provided little in the way of financial or social stability.

As a student caseworker managing files in a poverty law clinic, it is perhaps unsurprising that my files gave witness to the conflux of gender and precarious work. Yet, the women I worked with are by no means aberrations in Canadian society. In 2008, forty percent of all female workers in Canada were employed under the so-called "non-standard work arrangements" that typify precarious work.[7] Only thirty percent of working men filled similar positions.[8] This ratio is higher in Ontario, where women perform seventy-two percent of all permanent, part-time jobs.[9] The disparity is even higher for racialized women.[10]

Precarious work may manifest itself in any number of ways. The Law Commission of Ontario has developed a useful definition for precarious work:

> Precarious work is characterized by lack of continuity, low wages, lack of benefits and possibly greater risk of injury and ill health. It is often compared to "standard" employment which is long-term with one employer in a single location with good benefits during and after the working period, increasingly subject not only to minimum statutory protections but also to greater protections through collective bargaining or individual negotiation.[11]

Beyond comparatively lower levels of wages and benefits, precarious work tends to involve lower skilled sectors of the economy, such as, food service, accommodation, and personal care.[12] Such low-skill positions offer limited opportunity for job training and advancement, an arrangement that means "workers frequently become trapped in less secure, low paying positions."[13]

Women's traditional role as the family's primary caregiver has worked to reinforce the over-representation of women in low-skill, precarious work. While a breadwinning father is likely encouraged to develop valuable skills in the labour market, a mother's domestic skills are likely to fill similar domestic positions when she is required to find paid employment.[14] As

---

[7] Monica Townson, *Women's Poverty and the Recession* (Ottawa: Canadian Centre for Policy Alternatives, 2009) at 17 (the report also classifies multiple jobs as a "non-standard work arrangement").
[8] *Ibid*.
[9] Law Commission of Ontario, *Vulnerable Workers and Precarious Work*: *Final Report* (Toronto: December 2012) at 19 [LCO Final Report].
[10] Sheila Block & Grace-Edward Galabuzi, *Canada's Colour Coded Labour Market: The Gap for Racialized Workers* (Ottawa: Canadian Centre for Policy Alternatives & The Wellesley Institute, 2011) at 15; Cheryl Teelucksingh & Grace-Edward Galabuzi, *Working Precariously: The Impact of Race and Immigrants Status on Employment Opportunities and Outcomes in Canada* (Canadian Race Relations Foundation, 2005) at 4.
[11] Law Commission of Ontario, *Vulnerable Workers and Precarious Work: Background Paper* (Toronto: December 2010) at vi.
[12] *Supra* note 9 at 18.
[13] *Ibid* at 114. See also Block & Galabuzi, *supra* note 10 at 17 (This ability to make workers feel both professionally trapped and yet uncertain of what tomorrow will bring has been linked to high levels of depression and exhaustion); Wayne Lewchuk et al, "From Job Strain to Employment Strain: Health Effects of Precarious Employment" (2003) 3 Just Labour 23 at 24.
[14] *Supra* note 7 at 20; *supra* note 9 at 20. See also Jack L Knetsch, "Some Economic Implications of Matrimonial Property Rules" (1984) 34:3 UTLJ 263.

Professor Joan Sangster highlighted in her work on pregnant flight attendants and organized labour, gendered notions of women's work, based on traditional conceptions of mothers, have regulated women's employment.[15]

The negative effects of "occupation segregation"[16] and workplace precarity are only further exacerbated when one considers women in lone-parent families. Of Canada's over 1.5 million lone-parent families, women lead almost eight in ten households.[17] Even after decades of improving poverty rates, lone-parent, female-led families still rank among the poorest groups in the country.[18] In fact, these households are five times more likely to fall into poverty than families with two-parents.[19] In their report on the effects of the Great Recession on women's economic well-being, the Centre for Canadian Policy Alternatives connected high rates of single mother poverty with the high rate of precarious work. The report discusses how:

> Differences in low-income rates between female and male lone parents may be partly attributable to differences in the incidence of non-standard work arrangements and thus in earnings…Data from the 2001 Census indicate that 71.1% of lone mothers were employed, and, of these, 60.8% were working mostly full-time, while 17.1% were working mostly part-time. In contrast, 82.0% of lone-parent fathers were employed in 2001, of whom 83.6% worked mostly full-time while 5.7% worked mostly part-time.[20]

FAMILY STATUS JURISPRUDENCE AND CHILDCARE ACCOMMODATION

A lack of affordable and available childcare options is a symptom and cause of poverty in lone-parent families.[21] This tension between childcare needs and precarious work schedules has led some parents and lawyers to view the issue through the lens of employment accommodation and human rights law. Recent news articles have identified that the protected ground of family status under the *Code* is being used to argue for scheduling accommodations that consider family obligations.[22] While family status discrimination was generally used to address hiring practices

---

[15] Joan Sangster, "Debating Maternity Rights: Pacific Western Airlines and Flight Attendants' Struggle to "Fly Pregnant" in the 1970s" in Judy Fudge & Eric Tucker, eds, *Work on Trial: Canadian Labour Law Struggles* (Toronto: Irwin Law, 2010) 283 at 285-86.

[16] Townson, *supra* note 7 at 20.

[17] Statistics Canada, *Portrait of Families and Living Arrangements in Canada*, Catalogue No 98-312-X2011001 (Ottawa: Minister of Industry, 2012) at 3, 6.

[18] *Supra* note 7 at 7. Rates of poverty for lone-parent families have been improving over the past two decades, but almost 20% of all lone-parent families still live in poverty, as opposed to 5.1% of two-parent families, Citizens for Public Justice, *Poverty Trends Scorecard: Canada 2012* (Citizens for Public Justice, 2012) at 13, online: <www.cpj.ca/files/docs/poverty-trends-scorecard.pdf>.

[19] *Supra* note 7 at 6-7 (the average household income of a female-led, lone-parent family is about $7,500.00 less than Statistics Canada's Low Income Cut-Off).

[20] *Ibid* at 20.

[21] *Ibid*; Grace Park, *Gender, Poverty, and Access to Justice: An Ethnographic Approach to Defining Legal Aid Needs* (LLM Thesis, York University, Faculty of Graduate Studies, 2010) at 67 [unpublished].

[22] See e.g. Laurie Monsebraaten, "Canada Border Services Agency Discriminated Against Employee When it Refused to Accommodate Employee's Child-Care Request, Court Rules", *The Toronto Star* (4 February 2013), online: <www.thestar.com/news/canada/2013/02/04/canadian_border_services_agency_discriminated_against_employee_when_it_refused_to_accommodate_employees_childcare_request_court_rules.html>; Chris Rootham, "Treating Parents Right: Flexibility is Key in Accommodating Family Status", *Ottawa Life* (5 December 2013), online: <www.ottawalife.com/2013/12/treating-parents-right-flexibility-is-key-in-accommodating-family-status>; Emond Harden LLP, "Family Status Issues in the Workplace", *Ottawa Life* (6 December 2013), online:

that penalize workers with children, this new line of jurisprudence looks at the way scheduling policies have become a subtle and systemic barrier for workers with children.

A. Initial Split in the Jurisprudence

Recent academic interest in family status jurisprudence and childcare accommodation stems from the divergence between two of the early and foundational cases on the matter: *Health Sciences Association of British Columbia v Campbell River and North Island Transition Society*[23] and *Johnstone v Canada (Attorney General)*[24].

Campbell River is the first appellate level decision to address the issue of family status discrimination and childcare accommodation.[25] The case involved a work schedule that made it impossible for the applicant to care for her children's unique needs. The British Columbia Court of Appeal found the schedule to be a discriminatory barrier to workplace participation.[26] On behalf of the applicant, the union asked the court to follow the holdings in *Brown v Department of National Revenue (Customs and Excise)*[27] and *Woiden v Lynn*[28], two earlier human rights cases that found family status discrimination on what appeared to be similar facts.

While the applicant was successful in her appeal, the court opted for a more restricted view of family status discrimination than that proposed by the union. Writing for a unanimous Court, Justice Low found the previous rulings underdeveloped and grounded in a definition of family status that was overly broad and vague.[29] The court held a *prima facie* finding of family status discrimination could only be found when "a change in a term or condition of employment *imposed by an employer* results in a serious interference with a substantial parental or other family duty".[30] This test for family status discrimination meant that a parent would have to demonstrate a serious infringement of a unique childcare need, and show that the harm was caused by a change brought on by the employer.

Johnstone, 2007 would eventually question the need for such a restrictive framework. *Johnstone*, 2007 involved a mother who was unable to balance the needs of her children and the scheduling requirements of her employer. Here, the disruption was caused by a change within the applicant's family, instead of by an employer.[31] Rather than require the applicant show a detrimental change prompted by the employer, the Federal Court agreed with the application's argument. The court held,

---

<www.ottawalife.com/2013/12/family-status-issues-in-the-workplace>; "Employers Told They Must Accommodate Staff's Child-Care Requests", *Canadian Press* (5 February 2013), online: CBC News <www.cbc.ca/news/canada/employers-told-they-must-accommodate-staff-s-child-care-requests-1.1315953>.

[23] 2004 BCCA 260, 240 DLR (4th) 479 [*Campbell River*].

[24] 2007 FC 36; 306 FTR 271 [*Johnstone*, 2007].

[25] Recent treatments of the case seem to disregard the case's jurisdictional stature, see e.g. *Seely v Canadian National Railway*, 2013 FC 117 at paras 79-81, 426 FTR 258 [*Seely*].

[26] *Supra* note 23 at para 40 (these needs included caring for a child with Tourette's Syndrome and Attention Deficit Hyperactivity Disorder: treatment that required adherence to a very tight and stable schedule).

[27] (1993), 19 CHRR D/39, 93 CLLC para 17,013.

[28] 43 CHRR D/296, 2003 CLLC 230-005.

[29] *Supra* note 23 at para 35.

[30] *Ibid* at para 39 [emphasis added].

[31] *Supra* note 24 at para 3.

> [T]o limit family status protection to situations where the employer has changed a term or condition of employment is unduly restrictive because the operative change typically arises within the family and not in the workplace (eg. the birth of a child, a family illness, etc.). The suggestion by the Court in *Campbell River*, above, that *prima facie* discrimination will only arise where the employer changes the conditions of employment seems to me to be unworkable and, with respect, wrong in law.[32]

In addition to finding error in the employer-focused model of discrimination, the court also took issue with the "serious interference" standard endorsed in *Campbell River*:

> There is no discretion, and no degree or level of discrimination which must be suffered by a complainant to obtain the protection of the *CHRA*. Thus, the fact that the Applicant was adversely affected by the Respondent's policy is sufficient to establish a prima facie case of discrimination, and, by applying a higher standard to the ground of family status in its decision, the Commission erred in law.[33]

The difference between the standards in *Campbell River* and *Johnstone*, 2007 is stark. The narrow treatment in *Campbell River* requires a high level of interference with childcare obligations. On the other hand, *Johnstone*, 2007 suggests that any non-trivial interference between one's family life and career will amount to *prima facie* discrimination. The different standard of interference is significant when demonstrating harm to the applicant. A lower level of interference also creates a correspondingly lower threshold to meet when showing self-accommodation.

B. Testing and Finessing the Divide

The first major case to examine this jurisprudential divide was *Re Power Stream Inc and International Brotherhood of Electrical Workers (Bender et al)*.[34] The case involved a group of employees who were denied childcare accommodations after an employer-driven change in scheduling. In addressing the issue of family status, Arbitrator Jesin found that *Campbell River* was too restrictive and that *Johnstone*, 2007 did not provide a workable alternative.[35]

Arbitrator Jesin instead proposed a more contextual analysis. The analysis would determine if an applicant had made reasonable attempts at limiting adverse childcare effects from a workplace *or* family change. For instance, after disposing with the respondent's claim that one of the applicants should have relocated before claiming discrimination, Arbitrator Jesin stated that the employer would have been justified in requiring the employee demonstrate investigations into alternative childcare arrangements.[36]

This imposes a non-trivial duty to self-accommodate, a level of reasonable efforts that is closer to *Campbell River* than *Johnstone*, 2007. While the Federal Court in *Johnstone*, 2007 seemed hesitant to use the language of "choice" when determining the appropriateness of a parent's desired childcare arrangement, Arbitrator Jesin had no such qualms:

---

[32] *Ibid* at para 29.
[33] *R v Johnstone,* 2007 FC 36 (Memorandum of Johnstone at para 38) [emphasis added].
[34] (2009), 186 LAC (4th) 180, 99 CLAS 93 [*Power Stream* cited to LAC].
[35] *Ibid* at 197-98.
[36] *Ibid* at 202.

> Nor should employees expect their employer to accommodate every such characteristic [of family status]. Employees can and do make accommodations to meet the needs of their employer so that they can work for themselves and their families. Those accommodations include their choice of accommodation, choice and degree of child care, and choice of what kind of jobs to accept.[37]

Power Stream involves one of the few applicants in the case law whose status as a lone-parent is identified and explored. To contrast with lone-parent families, like Maria Menendez's, who do not have the aid of a former spouse, this applicant was successful in negotiating a custody-sharing agreement. While Arbitrator Jesin did not thoroughly explore issues present in separated families, he did recognize the need to protect custody agreements. Arbitrator Jesin held that, "a change in a workplace rule which forces parents to alter a carefully constructed custody agreement to their detriment in order to accommodate that workplace rule may be found to be discriminatory."[38]

C. Tipping the Scales towards the Employee

The most recent and expansive interpretation of family status accommodation occurred when the same family from *Johnstone*, 2007 made their way back to the Federal Court in *Johnstone v Canada (Border Services)*.[39] In upholding the Canadian Human Rights Tribunal's finding of discrimination and inadequate accommodation, Justice Mandamin also agreed with the tribunal's use of a lower standard for childcare interference:

> The Tribunal acknowledged that 'not every tension that arises in the context of work-life balance can or should be addressed by human rights jurisprudence'. In my view the childcare obligations arising in discrimination claimed based on family status must be one of substance and the complainant must have tried to reconcile family obligations with work obligations. However, this requirement does not constitute creating a higher threshold test of serious interference [as used in *Campbell River*].[40]

By questioning the efficacy of the *Campbell River* model, Mandamin J proposed that family status discrimination would be made out when an "employment rule interferes with an employee's ability to fulfill her *substantial parental obligations in any realistic way*".[41]

This new articulation differs from both *Campbell River* and *Johnstone*, 2007. First, Mandamin J replaced *Campbell River*'s "serious interference" test with the threshold of "interferes…in any realistic way". This new standard reduces the employee's burden of demonstrating harm, and lowers the threshold of demonstrated efforts to self-accommodate. Second, while *Johnstone*, 2007 shied away from the question of what constitutes a "substantial parental duty or obligation", *Johnstone*, 2013 provides a definition, equating substantial parental duty with the threshold used for religious discrimination in *Syndicat Northcrest v Amselem*.[42]

---

[37] *Ibid* at 201 [emphasis added].
[38] *Ibid* at 204.
[39] 2013 FC 113, 357 DLR (4th) 706 [*Johnstone*, 2013].
[40] *Ibid* at para 120.
[41] *Ibid* at para 129 [emphasis added].
[42] *Ibid* ("In Amselem the Supreme Court of Canada ruled that a person's freedom of religion is interfered with where the person demonstrates that he or she has a sincere religious belief and a third party interfered, in a manner that is

Considering the Supreme Court of Canada in *Amselem* held that religious discrimination can be established without intense judicial investigations into religious authenticity,[43] this comparison appears to instruct future courts and tribunals to avoid deep questioning of "authentic" parental needs.

While *Johnstone*, 2013 shifts from the expansive—albeit, vague—treatment of family status discrimination in *Johnstone*, 2007, the judgment is still sympathetic to the needs of working parents. The divide between the restrictive test in *Campbell River* and the very accommodating standard in *Johnstone*, 2007, has been replaced with a tighter, somewhat employee-friendly divide. The debate is now between a model of equal employer-employee responsibilities in *Power Stream* and Mandamin J's model that tips the scales in favour of employees.

The test for establishing *prima facie* family status discrimination was recently examined at the Federal Court of Appeal.[44] Though maintaining much of the lower court's decision,[45] in *Johnstone v Canada*, the Federal Court of Appeal clarified some persistent issues in the case law.[46] Of interest is the court's conception of family status discrimination as a mirror of the other protected grounds.

One of the Federal Court of Appeal's most important clarifications involved the concept of parental obligation.[47] Focusing on the immutable nature of other protected grounds in the *Canada Human Rights Act*[48]*,* the court held the legal responsibilities set out in the *Criminal Code*[49] and provincial child welfare statutes are the immutable aspect of the parent-child relationship. Since other protected grounds are understood as the inability or high personal cost of removing a protected characteristic, a parent's legal obligation to supply childcare is similarly immutable. While the case provides necessary guidance, it seems likely provincial appellate courts will continue to debate the extent that family status discrimination can be compared to other protected grounds.

D. Growing Space for a Contextual Analysis

Mandamin J's recent family status case law shows how a contextual analysis of family status discrimination, giving voice to lone-parent struggles, can be achieved. In *Seely*, a decision released days after *Johnstone*, 2013, Mandamin J concluded that judges and other adjudicators should ask the following questions when deciding issues of family status discrimination:

> a) does the employee have a substantial obligation to provide childcare for the child or children; in this regard, *is the parent the sole or primary care giver*, is the obligation substantial and one that goes beyond personal choice;

---

non-trivial or not insubstantial, with that person's ability to act in accordance with the belief. The phrase 'a substantial parental duty or obligation' equates with and establishes the same threshold as a sincere religious belief" at paras 126-27); 2004 SCC 47, [2004] 2 SCR 551 [*Amselem*].

[43] *Ibid* at para 51.

[44] *Canada (Attorney General) v Johnstone,* 2014 FCA 110, 372 DLR (4th) 730.

[45] The Court of Appeal did overturn several remedial findings from the lower court. These changes are immaterial to the present discussion.

[46] *Johnstone,* 2013, *supra* note 39.

[47] *Supra* note 44 at paras 68-74.

[48] RSC 1985, c H-6.

[49] RSC 1985, c C-46, s 215(1).

b) are there realistic alternatives available for the employee to provide for childcare: has the employee had the opportunity to explore and has explored available options; and is there a workplace arrangement, process, or collective agreement available to the employee that may accommodate an employee's childcare obligations and workplace obligations;
c) does the employer conduct, practice or rule put the employee in the difficult position of choosing between her (or his) childcare duties or the workplace obligations?[50]

The first question requires the decision-maker consider if the employee's childcare obligations are "substantial". This decision is made in consideration of the parent's role as either "sole or primary care giver", as well as through the notion of personal choice.[51]

To support this, Mandamin J cites *Power Stream* and the individualized investigations used therein to determine whether discrimination had been made out.[52] Individualized assessments appear to run counter to the hands-off investigation of childcare obligations proposed in *Johnstone*, 2013. However, given Mandamin J's desire to craft employee-friendly jurisprudence, one can surmise that "substantial childcare obligation" refers to the needs of the child, and the potential for alternative, self-accommodating childcare choices. While it may be simpler for parents to rely on the hands-off approach of discretion when showing the needs of a child, an individualized assessment may be more helpful to demonstrate the reasonable options of self-accommodation.

THE LAW OF DOMESTIC AFFAIRS AND JUDICIAL DISCRETION

By creating case law that is responsive to the needs of all parents, Mandamin J's recent judgments present an opening for lone-parent families to be heard. However, without an explicit investigation and articulation of lone-parent concerns, this important family-focused jurisprudence will be left to the whim of individual judges and adjudicators.

The pitfalls of wide discretion in the legal regulation of domestic affairs have been a topic of study and concern throughout the twentieth century.[53] The present abundance of discretion in domestic affairs is part of an intentional, historical shift away from the rigidity of nineteenth century legal doctrines. This shift is now viewed by some as going too far.[54]

Former justice of the Supreme Court of Canada, Justice Estey, expressed similar concerns in his dissent in the family law case, *Leatherdale v Leatherdale*:

---

[50] *Supra* note 25 at para 78 [emphasis added].
[51] See *Falardeau v Ferguson Moving and Others*, 2009 BCHRT 272, [2009] BCWLD 8124 (this case involved a lone-parent father that was attempting to balance childcare needs with his job as a mover. Even though his status as a single father was briefly discussed when the Tribunal was laying out the facts of the case, they did not explicitly factor his marital status into their ultimate decision to deny family status discrimination).
[52] *Seely*, *supra* note 25 at para 81.
[53] Nicholas Bala, "Judicial Discretion and Family Law Reform in Canada" (1986) 5 Can J Fam L 15 (Professor Bala cites the emergence of the pejorative term "palm tree justice" from 1950s British family law cases as evidence of this long-standing consternation). See also *Pettkus v Beecker*, [1980] 2 SCR 834, 19 RFL (2d) 165 (the term was also used in Cairns LJ's dissent in the famous Canadian family property case); Edward W Cooey, "The Exercise of Judicial Discretion in the Award of Alimony" (1939) 6 Law & Contemp Probs 213 (For an early 20th-Century example of this discretion scholarship); Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (Oxford: Oxford University Press, 2003) at 282.
[54] Bala, *supra* note 53 at 34.

> One of the hallmarks of family law is the broad discretion vested in trial judges to resolve individual disputes in accordance with very general principles. Inevitably when judges are guided only by the vague standards embodied in these principles, they will be greatly influenced by their personal values, experiences and assumptions…Although judicial discretion can never be eliminated, especially in family law, it must be structured so as to make the outcome of litigation more predictable.[55]

In recognizing the needs of lone-parent families to have their voices heard, as well as the tendency of personal experiences and assumptions to influence the discretion of the judiciary, it is important for lawyers and their clients to present a strong and explicit story of these struggles. Judges and adjudicators must understand how Canada's 1.5 million lone-parent families live, struggle, and thrive in this country. While family law and family status jurisprudence may carry unique assumptions and histories, the overlapping regulation of domestic affairs allows comparisons to be made and lessons to be learned. In the next section, I investigate the perils of discretion and domestic affairs by analyzing the history and reform of the *Divorce Act.*

A. A Brief History of the *Divorce Act* in Canada

Legal divorce did not begin in Canada with the introduction of a comprehensive, federal *Divorce Act*.[56] Judges in most common law provinces possessed the power to terminate marriages on account of adultery, with Nova Scotia also allowing judges to terminate marriages on the basis of cruelty.[57] The legislation's main reform involved the expansion of this judicial power by allowing "marital breakdown" to form a ground of divorce, or legal separation by way of general relationship breakdown. Other grounds for divorce were introduced alongside adultery and marital discord.[58] The *Divorce Act* made the practice of legal separation mainstream, through an expanded and nationally uniform framework for separation.

The *Divorce Act* dramatically changed the nation's perception and practice of divorce, but it was not without flaws. Problems with the legislation included: the adversarial nature of marital offences, a lack of judicial knowledge and efficiency in the realm of family law, and the treatment of children in the system.[59] The Law Reform Commission of Canada's landmark report, *Report on Family Law*, proposed a series of reforms to these issues, namely the elimination of the marital offenses system,[60] and the creation of courts that would have exclusive jurisdiction over family law matters.[61] This latter reform would only come to pass in a few Canadian cities.[62] But the replacement of the marital offence model would eventually form the backbone of Parliament's 1985 reforms to the *Divorce Act*.[63] Currently, divorces are granted

---

[55] [1982] 2 SCR 743 at 772, 142 DLR (3d) 193.
[56] SC 1967-68, c 24.
[57] *Report of the Special Joint Committee of the Senate and House of Commons on Divorce* (June 1967) at 102 (Joint Chairmen: AW Roebuck & AJP Cameron) (wealthy and well-connected families could also appeal to the Canadian Parliament for a legal divorce. An act of Parliament was the only way that couples in Quebec and Newfoundland were able to obtain a legal separation before the passage of the *Divorce Act*).
[58] These additional grounds included: abandonment, homosexuality, the national expansion of cruelty, etc.
[59] Law Reform Commission of Canada, *Report on Family Law* (Ottawa: LRCC, 1976) at 7-8 [*Report on Family Law*].
[60] *Ibid* at 7, 13.
[61] *Ibid* at 7.
[62] Parliamentary Information and Research Service, *Divorce Law in Canada* by Kristen Douglas (Library of Parliament, 2008), online: <www.publications.gc.ca/collections/collection_2009/bdp-lop/cir/963-2e.pdf>.
[63] *Divorce Act*, RSC, 1985, c 3, 2nd Supp.

when a spouse can demonstrate marital breakdown has taken place.[64] By eliminating the need to prove an offence, the system also allows couples to file joint applications that encourage pre-emptive negotiations over children and shared financial responsibilities.[65]

In addition to the procedural fairness and efficiency of divorces, the *Report on Family Law* addressed the substantive issue of economic disparity between spouses. Best typified by the unfortunate case of *Murdoch v Murdoch*,[66] the Law Reform Commission of Canada saw a clear divide between the legal conception of divorce and the lived experience of former spouses:

> The present legal framework for dealing with questions of property and the maintenance of a needy spouse simply does not accord with social reality today. Traditionally…the law has not considered the work of the homemaker as a contribution to, or as having anything to do with the acquisition of property in marriage; equally it did not foresee that women could be independent and responsible for their own lives… The law therefore cannot be fixed but must have room to evolve creatively, allowing men and women to define their own roles within marriage, supporting rather than confining individual choices.[67]

Provincial property-sharing legislation would later remedy some of these economic inequalities. At the federal level, the gendered nature of poverty after divorce remained a pressing issue until 1985. With a belief that enumerated objectives would guide judicial discretion towards economic equality, Parliament amended the *Divorce Act* to include four basic objectives for determining spousal support orders.[68] While the federal political parties agreed on the need for some kind of enumerated guidelines, there were serious questions about the content and vagueness of the objectives being proposed.[69]

Yet, none of the guidelines evoked as much debate as the inclusion of "economic self-sufficiency" in the *Divorce Act*. This controversy is best evidenced by the Attorney General's need to explicitly assuage fears in the House of Commons:

> The legislation will not impose hardship on those that cannot attain economic self-sufficiency. If…we were to discover that, contrary to our intention, this does occur, then I will certainly consider changes. That is, once it is proven, if it ever is proven.[70]

The Attorney General also assured Parliament that all four objectives would be given equal weight, so that judges would not be tempted to latch onto the language of "economic self-sufficiency".[71]

---

[64] *Ibid*, s 8.
[65] Julien D Payne & Marilyn A Payne, *Canadian Family Law*, 4th ed (Toronto: Irwin Law, 2011) at 192.
[66] [1975] 1 SCR 423, 41 DLR (3d) 367 (former wife denied share of family home, due to perceived lack of value in household labour).
[67] *Report on Family Law*, *supra* note 59 at 3.
[68] *Divorce Act*, *supra* note 63 ("(a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown; (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage; (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time", s 6).
[69] *House of Commons Debates*, 33nd Parl, 1st Sess, vol 7 (22 January 1986) at 10051 (Lynn McDonald) (NDP proposed amendments to provide more specificity to the support objectives. The inclusion of spousal age was one of these proposed amendments).
[70] *Ibid,* (23 January 1986) at 10107 (Hon John Crosbie).
[71] *Ibid*.

There is no reason to believe that Attorney General John Crosbie misled Parliament, but a study on post-1986 divorces indicates these statements were perhaps too confident:

> [I]t appears that the dominant emphasis in the grouping of cases involving middle-aged women leaving mid-length marriages is on the value of promoting spousal self-sufficiency. The philosophy of spousal support that is continually articulated in these cases is a philosophy of spousal self-sufficiency after divorce…Some courts explicitly acknowledge that a clean break philosophy is inherent in the new *Divorce Act*.[72]

This study showed that although extenuating factors, such as length of marriage and dependent children, helped lessen a judge's reliance on self-sufficiency, the *Divorce Act*'s vague objectives continued to create case law based on the viewpoints of a given judge.

B. Judicial Notice and the Law of Domestic Affairs

The inconsistent jurisprudence on divorce and separation provided the backdrop for Justice L'Heureux-Dubé's seminal spousal support ruling in *Moge v Moge*.[73] Drawing on a lower court's decision to nullify a husband's spousal support order on the grounds that his wife had taken too long to achieve economic self-sufficiency, the Supreme Court of Canada considered the ability of judges to use discretion when amending spousal support orders. L'Heureux-Dubé J explicitly highlighted the issues surrounding women's poverty after divorce. Citing extensive social science research on the feminization of poverty, L'Heureux-Dubé J clearly articulated the poverty created within the traditional family unit,

> Women have tended to suffer economic disadvantages and hardships from marriage or its breakdown because of the traditional division of labour within that institution. Historically, or at least in recent history, the contributions made by women to the marital partnership were non-monetary and came in the form of work at home, such as taking care of the household, raising children, and so on…These sacrifices often impair the ability of the partner who makes them (usually the wife) to maximize her earning potential because she may tend to forego educational and career advancement opportunities.[74]

In her judgment, L'Heureux-Dubé J elevated the experience of women and poverty after divorce to the position of judicial notice:

> Based upon the studies…the general economic impact of divorce on women is a phenomenon the existence of which cannot reasonably be questioned and should be amenable to judicial notice…While quantification will remain difficult and fact related in each particular case, judicial notice should be taken of such studies, subject to other expert evidence which may bear on them, as background information at the very least.[75]

---

[72] Carol J Rogerson, "Judicial Interpretation of the Spousal and Child Support Provisions of the *Divorce Act, 1985* (Part I)" (1991) 7 Can Fam LQ 155 at 204.
[73] [1992] 3 SCR 813, 99 DLR (4th) 456 [*Moge,* cited to SCR].
[74] *Ibid* at 861.
[75] *Ibid* at 873-74.

Moge has been heralded as both a "watershed judgment" and "a victory for women".[76] Contemporary news reports recognized the profound importance of the case, reporting that the Supreme Court of Canada had effectively "[warned] lower court judges not to force women to sink or swim in the job market".[77] While there have been questions over the ability of *Moge* to change the material circumstances of divorced women, Carol Rogerson, Canada's leading scholar in spousal support, has demonstrated that *Moge* had significant effects on the way spousal support orders were determined.[78] Further, numerous judges and lawyers have cited the case to show the interaction between women's poverty and the law.[79]

The ruling changed the way judges adjudicate questions of spousal support, and greatly expanded the use of judicial notice within the regulation of domestic affairs.[80] By allowing divergent stories of family life to become easily accessible to both judges and litigants, *Moge* helped remove a significant evidentiary burden from marginalized women.[81]

CONCLUSION

Judicial notice can act as a catalyst for developing legal remedies to the issues faced by lone-parent families. In the historical development of the *Divorce Act* and Canadian family law jurisprudence, judicial notice has played an important role in shedding light on the interaction of women's poverty and traditional marriage. There is room in the recent case law to craft a place for lone-parent families. However, if the legal community leaves these stories unexplored, courts and tribunals risk reinforcing historical patterns of poverty and precarity. Families like Maria Menendez's cannot be left to the individual discretion of judges and adjudicators. Lawyers must implement a legal strategy that places these stories at the fore. An explicit and concerted effort is the only way that judicial notice can be realistically achieved.

Lawyers must work to actively create links with lone-parent families, childcare experts, and social reformers in the areas of feminism and poverty. By working as equal partners, lawyers, clients, and activists can find ways to present substantial records of expert and personal testimony that will comprehensively explore the needs of lone-parent families. Creative legal arguments could also be crafted through this partnership—for example, framing refusal to consider the unique needs of lone-parent families as an implicit form of marital status discrimination. By pairing this legal strategy with the current state of family status jurisprudence, lawyers can convince a court that the struggles facing single mothers in the workplace merits judicial notice. At the very least, it will alert adjudicators to the importance of considering these factors when deciding cases of childcare accommodation.

---

[76] Robert Leckey, "What is Left of *Pelech*?" (2008) 51 Sup Ct L Rev 103 at 107-08. Professor Leckley is quick to note, though, that *Moge* has been criticized by feminist scholars for not going far enough, see Colleen Sheppard, "Uncomfortable Victories and Unanswered Questions: Lessons from *Moge*" (1994-95) 12 Can J Fam L 283.
[77] CBC Television, "Divorce: Alimony Agony" (17 December 1992), online: CBC <www.cbc.ca/player/Digital+Archives/Society/Family/ID/1769147048>.
[78] Carol Rogerson, "Spousal Support Post-*Bracklow*: The Pendulum Swings Again?" (2001-02) 19 Can Fam LQ 185 at 192.
[79] At the time of writing, Westlaw Canada states that *Moge* has been judicially considered 2596 times.
[80] Susan G Drummond, "Judicial Notice: The Very Texture of Legal Reasoning" (2000) 15 Can JL & Society 1 at 5.
[81] Claire L'Heureux-Dubé, "Re-examining the Doctrine of Judicial Notice in the Family Law Context" (1994) 26 Ottawa L Rev 551 at 568-69.