File No. S-2013768
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *HUMAN RIGHTS CODE*, R.S.B.C. 1996, C. 210 (AS AMENDED) AND THE *JUDICIAL REVIEW PROCEDURE ACT*, R.S.B.C. 1996, C. 241 (AS AMENDED)

AND IN THE MATTER OF A DECISION MADE BY THE BRITISH COLUMBIA HUMAN RIGHTS TRIBUNAL ON NOVEMBER 3, 2020

BETWEEN:

GIBRALTAR MINES LTD.

PETITIONER

AND:

LISA HARVEY –AND- BRITISH COLUMBIA HUMAN RIGHTS TRIBUNAL

RESPONDENTS

WRITTEN ARGUMENT OF THE INTERVENOR, BRITISH COLUMBIA HUMAN RIGHTS COMMISSIONER

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I. INTRODUCTION

1. B.C.'s Human Rights Commissioner (the "Commissioner") is an independent officer of the Legislature with a statutory mandate to protect and promote human rights in the province: *Human Rights Code*, R.S.B.C. 1996, c.210, s. 47.12(1) (the "*Code*"). The Commissioner has been granted leave to intervene in this Petition for judicial review to make written submission on the legal test for family status discrimination under s. 13 of the *Code*.

2. The Commissioner submits that the proper legal test to be applied in determining whether there has been *prima facie* discrimination in employment on the basis of family status in all cases is the three part test enunciated by the Supreme Court of Canada in *Moore v. British Columbia*, 2012 SCC 61 ("*Moore*"). The BC Court of Appeal's decisions in *Health Sciences Association of BC v. Campbell River and North Island Transition Society*, 2004 BCCA 260 ("*Campbell River*") and *Envirocon Environmental Services, ULC v. Suen*, 2019 BCCA 46 ("*Envirocon*") speak to whether the adverse impact required by the *Moore* test has been made out and do not supplant the *Moore* test.

3. Any interpretation of the test for family status discrimination regarding employment in caregiving cases which limits *prima facie* discrimination to circumstances in which an employer has changed a term or condition of employment:

    a. is inconsistent with the plain language of s. 13 of the *Code*, the modern approach to statutory interpretation, and the purposive approach to be applied when interpreting quasi-constitutional legislation like the *Code*;

    b. is inconsistent with the Supreme Court of Canada's jurisprudence on the proper approach to, and test for, determining whether human rights legislation has been breached; and,

    c. is arbitrary and contrary to the rule of law.

4. In addition to these written submissions, the Commissioner seeks leave to make oral

submissions at the hearing of the Petition.

II. FACTS

5. The Petitioner, Gibraltar Mines Ltd. ("Gibraltar"), operates a mine (the "Mine") near Williams Lake, B.C. The Respondent, Ms. Lisa Harvey, and her husband are both employed by Gibraltar at the Mine. In the Fall of 2016, Ms. Harvey became pregnant. At the time, both she and her husband worked the same 12-hour shift at the Mine.

6. Following the birth of their child, and as Ms. Harvey prepared to return to work after her maternity leave, Ms. Harvey and her husband requested that one of them be permitted to work a different shift so they could access childcare. Gibraltar declined the request.

7. Ms. Harvey filed a human rights complaint (the "Complaint") with the British Columbia Human Rights Tribunal (the "Tribunal") alleging that Gibraltar discriminated against her in employment on the basis of family status, marital status, or sex contrary to s. 13 of the *Code*. Subsequent to filing the Complaint, the parties tried to resolve Ms. Harvey's accommodation request but were unsuccessful.

8. Gibraltar applied to dismiss the Complaint on a preliminary basis pursuant to subsections 27(1)(b), (c), and (d)(ii) of the *Code* which permit the Tribunal to dismiss all or part of a complaint if it determines that: the acts or omissions alleged do not contravene the *Code* (s. 27(1)(b)); there is no reasonable prospect that the complaint will succeed (s. 27(1)(c)); or that proceeding with the complaint will not further the purposes of the *Code* (s. 27(1)(d)(ii)).

9. Gibraltar's primary argument in applying to dismiss was that the facts alleged could not meet the test for family status discrimination in employment. Specifically, Gibraltar argued that, to make out *prima facie* discrimination in employment on the basis of family status, a complainant must allege that an employer imposed a change to a term or condition of employment which resulted in a serious interference with a substantial parental obligation. Gibraltar argued that, since it had not imposed a change to Ms. Harvey's terms and conditions of employment, there could be no contravention of the *Code* and no reasonable

prospect the Complaint would succeed.

10. In a decision dated November 3, 2020 (the "Decision"), the Tribunal granted Gibraltar's application to dismiss the allegations based on marital status and sex under 27(1)(c) of the *Code* but declined to dismiss the Complaint on the basis of family status at this preliminary stage.

11. On the subject of the alleged family status discrimination, the Tribunal determined that, in order to be successful at hearing, Ms. Harvey would need to make out the well-established test for *prima facie* discrimination affirmed by the Supreme Court of Canada in *Moore*, namely that:

    a. she has a characteristic protected under the *Code*;

    b. she has experienced adverse treatment regarding her employment; and,

    c. her protected characteristic was a factor in that adverse treatment.

12. The Tribunal considered the decisions of the British Columbia Court of Appeal in *Campbell River* and *Envirocon*, acknowledging *Campbell River*'s finding that, in the usual case, a complaint of *prima facie* discrimination will be made out "when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employee": Decision at para. 24, citing *Campbell River* at para. 39.

13. The Tribunal acknowledged that *Envirocon* affirmed that *Campbell River* remains good law in so far as a complainant must show a serious interference with a substantial parental or other family duty or obligation in order to make out a *prima facie* case: Decision at para. 24.

14. Reviewing its own jurisprudence interpreting and applying *Campbell River*, the Tribunal concluded that *Campbell River*, *Envirocon* and its own jurisprudence do not support the

proposition that a change to a term or condition of employment is the only circumstance that may give rise to family status discrimination: Decision at para. 27.

15. Gibraltar brings this Petition for judicial review seeking to quash the Decision on the basis that the Tribunal's interpretation and application of the test for discrimination in employment on the basis of family status was incorrect. Gibraltar asserts that *Campbell River* stands for the proposition that the test for discrimination in employment on the basis of family status can only be made out if an employer has changed the terms and conditions of employment.

III. ARGUMENT

Legal Framework

16. Determining whether there has been a breach of human rights legislation involves a two-step analysis: *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.*, [1999] 3 S.C.R. 3 at paras. 54-55 ("*Meiorin*").

17. At the first step, the complainant must establish a *prima facie* case of discrimination by showing: (1) they have a characteristic which is protected under the *Code*; (2) they have experienced an adverse effect with regard to their employment or a term of that employment; and (3) that the protected characteristic was a factor in the adverse treatment: *Stewart v Elk Valley Coal Corp*, 2017 SCC 30 at para 24 ("*Elk Valley Coal*").; *Moore* at para. 33; *British Columbia Human Rights Tribunal v Schrenk*, 2017 SCC 62 at para. 86 ("*Schrenk*"). The Supreme Court of Canada has affirmed that additional requirements are not to be inserted into the third step of the *prima facie* discrimination analysis: *Elk Valley Coal* at para 46.

18. At the second step, the onus shifts to the respondent who will seek to justify the *prima facie* discrimination. If a respondent is successful in justifying the *prima facie* discrimination, there will have been no discrimination or breach of the *Code*.

19. In the employment context, a respondent can justify *prima facie* discrimination by establishing a *bona fide* occupational requirement or BFOR. To establish a BFOR, the respondent must show:

1. it adopted the standard for a purpose rationally connected to the performance of the job;

2. it adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and

3. the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

Meiorin at para. 54

20. Accommodation, the final step of the BFOR analysis, is a multi-party inquiry. The employer is primarily responsible, but in unionized workplaces the union must cooperate, and "there is also a duty on the complainant to assist in securing accommodation… Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant can be considered": *Renaud v. Central Okanagan School District No. 23*, [1992] 2 S.C.R. 970 at paras. 50-51.

21. The above approach does not distinguish between direct discrimination (adverse treatment that is, on its face, discriminatory) and adverse effect discrimination (a neutral standard having a disproportionate adverse effect on an individual or group), as was the case pre-*Meiorin*. Rather, the Supreme Court of Canada has been clear that there is now only one analytic approach to be applied when determining human rights complainants: namely the *Moore/Meiorin* approach set out above.

22. For clarity:

… Adverse impact [also known as adverse effect] discrimination occurs when a seemingly

> neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground (see Watson Hamilton and Koshan (2015), at p. 196; Sheppard (2001), at p. 549; see also *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396(S.C.C.), at para. 64; *Taypotat*, at para. 22). Instead of explicitly singling out those who are in the protected groups for differential treatment, the law [or standard] indirectly places them at a disadvantage (Sophia Moreau, "What Is Discrimination?" (2010), 38 *Philosophy & Public Affairs* 143, at p. 155).
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> Increased awareness of adverse impact discrimination has been a "central trend in the development of discrimination law", marking a shift away from a fault-based conception of discrimination towards an effects-based model which critically examines systems, structures, and their impact on disadvantaged groups (Denise G. Réaume, "Harm and Fault in Discrimination Law: The Transition from Intentional to Adverse Effect Discrimination" (2001), 2 *Theor. Inq. L.* 349, at pp. 350-51; see also Béatrice Vizkelety, *Proving Discrimination in Canada* (1987), at p. 18; Sheppard (2010), at pp. 19-20). Accompanying this shift was the recognition that discrimination is "frequently a product of continuing to do things 'the way they have always been done'", and that governments must be "particularly vigilant about the effects of their own policies" on members of disadvantaged groups" [citations omitted].
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> *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at paras. 30-31.

Interpretation of the *Code*

23. Whether discrimination on the basis of family status in employment is limited to circumstances in which an employer has made a change to a term or condition of employment is fundamentally a question of statutory interpretation. Does s. 13(1)(b) of the *Code* – as Gibraltar suggests – limit family status discrimination only to circumstances where there has been a change to employment terms or conditions?

24. The starting point for such questions is the modern principle to statutory interpretation outlined by E.A. Driedger and adopted by the Supreme Court of Canada in *Rizzo v. Rizzo Shoes Ltd.* at para. 21:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Language of s. 13

25. The modern approach looks first to the language of the provision in question, in this case, s. 13 of the *Code*: *Schrenk* at para. 29.

26. Section 13 provides:

> 13(1) A person must not
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> (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 the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or the intended employment of that person.
>
> ...
>
> (4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.
>
> [Emphasis added.]

27. The central issue before the Supreme Court of Canada in *Schrenk* was the interpretation of s. 13. Specifically, the Court was asked to consider whether s. 13 protected individuals from discrimination in the context of employment generally, or whether it protected them only from discrimination at the hands of their employer or superiors in the workplace. Examining the language of s. 13, the Court confirmed that s.13(1)(b) contains "two disjunctive prohibitions: the first refers to discrimination regarding 'employment'; the second refers to discrimination regarding 'any term or condition of employment'": *Schrenk* at paras. 2 and 46.

28. Section 13, then, expressly protects against both discrimination regarding employment and discrimination regarding any term or condition of employment. Importing a requirement that there must be a change to a term or condition of employment in order to ground discrimination on the basis of family status, as Gibraltar argues, not only offends the disjunctive nature of s. 13(1)(b) and the plain language of the *Code*, but it purports to add or read in a requirement for "a change" to the subsection's second prohibition respecting terms or conditions of employment.

29. As the plain language of s. 13 makes clear, the Legislature did not limit discrimination under

s. 13 to circumstances where an employer imposes a unilateral change. Gibraltar's argument, in essence, asks this Court to read language into s.13(1)(b) – reducing its scope – when there is no justifiable basis to do so.

30. The Commissioner does not dispute that it may be acceptable in some circumstances for adjudicators to read down the scope of provisions by adding words of qualification. However, to be justified in inserting such a limit, there must be a clear basis to do so arising from "cogent indicators of legislative intent and relevant legal norms": Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Toronto: LexisNexis Canada Inc, 2014) at §7.12. In the Commissioner's respectful submission, there is no such basis to justify reading in "a change" to the second half of s. 13(1)(b) or elsewhere. To the contrary, when s. 13 is read in context and with a view to the purposes of the *Code* and the Legislature's intent, there are compelling reasons not to do so: Sullivan at §7.6 - §7.19.

Purposes of the Code

31. The purposes of the *Code* are set out in s. 3 and include:

- Fostering a society in B.C. in which there are no impediments to full and free participation in the economic life of the Province;
- Preventing discrimination prohibited by the *Code*; and,
- Identifying and eliminating persistent patterns of inequality associated with discrimination prohibited by this *Code*.

32. In sum, the goal of human rights legislation, including the *Code*, is to eliminate discrimination and provide relief to individuals and groups who have been discriminated against in order to achieve substantive equality: *United Nurses of Alberta v. Alberta Health Services*, 2021 ABCA 194 at para 86 ("*United Nurses*").

33. It has long been held that the *Code* is quasi-constitutional in nature and that the protections

it affords are fundamental to our society. In *Canadian National v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at para. 26, Chief Justice Dickson described human rights legislation as giving rise to "individual rights of vital importance", and he emphasized that courts "should not search for ways and means to minimize those rights and to enfeeble their proper impact". In short, the *Code* must be interpreted broadly and liberally in order to best achieve its remedial purposes: *Schrenk* at para. 31; *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd,* [1985] 2 S.C.R. 536 at para. 12.

34. In the Commissioner's submission, a broad and purposive interpretation of human rights legislation in relation to family status discrimination must be oriented towards enabling the full participation of parents and caregivers in the workforce with the understanding that women continue to bear the brunt of caregiving responsibilities in families: Kance and Cembrowski, "Family Status Discrimination and the Obligation to Self-Accommodate" (2018) 14 JL & Equality 61 at 70. Failing to do so risks impeding the kind of systemic change necessary to flatten gender hierarchies in workplaces and families by ignoring "the links between work-family conflict and women's economic, social, and cultural subordination": Elizabeth Shilton, "Family Status Discrimination: 'Disruption and Great Mischief' or Bridge over the Work-Family Divide?" (2018) 14 JL & Equality 33 at 34.

35. Reading in a requirement that narrows the scope of s. 13(1)(b)'s protections is far from a broad, liberal, and purposive interpretation of the *Code* which furthers substantive equality. It does not take into account that women continue to bear most of the practical responsibility for family caregiving and that women are more likely to require accommodation to avoid serious interference with parental or other caregiving obligations as their personal circumstances change: Sylvia Fuller & Yue Qian, "Covid-19 and the Gender Gap in Employment of Parents of young Children in Canada" (2021) 35:2 Gender & Society 206 at 209. By limiting s. 13 only to circumstances where the employer changes a term or condition (thereby precluding a change in personal circumstances from triggering an adverse impact) women will be forced to try and find ways to manage competing responsibilities. Often this takes the form of women resorting to part-time and precarious forms of work that typically come with lower wages, fewer benefits, fewer promotional opportunities, and minimal or no

retirement pensions: Shilton at para. 2.

36. The protections enshrined in s.13 of the *Code* are situated at the nexus of human rights and employment which, as the Supreme Court of Canada has long said, is a context central to people's identity, self-worth and emotional well-being: *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at p. 368; see also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 93. Employment is, in the words of the majority in *Schrenk*, a context of vulnerability. In the Commissioner's submission, courts should be particularly hesitant to interpret s.13 in a manner that strips much of the protection contained on its face and in light of the purposes of the *Code*, especially where doing so may reinforce women's inequality at work and at home: Shilton at para. 2.

37. The interpretation of s. 13 urged by Gibraltar would, in the Commissioner's respectful submission, perpetuate rather than ameliorate inequality, as it would permit family status discrimination in circumstances where the employer did not change a term or condition of employment. Such an approach is clearly contrary to the purpose captured by s. 3(c) of the *Code*, which is to prevent discrimination, and to the purpose of subsection 3(a), by hampering the "full and fair participation" of employees, particularly women, whose family status or parental obligations change during the course of their employment.

38. Further, the purpose of the *Code* is not limited to preventing discrimination. The *Code* also aims to "promote a climate of understanding and mutual respect where all are equal in dignity and rights" and to "provide a means of redress for those persons who are discriminated against contrary to this Code" (s. 3(b) and (e)).

39. Gibraltar's proposed interpretation of *Campbell River* and s. 13 of the *Code* is at odds with these aims; it differentiates between employees whose family obligations change during their employment from those whose family status remain constant. Such an interpretation would have the perverse effect of excluding those employees, facing significant vulnerability in their employment, from the protections of the *Code* perhaps at the moment when they need them the most.

40. Such an approach to family status discrimination is further inconsistent with the accepted interpretation of s. 13(1)(b) in any other context. In relation to any other enumerated ground, for example, s. 13(1)(b) protects against discrimination regarding employment at any stage in the employment relationship: in hiring practices, in the workplace environment, on a systemic level, in discipline, in termination, in the receipt of benefits, in relation to leaves of absence, in workplace advancement and promotion, and in relation to terms and conditions of employment. There is no requirement that someone alleging discrimination in employment on the basis of disability, for example, establish that the adverse effect experienced was trigged by a unilateral change imposed by the employer.

Section 13 in Context

41. In keeping with the modern approach to statutory interpretation, adjudicators must not construe particular statutory provisions in isolation; "rather, individual provisions must be considered in light of the act as a whole, with each provision informing the meaning given to the rest": *Schrenk* at para. 45. Interpreting s. 13(1)(b) with regard to the *Code* as a whole does not support reading in the requirement for "a change".

42. Where the Legislature has determined that a reduction in the scope of protection afforded by the *Code* is warranted, it has set out those limitations expressly. Perhaps most importantly, ss. 13(3) and (4) set out the exceptions to the protections found in s.13(1), establishing that it does not apply: as it relates to age, to a seniority scheme; or as it relates to certain protected characteristics like marital status, disability, and age, to the operation of retirement, superannuation or pension plans and employee insurance plans, and; finally, with respect to a *bona fide* occupational requirement. Neither of these subsections suggest that the protections afforded by s.13(1)(b) are or should be limited to changes in the terms or conditions of employment generally or that there is such a restricted scope solely in relation to the ground of family status or family status claims that involve caregiving (which is just one type of factual foundation giving rise to family status complaints: see, for example, *Mangel and Yasue obo Child A v. Bowen Island Montessori School and others*, 2018 BCHRT 281.

43. Principles of statutory interpretation dictate that when the Legislature "lists all of the protected grounds of discrimination together and expresses no distinctions among them, it is reasonable to conclude that it intends all of the grounds of discrimination to be governed by the same legal tests": Kanee & Cembrowski at 73; Sullivan at §8.21 and §8.38. No other ground of discrimination requires a change to a term or condition of employment in order to fall within the scope of s.13(1)(b)'s protection.

44. Similar limitations can be found in sections of the *Code* prohibiting discrimination in other areas of life. For example, s. 8(2) sets out exceptions to the *Code*'s prohibition against discrimination in the provision of an accommodation, service or facility customarily available to the public. Section 10(2) sets out exceptions to the *Code*'s prohibitions on discrimination in tenancy.

45. Examining the *Code* as a whole affirms the view that the Legislature turned its mind to exceptions to the protection offered by s. 13 and did not intend the exception to the plain language of s. 13 now advanced by Gibraltar. If the Legislature had intended for employment discrimination to be triggered (generally or in relation only to family status complaints specifically) only after an employer had changed a term or condition of employment, it would have done so expressly. In the Commissioner's submission, the Legislature's intent regarding exceptions to s. 13 is clear on the face of the *Code*. Those exceptions do not preclude a *prima facie* case of discrimination in cases where the terms and conditions of employment remain the same (i.e. where an adverse effect arises from a change in personal circumstances).

A Single Test

46. Neither the test for *prima facie* discrimination affirmed in *Moore*, nor the two-step approach to determining whether human rights legislation has been breached established in *Meoirin*, allows for the addition of a requirement that an employer change a term or condition of employment before the *Code* will apply.

47. The requirement to establish a *prima facie* case is a low threshold and it serves only to shift the evidential burden to the respondent, in this case the employer, to provide an explanation: *United Nurses* at para. 66; *Elk Valley Coal* at para. 106.

48. An interpretation of *prima facie* discrimination requiring an employer to first change a term or condition of employment subtly but nonetheless improperly focuses the analysis on the employer's actions. The complainant's burden at the *prima facie* discrimination stage is to show only that they have experienced an adverse impact in employment and that a protected characteristic was a factor in that adverse impact: *Moore* at para. 33; *Elk Valley Coal* at para. 24; *Schrenk* at para. 86. Concerns respecting an employer's actions are not imported into this stage of the test as doing so shifts the justificatory onus from the employer onto the employee: *United Nurses* at para. 66.

49. In *United Nurses*, a recent decision *per curiam*, the Alberta Court of Appeal addressed the appropriate test for family status discrimination under the identically worded s. 7 of the *Alberta Human Rights Act*, RSA 2000, c A-25.5. The Alberta Court of Appeal considered the test for family status discrimination in employment then applicable in Alberta which included an additional self-accommodation requirement established in *Canada (Attorney General v. Johnstone*, 2014 FCA 110. The Alberta Court of Appeal concluded, at para. 7:

> In our view, the nature of human rights and the rule of law, require one uniform and consistent test for determining *prima facie* discrimination in all cases. That test was laid down by the Supreme Court of Canada in *Moore*. There is no legal justification for the imposition in *Johnstone* of an additional, burdensome element of proof on family status claimants at the *prima facie* discrimination stage. Imposing a more onerous self-accommodation burden in this manner perpetuates rather than ameliorates human rights inequality. Inequality undermines the rule of law: *Fraser v Canada (Attorney General)*, 2020 SCC 28, 450 DLR (4th) 1.
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> [Emphasis added.]

50. The Commissioner respectfully submits that the Alberta Court of Appeal's reasoning represents the correct application of the test for discrimination in employment on the basis of family status. One test (the test enunciated by the Supreme Court of Canada in *Moore*) must be applied to all cases of discrimination in employment, irrespective of the ground of

discrimination claimed.

51. Gibraltar relies heavily on *Campbell River* and *Envirocon* which concern discrimination on the basis of family status in employment with respect to caregiving obligations. Both involve parents who sought accommodation from their employers to address their childcare responsibilities when their employers unilaterally changed a term of their employment.

52. In *Campbell River*, the employee (Ms. Howard) had a school-aged child with severe behavioral problems requiring specific parental and professional attention in the afternoons. Her employer unilaterally changed her hours of work such that her shift would end at 6:00 p.m. as opposed to 3:00 p.m. Ms. Howard objected to this change on the basis that the new schedule would inhibit her ability to care for her child with special needs. Nonetheless, the employer implemented the new schedule.

53. The Court in *Campbell River* was thus presented with circumstances in which an allegation of discrimination stemmed from an employer's decision to change a term or condition of employment. In addressing the scope of family status under the *Code*, the Court properly grounded its analysis on the facts before it.

54. At para. 40 of *Campbell River*, the Court of Appeal concluded that Ms. Howard's son's medical condition constituted "a substantial parental obligation", and that the decision of the employer "to change Ms. Howard's hours of work was a serious interference with her discharge of that obligation." Read in the context of the entire decision, the Court's focus on a change in a term or condition of employment in paragraph 39, clearly relates to the facts that were before it. The Court's focus was properly upon the impact of the employer's decision on Ms. Howard, rather than on the specific form of the act or omission giving rise to the serious interference.

55. A "substantial parental obligation", as articulated in *Campbell River*, may arise after an employee commences their employment. To suggest that those employees should be bereft of the *Code*'s protections simply because their employer did not first change a term or

condition of their employment: is contrary to the language of s. 13; undermines the *Code*'s objectives (most notably of fostering a society free of impediments to full and free participation in economic life (i.e. work) and eliminating persistent patterns of inequality); and, improperly focuses the *prima facie* discrimination analysis on the employer's actions, rather than on impact on the complaint.

56. As should be apparent when basic principles of statutory interpretation are applied, *Campbell River* cannot stand for the proposition that the circumstances addressed in that case – a change to the employee's terms of employment resulting in an adverse impact - apply to family status discrimination *in toto*. In the Commissioner's respectful submission, the Court of Appeal's reasons in *Campbell River* make clear that it was simply speaking to the circumstances before it. The Court was not seeking to limit the application of the *prima facie* test by insisting there must, in all cases, be a change to terms and conditions of employment to attract the protection of s. 13(1). Such a reading is incongruous with the correct interpretation of s. 13; is inconsistent with the *Moore* test for *prima facie* discrimination; and would lead to an absurd result.

57. Consider the result if, for example, Ms. Howard had always worked the shift ending at 6:00 pm and her son's health condition had arisen during the course of her employment. Precisely the same adverse effect would arise as a result of the intersection between her hours of work and their substantial interference with her parental obligation to care for her child. Nonetheless, if Gibraltar's reading of *Campbell River* is accepted, Ms. Howard would not have been capable of establishing *prima facie* discrimination and her complaint would have been dismissed; simply because the interference with Ms. Howard's substantial parental obligation (the conflict between hours of work and care) was not the result of a specific type of action by the employer – namely a change to Ms. Howard's terms and conditions of employment.

58. Gibraltar's interpretation of s. 13 would thus create an absurd result, distinguishing between identical adverse effects based in part on a prohibited ground – one *prima facie* discriminatory, the other shielded from scrutiny.

59. The Commissioner submits that *Envirocon* affirms *Campbell River* only in regards to whether "a serious interference with a substantial parental or other family duty or obligation" was required to establish *prima facie* discrimination. Whether a change in terms and conditions of employment was required was not at issue before the Court of Appeal: *Envirocon* at para. 30. *Envirocon* is therefore of no assistance in the case at bar.

Arbitrariness

60. Finally, the Commissioner submits that Gibraltar's reading of s. 13(1)(b) is arbitrary because: first, there is no connection between the effect and the object of the law; second, there is no principled basis to depart from the well-established test for *prima facie* discrimination solely where family status regarding employment is concerned (and only in regards to family status cases where caregiving obligations are at issue), and; third, it implies that an employee's choice to have children is relevant to the *prima facie* discrimination analysis when decades of jurisprudence say otherwise.

61. Arbitrariness arises, among other places, where there is no connection between the effect and the object of an impugned law. For example, in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, the Court found that the *Criminal Code* provisions requiring abortions to be approved by a therapeutic abortion committee of an accredited or approved hospital were arbitrary because the purpose of the law was to protect women's health: *Bedford v. Canada (Attorney General)*, 2013 SCC 72 at paras. 98-99 ("*Bedford*").

62. So too may an administrative decision be arbitrary when it is contrary to the objectives of the law in question. This was the case in *PHS Community Services Society v. Canada (Attorney General)*, 2011 SCC 44 ("*PHS*"). In *PHS* the Supreme Court of Canada found the decision of Canada's Minister of Health not to extend an exemption from drug possession laws to a safe injection site arbitrary because the purpose of drug possession laws was the protection of health and public safety, and the safe injection site contributed to those objectives: *Bedford* at para. 100.

63. While jurisprudence concerning arbitrariness is most developed in the context of *Charter* challenges, the principles established in these cases apply equally to the case at bar. An interpretation of the legal test for discrimination in employment on the basis of family status cannot stand if it is not connected to, or undermines, the purposes of the *Code*. In the Commissioner's submission, requiring a unilateral change to terms or conditions of employment to establish *prima facie* discrimination is not connected to and undermines, the purposes of the *Code*.

64. In addition to the submissions made regarding the purposes of the *Code* generally, the Commissioner submits that the purpose of eliminating family status discrimination is, in many cases, inextricably linked with achieving substantive equality for women.

> In twenty-first-century Canada, the male breadwinner family has largely vanished along with the idea of the "family wage"; women are almost as likely as men to belong to the paid workforce.[5] Two constants remain, however. Employers continue to demand an "unencumbered worker,"[6] along with the right to organize work without regard to workers' care obligations. And gender roles within families have been slow to change. Care work still needs to be done, and women still bear most of the practical responsibility for doing it. In consequence, women are forced to manage family care without impinging on their work obligations. Their strategies—euphemistically labelled "choices"—often include part-time and precarious forms of work that typically come with lower wages, fewer benefits, fewer promotional opportunities, and minimal or no retirement pensions. The impact on women's economic welfare is compounded by stereotypical assumptions that women do not merit or want more responsible, higher-paying jobs because they will inevitably prioritize family over work. The unequal burden of family care creates and reinforces women's continuing inequality both inside and outside the workplace.
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> *Shilton* at para. 2 [Emphasis added].

65. In considering whether Gibraltar's proposed interpretation of *prima facie* discrimination in family status discrimination regarding employment is arbitrary, the Commissioner submits it is necessary to consider not only the objective of ensuring parents have equal access to employment opportunities, but that mothers do in particular. It would be contrary to the aim of getting to the truth in a given case and fulfilling the objectives of achieving substantive equality to treat Ms. Harvey – and other women - "as if she is simply the sum of various disconnected identities" even when a case is being decided on the basis of "family status" as opposed to "sex", or vice versa: *Campbell v. Vancouver Police Board (No 4)*, 2019 BCHRT 275 at paras 11-12.

66. Requiring a unilateral change to the terms of employment to ground *prima facie* discrimination, will inhibit mothers from fully participating in the workforce. This is contrary to the express goal of human rights legislation: Kanee & Cembrowski at 73. Accordingly, in the Commissioner's submission, there is no connection between Gibraltar's proposed interpretation of s. 13(1)(b) and the objects of the *Code*, making such an approach arbitrary and contrary to the rule of law.

67. The limitation of family status discrimination only to cases where there has been a change to the terms and conditions of employment is further arbitrary because there is no principled basis to depart from the established test for *prima facie* discrimination employed for other grounds enumerated in the *Code*. Such a limitation does not accord with other types of employment discrimination based on other grounds (or the approach to discrimination generally). For example, it would be absurd to suggest that an employee who becomes disabled in a fashion preventing her from working her pre-disability shift, could not benefit from the protection of the *Code* because the employer did not change her hours of work.

68. There are innumerable cases where an employee becomes disabled during the course of their employment. In none that the Commissioner is aware of is there a suggestion that the employee with a disability cannot establish *prima facie* discrimination without first proving that the employer changed the terms of their employment. For example, *Syndicat des employés de l'Hôpital général de Montréal c. Sexton,* 2007 SCC 4 *("McGill University")* is a leading human rights law case concerning primarily the scope of an employer's duty to accommodate to the point of undue hardship.

69. In *McGill University* an employee became disabled during the course of her employment and was not able to work her assigned hours. After several accommodation attempts over a number of years, the employee was off work entirely and the evidence indicated she was unlikely to be able to return in the foreseeable future. The employer accordingly sought to terminate her employment: *McGill University* at paras. 2-4.

70. As the majority of the Supreme Court of Canada wrote in *McGill University* at para. 11:

> The duty to accommodate in the workplace arises when an employer seeks to apply a standard that is prejudicial to an employee on the basis of specific characteristics that are protected by human rights legislation. This can occur in the context of a sick employee's right to be absent from work, as in the case at bar, or of a similarly protected right, such as a woman's right to be absent from work owing to pregnancy.

71. The Court then went on to cite the *bona fide* occupational requirement test set out in *Meiorin* and apply it to the case at bar. There was simply no suggestion in *McGill University* that the employee could not establish *prima facie* discrimination because the employer had not changed her hours. The focus was, rightly, on the effect on the employee of the requirement to attend work when she was disabled from doing so, not on who caused that circumstance. Having met her onus, the burden shifted to the employer to prove that it had met its burden; specifically, that it had accommodated her to the point of undue hardship.

72. In the Commissioner's respectful submission, it would have been absurd and arbitrary for the Court to limit the protections of the *Code* in *McGill University*, or the countless other cases of employees becoming disabled during the course of their employment, by insisting that only in cases where the employer's choice to change a term of employment was at issue (i.e. the employer caused the adverse effect) could the employee discharge their onus. The two-step analysis permitted the employer's standard to be evaluated and its accommodation efforts assessed. Such an approach is equally arbitrary and absurd in the case of family status discrimination regarding employment.

73. Finally, the Supreme Court of Canada has consistently rejected arguments that "choice" is relevant to the *prima facie* discrimination analysis. Notably, choice is often argued expressly, or as here, impliedly, in cases where women's rights are at play. As the majority of the Supreme Court of Canada wrote in *Quebec (Attorney General) v. A.*, 2013 SCC 5 at para. 336:

> Moreover, this Court has repeatedly rejected arguments that choice protects a distinction from a finding of discrimination. In *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, the employer argued that a different amount of compensation for women who took time off from work while pregnant was not discriminatory because "pregnancy is a voluntary state and, like

> other forms of voluntary leave, it should not be compensated" (p. 1236). Dickson C.J. refused to accept that pregnancy was a choice, noting that an emphasis on choice would be "against one of the purposes of anti-discrimination legislation . . . the removal of unfair disadvantages which have been imposed on individuals or groups in society" (p. 1238). In other words, not only was pregnancy not a "true choice", but choice was *irrelevant* to the question of discrimination.
>
> [Emphasis added.]

74. The Commissioner submits that the Alberta Court of Appeal was correct in relying on the above passage to find that, "Similarly, in the case of family status discrimination, when one has a child or children and is employed, not only is childcare not a 'true choice', but choice is *irrelevant* to the question of [*prima facie*] discrimination": *United Nurses* at para. 72 [emphasis in original]. See also Shilton at paras. 37-38.

IV. CONCLUSION

75. Narrowing the scope of s. 13 by inserting "a change" into s.13(1)(b) does not accord with the plain language, context or objectives of the *Code*. There is no principled reason to depart from the well-established and only test for *prima facie* discrimination affirmed in *Moore*, *Elk Valley Coal*, and *Schrenk*. Importing a focus on choice and causation into the *prima facie* discrimination test would be improper and undermine not only the *Code*'s objective of achieving substantive equality but decades of Supreme Court of Canada jurisprudence. Moreover, accepting that "a change" should be read into s. 13(1)(b) would be arbitrary and lead to absurd results. For all of these reasons, the Commissioner submits that the proper legal test for family status discrimination regarding employment is simply the *Moore/Meoirin* test.

All of which is respectfully submitted on behalf of the British Columbia Office of the Human Rights Commissioner.

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