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Elizabeth Shilton

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In this paper, the author argues that by imposing a duty to accommodate on unions in the Renaud case, the Supreme Court of Canada intended primarily to encourage unions to cooperate with employer efforts to accommodate, and did not seek to make unions co-liable for all discrimination embedded in collective agreements. The Court’s decision was ambiguous, however, and subsequent tribunals and courts have distorted its original intent by imposing joint (and sometimes sole) liability on unions for discrimination in situations in which they had no meaningful control over bargaining outcomes or no independent ability to accommodate the claimant, or in which unions’ representative role was not properly considered. Unions have largely avoided Renaud-based liability because, in the decades since that decision, workplace human rights claims have increasingly been dealt with through grievance arbitration (where unions are not vulnerable to co-liability claims) rather than before human rights tribunals. The author sees this as a generally positive development which permits human rights claims to be integrated with collective agreement claims and places primary accountability for workplace discrimination on employers, who are best placed to remedy the discrimination. She acknowledges, however, that dealing with workplace discrimination at arbitration could create conflicts of interest, which may require reconsideration of some aspects of current procedure. She concludes that Renaud has largely done the job the Supreme Court intended, although it has done so by influencing union behaviour in arbitration rather than by making unions directly accountable for compliance with statutory human rights norms. She expresses continuing concern about Renaud’s ambiguities and calls on the Supreme Court to clarify Renaud’s message in light of modern conceptions of the duty to accommodate and the realities of workplace power distribution.

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1. INTRODUCTION

In its 1992 decision in the *Renaud* case,¹ the Supreme Court of Canada drafted a model for implementing the duty to accommodate in Canadian workplaces. Where the workplace is unionized, that model assigns an important role to the union. Responding to a set of facts in which the union unreasonably obstructed employer efforts to accommodate, the Court imposed a legal duty to accommodate on unions as well as employers, and held that unions may share liability with employers for workplace discrimination if they do not fulfill that duty. The rules shaping that union duty — I will call them the *Renaud* Rules — had the highly pragmatic purpose of ensuring that unions would play a constructive role in promoting workplace equality by cooperating with employers to find solutions to discrimination issues. To union arguments that employers, not unions, control the workplace and should bear legal responsibility for their workplace decisions, the Court's response, more aspirational than analytical, was that "[d]iscrimination in the work place is everybody's business."²

Not all observers saw the *Renaud* Rules as a win for the cause of workplace equality. Justice Archie Campbell, dissenting forcefully in the Divisional Court in *Renaud*'s "shadow" companion decision, *Gohm v. Domtar Inc.*,³ saw the co-liability doctrine as a fundamental

1 *Central Okanagan School District No 23 v Renaud*, [1992] 2 SCR 970 [*Renaud* SCC], rev'g (1989), 11 CHRR D/62, 90 CLLC ¶16018 (BCCA), aff'g (1987), 9 CHRR D/4609 (BCSC), rev'g [1987] BCCHRD No 10 (QL) (*sub nom Renaud v Central Okanagan School District No 23*) [*Renaud* HRT].

2 *Ibid* at para 37, quoting the Divisional Court decision in *Office and Professional Employees International Union, Local 267 v Domtar Inc* (1992), 8 OR (3d) 65 (Div Ct) [*Gohm* Div Ct].

3 *Gohm v Domtar Inc (No 4)* (1990), 12 CHRR D/161 (Ont HR Bd Inq) [*Gohm* Bd Inq], aff'd *Gohm* Div Ct, *ibid* (I was counsel for the union in this case). I describe *Gohm* as *Renaud* SCC's "shadow companion" because, although *Gohm* did not proceed to the Supreme Court of Canada, it was cited with approval by the Court in *Renaud* SCC, and its factual matrix clearly influenced the structure of the *Renaud* Rules. Like *Renaud* SCC, *Gohm* revolved around scheduling issues for an employee who was a Seventh Day Adventist. However, unlike *Renaud* SCC, the requested accommodation in *Gohm* did not create any conflict with the collective agreement. Nonetheless, the Board of Inquiry hearing the case found the union co-liable. On judicial review, a majority of the Divisional Court (Campbell J dissenting) embraced the Board of Inquiry decision, invoking a mantra subsequently repeated by the Supreme Court in *Renaud* SCC: "Discrimination in the work place is everybody's business." The Court reasoned that "[t]here can be no hierarchy of responsibility Companies, Unions and persons are all in a primary and equal position in a single line of defence against all types of discrimination" (*Gohm* Div Ct at para 29).

departure from the principle that parties should be liable only for their own (mis)conduct. He characterized the doctrine as “a radical redistribution of the rights and obligations of companies and unions,”⁴ which “imposes on unions a duty with no corresponding right [and] subjects them to liability with no corresponding control.”⁵ Academic commentators echoed that sentiment, rebuking the Court for its failure to consider the practical and legal power dynamics of the unionized workplace, and the salient differences between the roles of the employer and union in workplace rule-making and decision-making.⁶ In a detailed critique of the *Gohm* decision, Michael Lynk and Richard Ellis argued that co-liability rules effectively make unions vicariously liable for employer discrimination.⁷

Renaud’s influence on the evolution of the duty to accommodate in Canada has been pervasive. However, despite fears that the decision would open the floodgates to human rights complaints against unions, case law directly considering the issue of union co-liability is remarkably sparse.⁸ In this paper, I argue that the flood was averted in part because of the fact that in the two decades since the *Renaud* decision, human rights disputes in unionized workplaces have been largely channelled away from human rights tribunals, where unions can be held co-labile, and into grievance arbitration, where they cannot.⁹ An additional important factor, however, is the impact of the *Renaud* Rules

4 *Gohm* Div Ct, *supra* note 2 at para 46.

5 *Ibid*.

6 Michael Lynk & Richard Ellis, “Unions and the Duty to Accommodate” (1993) 1 CLLJ 238; Brian Etherington, “The Human Rights Responsibilities of Unions: Central Okanagan School District No. 23 v. Renaud” (1994) 2 CLLJ 267. For a more positive view, see Katherine Swinton, “Accommodating Equality in the Unionized Workplace” (1995) 33:3 Osgoode Hall LJ 703.

7 Lynk & Ellis, *ibid* at 265.

8 Of the hundreds of hits generated by searching for *Central Okanagan School District No 23 v Renaud* in both CanLII and Quicklaw, very few deal with union co-liability. Most results cite either *Renaud*’s discussion of the scope and content of the employer duty to accommodate, or its holding that individual employees cannot expect “perfect” accommodation. My searches spanned all Canadian jurisdictions from the date the Supreme Court decided *Renaud* to September 8, 2013. While the search included arbitration decisions, this paper focuses primarily on the decisions of statutory human rights tribunals (and reviewing courts), since it is in this statutory forum that unions are directly exposed to human rights liability.

9 In an earlier paper, I discussed the jurisprudential and statutory developments which led to arbitration becoming the forum of choice for human rights claims: see Elizabeth Shilton, “Choice, but No Choice: Adjudicating Human Rights Claims in Unionized Workplaces in Canada” (2012-2013) 38:2 Queen’s LJ 465.

themselves, which have almost certainly made unions more willing to open the arbitral forum for the resolution of human rights disputes.

My argument is laid out as follows. Part 2 discusses the *Renaud* decision and the policy impetus behind the *Renaud* Rules. Part 3 examines how the *Renaud* Rules have been interpreted and applied across Canada, and finds that the Court's mixed messages about the roles and responsibilities of unions have resulted in inconsistent application of the Rules. Part 4 discusses the post-*Renaud* revolution in the enforcement of human rights claims in unionized workplaces, which has shifted adjudication from human rights tribunals to arbitration, and the implications of that shift for unions, who gain a significant measure of immunity from *Renaud* Rules claims by sponsoring human rights grievances at arbitration. Part 5 examines some of the dynamics of this immunity, arguing that it is a logical and positive by-product of the *Renaud* Rules, since the decision to arbitrate can fulfill the union's duty to accommodate in cases that might otherwise have attracted co-liability claims. Part 6 concludes that the *Renaud* Rules have largely done the job that the Supreme Court intended them to do, albeit indirectly by influencing union behaviour rather than directly through enforcement of statutory human rights norms. However, it warns that *Renaud*'s ambiguities may continue to undermine workplace equality, and calls on the Court to clarify *Renaud*'s message in light of the realities of workplace power distribution and modern conceptions of the duty to accommodate.

2. THE *RENAUD* CASE AND THE *RENAUD* RULES

The facts of *Renaud* are familiar to Canadian labour lawyers. Larry Renaud was a unionized school custodian and a Seventh Day Adventist. Employees in his bargaining unit worked a variety of shift schedules, depending on the particular school and job assignment. Renaud's assignment required him to work on Friday afternoons and evenings, which overlapped with his sabbath. His employer canvassed a variety of options for adjusting his schedule to accommodate his religious requirements, and concluded that the practical solution was to assign him to a customized Sunday to Thursday schedule not contemplated by the collective agreement.¹⁰ However, the employer

10 The scheduling language of the collective agreement is not set out in either the tribunal or the court decision.

would not make this assignment without the union’s concurrence, and the union would not agree.¹¹ When Renaud repeatedly refused to work the assigned hours that conflicted with his sabbath observance, the employer dismissed him. He filed human rights complaints against both employer and union.

To provide some context for how Renaud’s complaints were dealt with by the human rights tribunal (HRT)¹² and the courts, it is useful to reflect on the state of Canadian human rights law at the time his complaint arose. Renaud’s dismissal took place on the cusp of important developments in human rights law. Shortly after he was fired but before his case was heard, the Supreme Court of Canada issued its historic decision in the *O’Malley* case.¹³ That decision revolutionized our understanding of workplace equality guarantees, clarifying that human rights codes¹⁴ prohibited not just intentional and direct discrimination, but also unintentional and indirect discrimination. *O’Malley* also affirmed a robust (if somewhat abstract) employer “duty to accommodate” workers who did not conform to conventional workplace norms because of personal characteristics protected by the codes. Coincident with *O’Malley*, the codes themselves were becoming more comprehensive.¹⁵ In British Columbia, where Renaud’s case arose, the prohibition against employment discrimination in the provincial code had recently been broadened to apply not just to employers but to all “persons,” including trade unions.¹⁶ *Renaud* was an important test of the meaning and scope of this broader provision,

11 See *Renaud* HRT, *supra* note 1 at para 52 (“the Union had fought long and hard to have a minimum requirement of work to be performed on Saturday and Sundays, being the traditional sought-after days off for most employees”).

12 To avoid terminological confusion, I have generally used “HRT” throughout this paper to refer to all statutory human rights adjudicators of first instance, regardless of jurisdiction or historical period.

13 *Ontario (Human Rights Commission) v Simpsons-Sears Ltd.*, [1985] 2 SCR 536, 23 DLR (4th) 321 [*O’Malley*].

14 General human rights statutes in Canada have a variety of names. I refer to them generically throughout this paper as “codes.”

15 R Brian Howe & David Johnson, *Restraining Equality: Human Rights Commissions in Canada* (Toronto: University of Toronto Press, 2000) at 12-22.

16 See *Human Rights Act*, SBC 1984, c 22, ss 8-9, as amended by *Human Rights Amendment Act*, SBC 1995, c 42; *Renaud* HRT, *supra* note 1 at paras 27, 63. The B.C. code also included unusually broad language in section 9, expressly prohibiting unions from negotiating discriminatory agreements. The HRT found that the union had violated both sections 8 and 9.

inviting an exploration of the role played by unions in implementing *O'Malley's* expansive and substantive concept of equality.

The HRT that heard Renaud's complaints applied *O'Malley* to conclude that scheduling Renaud to work on his sabbath constituted *prima facie* adverse effect discrimination.¹⁷ It also held that both the employer and union were responsible for that discrimination, since they were joint signatories to the collective agreement that contained the work schedule.¹⁸ To the HRT, it appeared to follow logically that both had a duty to accommodate, and both were found by the HRT to have failed to fulfill that duty — the employer because it chose to dismiss Renaud rather than assign him to a Sunday to Thursday shift,¹⁹ and the union because it failed to offer alternatives to the employer's accommodation proposal.²⁰ Without any further analysis, the HRT apportioned Renaud's damage award equally between employer and union.²¹

On judicial review, the British Columbia courts disagreed with the HRT's core finding that there had been discrimination. They saw the original work schedule as a *bona fide* occupational requirement (BFOR) which, according to the law of the day, provided a complete defence without triggering any duty to accommodate. By the time the case reached the Supreme Court of Canada, however, the law had changed. As a result of the Court's decision in *Central Alberta Dairy Pool*, BFOR exemptions could no longer be called upon in adverse effects cases to avoid a duty to accommodate.²² In *Renaud*, a decision

17 *Renaud* HRT, *supra* note 1 at paras 46-47.

18 *Ibid* at para 38. The HRT reasoned simply that since both employer and union were now governed by the employment discrimination provisions of the code, they were both liable. It did not analyze the dynamics that gave rise to the provisions of the agreement, or the different roles played by the employer and union in the workplace.

19 *Ibid* at paras 57-60.

20 *Ibid* at para 58.

21 *Ibid* at paras 63-64.

22 *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*, [1990] 2 SCR 489, 76 Alta LR (2d) 97. Canadian law continued to be ambivalent about the relationship between BFOR defences and the duty to accommodate until the issue was finally clarified in *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (Meiorin)*, [1999] 3 SCR 3, 176 DLR (4th) 1 [*Meiorin*], which confirmed that in cases of both direct and indirect discrimination, there is a duty to accommodate even in the presence of a BFOR.

penned by Sopinka J., a unanimous Court reinstated the tribunal’s finding of discrimination against both employer and union.

Sopinka J. stated the problem thus: “The issue raised in this appeal is the scope and content of the duty of an employer to accommodate the religious beliefs of employees and whether and to what extent that duty is shared by a trade union.”²³ This framing of the issues provides two important clues to how the Court saw the case. First, it shows that the Court was preoccupied less with broad principles of employment discrimination than with one narrow aspect of those principles: the duty to accommodate. Second, the Court saw the issue, as it applied to the union, as one of *co*-liability — in other words, the extent to which the union should *share* some of the responsibility (and liability) for discrimination that would otherwise fall entirely on the employer. Sopinka J.’s primary focus was on the role played by the union in blocking employer efforts at reasonable accommodation, rather than on union culpability in establishing the work rules which gave rise to adverse effect discrimination. Whether or not the union played an active role in formulating discriminatory workplace rules and practices, it had the power to impede the removal of those rules and practices through its power to hold the employer to the terms of the collective agreement. It was this power that the Court sought to constrict in the service of equality rights, by imposing a duty to accommodate on unions.

Sopinka J. was fully aware, however, that the so-called *duty* to accommodate is a misnomer. Although it is framed in affirmative terms, this “duty” is not free-standing under most Canadian codes.²⁴ In conventional human rights analysis, as Sopinka J. emphasized, the duty to accommodate is a *defence* (or justification) rather than an affirmative obligation. It arises only where a party has been found *prima facie* to have engaged in discrimination. Where *prima facie* discrimination is found, a party can still avoid liability by demonstrating that it has been prepared to accommodate up to the point of undue hardship.²⁵ Accordingly, before a union can be called upon to

23 *Renaud SCC*, *supra* note 1 at para 1.

24 The exceptions are Manitoba and the Yukon: see *Human Rights Code*, CCSM c H175, s 9(1)(d); *Human Rights Act*, RSY 2002, c 116, s 8(1) (limited to disability).

25 *Renaud SCC*, *supra* note 1 at paras 25-26.

take steps to accommodate an employee, it must first be implicated in a *prima facie* violation of the code. Sopinka J. identified two distinct ways in which a union can *prima facie* become implicated in workplace discrimination. The first, which he labelled “co-discrimination,” occurs where the union has “participat[ed] in the formulation of the work rule that has the discriminatory effect,” a situation that “will generally be the case if the rule is a provision of the collective agreement.”²⁶ Second, even where the discriminatory work rule has been unilaterally established and implemented by the employer, a union may be *prima facie* co-liable if it “impedes the reasonable efforts of an employer to accommodate.”²⁷ (I will call this “contributory discrimination,” although Sopinka J. applied no label to it.)

According to Sopinka J., a union can defend itself against liability for either type of *prima facie* discrimination by showing that it has fulfilled its duty to accommodate: i.e. that it has been willing to bend the rules up to the point of undue hardship. In cases of co-discrimination, the union has what Sopinka called an “original duty to accommodate”; it “shares” the same broad duty imposed on the employer.²⁸ In cases of contributory discrimination, however, the union bears only a residual duty to accommodate; the duty is not triggered unless the union’s cooperation is *necessary* to find an accommodation short of undue hardship.²⁹ On the facts of *Renaud*, Sopinka J. found co-discrimination, triggering an “original duty to accommodate.” By refusing to facilitate the employer’s reasonable proposal to place Renaud on a Sunday-to-Thursday shift and failing to propose reasonable alternatives of its own, the union failed in this duty, and was accordingly found co-liable.³⁰

26 *Ibid* at para 36.

27 *Ibid* at para 37.

28 *Ibid* at paras 39, 48.

29 *Ibid* at para 40. Contributory discrimination is very difficult to distinguish from a free-standing affirmative duty to accommodate, since its factual foundation is an unreasonable refusal to accommodate. The Court may have developed this concept to encompass the facts in *Gohm*, which arguably fall into this category, although the Court insisted that *Gohm* too was a case of co-discrimination. I have not found any HRT decisions that explicitly apply the concept of contributory discrimination, although in *Starzynski*, *infra* note 43, the Alberta Court of Appeal found the union guilty of *both* co-discrimination and contributory discrimination (see Part 3 of this paper, below).

30 *Ibid* at paras 48, 50.

The union sought to persuade the Court that it did not *in fact* share equal responsibility with employers for the content and administration of collective agreements, and should therefore not do so *in law*. It argued that employers, not unions, control the workplace and should accordingly bear primary responsibility for discriminatory work rules and for the decision to apply those rules. More specifically, the union argued, unions should be accountable only for the provisions of collective agreements that they had specifically sought at the bargaining table. The Court showed little sympathy for that proposition, and took a formalist stance: “It has to be *assumed* that all provisions are formulated jointly by the parties and that they bear responsibility equally for their effect on employees.”³¹

If this assumption of joint management-union formulation of collective agreement provisions were taken literally, it would be puzzlingly at odds with the conventional Canadian approach to the relationship between employers and unions under collective bargaining statutes; Canadian courts and tribunals have generally rejected a workplace governance model of “equal partnership,” in favour of a “residual management rights” model in which the employer’s (otherwise lawful) exercises of management power are constrained only by what the union has been able to obtain through collective bargaining.³² But I would argue that the assumption is not to be taken literally. Sopinka J. was fully aware of the legal and practical limitations on union power under Canadian labour law. Indeed, the interactive accommodation model he constructed in *Renaud* expressly acknowledged that “the employer, who has charge of the workplace, will be in a better position than the union to formulate accommodations.”³³

31 *Ibid* at para 36 [emphasis added].

32 I acknowledge that this oversimplification would be challenged by many Canadian labour law scholars: see Brian A Langille, “‘Equal Partnership’ in Canadian Labour Law” (1983) 21 Osgoode Hall LJ 496 at 532-536; Paul C Weiler, “The Role of the Labour Arbitrator: Alternative Versions” (1969) 19:1 UTLJ 16; Paul Weiler, “Two Models of Judicial Decision-Making” (1968) 46 Can Bar Rev 406. I maintain, however, that it accurately captures the distribution of workplace power reflected in the management rights clauses of typical Canadian collective agreements, and in the vast majority of arbitration decisions. Certainly the Supreme Court of Canada has never come close to adopting an equal partnership model of collective bargaining (with the arguable exception of *Renaud*, where a more equal model worked against unions).

33 *Renaud* SCC, *supra* note 1 at para 39.

The Court did not intend to make unions share liability for all discrimination embedded in collective agreements. It intended only to engage unions in the accommodation process. *Renaud* involved indirect (i.e. adverse effect) discrimination, and under the legal rules prevailing in the period between *O'Malley* and *Meiorin*, the only consequence of a finding of *prima facie* liability for adverse effects discrimination was that a respondent could be called upon to accommodate those who suffered the adverse effects. The discriminatory rule or practice itself was not in jeopardy, and individual respondents who did accommodate could escape liability.³⁴ The Court could justify a fairly cavalier approach to the question of shared responsibility for the content of collective agreements by the fact that a union could always avoid liability by taking a reasonable approach to an *ex post facto* request for accommodation: e.g. by agreeing not to enforce the rule in the complainant's individual case. The *Renaud* Rules were simply a convenient (and indeed a necessary) legal fiction designed to get to the meat of the matter: the perceived need to make unions more flexible — more “accommodating” — when confronted with employee claims for relief from provisions of collective agreements that had adverse effects on them on human rights grounds.

Unfortunately, the Court's “assumption” that “all provisions are formulated jointly by the parties and that they bear responsibility equally for their effect on employees”³⁵ was framed in fairly categorical terms which discouraged adjudicative post-mortems on negotiations “to determine which party pressed for a provision which turns out to be the cause of a discriminatory result.”³⁶ It is important to note, however, that the Court did not expressly exclude such post-mortems. Logically, an “assumption,” like a “presumption,” is rebuttable in the face of evidence to the contrary.³⁷ An assumption leaves a loophole — narrow, but real — for unions which have genuinely

34 Dianne Pothier, “BCGSEU: Turning a Page in Canadian Human Rights Law” (1999-2001) 11:1 Const Forum Const 19 at 21; Karen Schucher, “Weaving Together the Threads: A New Framework for Achieving Equality in Workplace Standards” (2000) 8 CLELJ 325 at 329-331.

35 *Renaud* SCC, *supra* note 1 at para 36.

36 *Ibid.*

37 Unlike “presumption,” “assumption” is not a legal term of art in this context in Canadian law.

attempted to resist discrimination. Importantly, the Court took note that in *Renaud* it was the *union* rather than the employer which had insisted on adherence to the letter of the scheduling provisions of the agreement. The Court observed that a party’s complicity in a particular provision is “especially” evident³⁸ when that party presses for the enforcement of a provision the other party is reluctant to enforce. I argue that it can be fairly inferred (although admittedly the Court did not spell this out) that an assumption of complicity may not be warranted where the union *resists* enforcement of a term alleged to have discriminatory impact — a point which subsequent courts and tribunals applying the *Renaud* Rules have sometimes overlooked, and to which I will return in Part 5.

Another important aspect of the *Renaud* Rules sometimes overlooked in subsequent cases is the Court’s unequivocal acknowledgment of the representative role of the union. The Court clearly understood that part of the union’s job is to insist that the rights of other employees, including seniority rights, should be taken into account and balanced with the statutory rights of the employee seeking accommodation. In cases of co-discrimination, Sopinka J.’s model assigned to the union an important function as guardian of the interests of other employees: “Any significant interference with the rights of others will ordinarily justify the union in refusing to consent to a measure that will have this effect.”³⁹ In cases of contributory discrimination, Sopinka J. was clear that the union could insist on compliance with the agreement unless it was *necessary* for the union to waive negotiated rights in order to find a reasonable accommodation.⁴⁰ For unions, the Court emphasized that the threshold of “undue hardship” for accommodation related not to cost or business inconvenience, but to “the effect [of the proposed accommodation] on other employees.”⁴¹

In summary, the Court wrote the *Renaud* Rules because it saw a union duty to accommodate as a necessary tool for advancing equality in unionized workplaces. The Court’s objective was *remedial*,

38 *Renaud* SCC, *supra* note 1 at para 36.

39 *Ibid* at para 38.

40 *Ibid* at paras 37-40.

41 *Ibid* at para 38.

not punitive. It was not seeking the “radical redistribution of rights and obligations of companies and unions” feared by Campbell J., but merely to secure union cooperation where it was necessary to effect appropriate accommodation for individual employees. The Court understood that status as a bargaining agent does not give unions equal workplace power with employers. But it did see unions as holders of more workplace power than individual employees. It sought to craft a co-liability regime that would divert some of that union power away from abstract collective concerns like the “integrity of the collective agreement,”⁴² and redirect it to the cause of individual employee workplace human rights. In Part 3, I will explore how this co-liability regime has been both applied and misapplied by Canadian courts and tribunals in subsequent cases.

3. HOW HAVE THE *RENAUD* RULES EVOLVED IN CANADA?

I have argued above that the *Renaud* Rules were designed only to trigger a union duty to accommodate. Formalistically interpreted and applied, however, they have the potential to trap unions into co-liability simply for having signed the collective agreement, in situations when they have no meaningful control over bargaining outcomes and no independent ability to accommodate once the provisions that are later found to be discriminatory are in place. *Starzynski v. Canada Safeway Ltd.*⁴³ illustrates the harsh consequences of a formalistic application of the *Renaud* Rules to a union reluctantly drawn into negotiating a downsizing agreement.

42 *Ibid* at para 30. The Court saw “the integrity of the collective agreement” as a principle that could not be validly defended in the abstract against human rights claims for accommodation, although particular rights set out in the agreement might well be defensible against particular claims for accommodation.

43 *Starzynski v Canada Safeway Ltd* (1999), 35 CHRR D/478, [2000] CLLC ¶230-007 (Alta HR Bd Inq) [*Starzynski* HRT], aff’d 2000 ABQB 897 (*sub nom Canada Safeway Ltd v Alberta Human Rights and Citizenship Commission*), 280 AR 68, aff’d 2003 ABCA 346 (*sub nom United Food and Commercial Workers, Local 401 v Alberta Human Rights and Citizenship Commission*), 330 AR 340 [*Starzynski* CA], leave to appeal to SCC denied (File No 30000, 10 October 2003).

The facts of *Starzynski* are as follows. In the face of severely declining profits, Canada Safeway, a retail grocery chain, sought to reduce its wage costs by bargaining an agreement with the union in which the company would “buy out” employee seniority. Under this scheme, employees who accepted the buy-out could either walk away from their jobs or continue to work at much reduced wage rates. The scheme targeted employees actively on the payroll and excluded employees who had been off work for lengthy periods, including those on disability benefits. The union initially resisted any form of buy-out, but ultimately came to the bargaining table when the employer threatened to shut down the business if no buy-out arrangements were made. The union then sought to extend the buy-out offer to all employees. The employer resisted, so the union took what was on offer in order to avoid a shutdown. After signing, the union continued to press for expansion of the qualifying conditions but had only limited success. Having failed at the bargaining table, the union then pursued a litigation strategy, seeking out the excluded employees, assisting them to prepare a human rights complaint on the ground of disability, and supporting their position on the merits before the tribunal.⁴⁴ The union was added as a party respondent at the insistence of the Alberta Human Rights Commission.

These facts bear almost no resemblance to *Renaud*, where the union not only signed the agreement but also insisted on enforcing it in the face of employer resistance. Nonetheless, the HRT relied on *Renaud* to hold the union *prima facie* co-liable for what it found to be the discriminatory impact of the buy-out agreement, simply on the basis that the union was a joint signatory.⁴⁵ On the issue of accommodation, the HRT found that the employer had made no effort to accommodate, and that the cost of including the disabled employees in the buy-out scheme — some \$280,000, as against employer savings from the scheme, estimated to reach \$75 million — would not have imposed “undue hardship” on the employer.⁴⁶ Again citing *Renaud*, the HRT found that the union also had a duty to accommodate. It was dismissive of the union’s bargaining efforts to obtain

44 *Starzynski* HRT, *ibid* at paras 2-35, 42, 46.

45 *Ibid* at paras 54-56.

46 *Ibid* at paras 62-66.

qualifying conditions that would have avoided the problem, and of its advocacy efforts both in post-agreement discussions and through the human rights complaint.⁴⁷ As the HRT saw it, the union, like the company, should have been prepared to put real money on the table, either through wage or benefit cuts imposed on other employees in the bargaining unit or in the form of its own dues revenues.⁴⁸ The HRT ordered equal apportionment of the costs of accommodation between the union and the employer on the basis that such apportionment was “consistent with the provisions of the Collective Agreement wherein the costs of arbitration are borne equally by these parties as a general practice.”⁴⁹

The HRT’s decision provided no insight into how the union could have forced the company off its fundamental bargaining objectives and produced a different outcome at the bargaining table, without risking a plant shutdown. The decision likewise failed to appreciate the representative role of the union as advocate for the rights of all employees in the bargaining unit, or the real allocation of costs and benefits in the buy-out agreement. This failure was replicated by the Alberta Court of Appeal, which upheld the HRT decision, finding the union co-liable *both* as co-discriminator and contributory discriminator.⁵⁰ The Court resisted the temptation to expressly adopt the strict liability standard espoused by the HRT for union co-discrimination, although it was clearly attracted to that view.⁵¹ On these facts, however, it could find nothing to mitigate the union’s responsibility for signing the discriminatory buy-out agreement. The Court offered the

47 *Ibid* at paras 68-70. The HRT emphasized that none of these measures created hardship. It appeared to interpret *Renaud* as demanding actual hardship before accommodation is sufficient, but in fact *Renaud* is clear that parties are *not* required to accept hardship.

48 *Ibid* at para 75.

49 *Ibid* at para 80.

50 *Starzynski CA*, *supra* note 43 at para 38. The Court did not seem to understand that the Supreme Court intended contributory discrimination to be a distinct trigger for a duty to accommodate where co-discrimination is not present. It would not logically arise in a situation in which the union has an “original duty to accommodate” because it has engaged in co-discrimination.

51 *Ibid* at para 39.

following formalistic response to the union’s argument that it lacked the bargaining power to resist the agreement:

[T]he evidence reveals that the Union and the Employer bargained as equals and the Memorandum of Settlement, including the Buyout, was the product of negotiations between the parties The evidence simply does not establish that the Union was in an unequal bargaining position relative to the Employer.⁵²

On the accommodation issue, the Court (like the HRT) gave the union no credit for its attempts to expand the scope of the buy-out at the bargaining table, for its efforts to persuade the company to extend the agreement to the affected employees after signing the agreement, or for its role in soliciting and supporting the human rights challenge to its validity.⁵³ The Court sympathized with the employer’s indignation at the union’s expectation that the employer should “shoulder all of the financial burden” of accommodation;⁵⁴ like the HRT, the Court saw reasonable accommodation as requiring a monetary contribution from the union.⁵⁵ In the result, the union was forced to pick up half of the tab for the employer’s cost savings, despite its sustained efforts to avoid the discrimination and its subsequent efforts to shelter the employees from the impact.

In *Starzynski*, the union paid half the damages claim. In other cases that take a similar formalistic approach, unions have found themselves bearing the entire cost of the discrimination — surely an unintended consequence of rules designed to determine whether and when unions should accept a share of the employer’s liability. Anomalous results like these have occurred where a parallel complaint against the employer was dismissed as the result of a missed limitation period,⁵⁶ or where a gatekeeper human rights commission chose to proceed against the union but not the employer.⁵⁷ A

52 *Ibid* at para 41.

53 *Ibid* at paras 44-45.

54 *Ibid*.

55 *Ibid* at para 45.

56 *Allen v Communications, Energy and Paperworkers Union of Canada, Local 456*, 2008 BCHRT 277 (available on CanLII).

57 *Oster v International Longshore & Warehouse Union (Marine Section), Local 400* (2001), 212 FTR 111 (FCTD) [*Oster* FCTD], aff’g [2000] CHR D No 7 (QL) (CHRT).

particularly unfortunate example is provided by *Goyette v. Voyageur Colonial*,⁵⁸ where a complaint alleging that a departmental seniority system discriminated on the basis of sex was dismissed against the employer on the ground that although it was a successor employer under the *Canada Labour Code*, that code did not make it accountable for its predecessor's human rights violations.⁵⁹ The companion complaint against the union proceeded, leaving the in-house union solely liable for, and eventually bankrupted by, the damages award.⁶⁰

Some courts outside Alberta have been willing to take account of the power imbalance between employer and union at the bargaining table and in the workplace, in cases where the discrimination is embedded in the design of a collective agreement provision and where *ex post facto* accommodation by the union is therefore not a realistic option. This more contextual approach is evident in certain Quebec decisions. In *Université Laval c Commission des droits de la personne et des droits de la jeunesse*,⁶¹ the Quebec Court of Appeal dealt with a discrimination complaint involving the implementation of a pay equity agreement to which the union was co-signatory. The Court found that the union had opposed the employer's implementation proposal at the bargaining table and therefore rejected a "strict co-liability" approach, refusing to find the union co-liable simply because its efforts to oppose the discrimination had been unsuccessful.⁶²

In other cases as well, Quebec courts have carefully examined the circumstances under which unions have agreed to provisions subsequently found to be discriminatory. Those courts allow unions less flexibility to make political and pragmatic trade-offs under human

58 *Goyette v Voyageur Colonial Ltd*, [1996] CHR D No 14 (QL) [*Goyette*]; *Goyette v Voyageur Colonial Ltée*, [1997] CHR D No 8 (QL), aff'd (1999), 185 DLR (4th) 36 (FCTD) (*sub nom Goyette v Voyageur*).

59 *Goyette*, *ibid* at para 27.

60 The Commission's attempt to hold the umbrella trade union federation, the Confédération des syndicats nationaux, legally responsible for the damages was ultimately defeated on the ground that it had not been a party to the complaint. *Goyette v Voyageur Colonial Ltée*, [2001] CHR D No 37 (QL).

61 2005 QCCA 27, [2005] RJQ 347 [*Laval*].

62 *Ibid* at para 133. While the decision makes extensive reference to the Supreme Court's decision in *Renaud*, it does not discuss the Court's reluctance to conduct post-mortems on negotiations: *ibid* at para 121.

rights norms than under labour codes,⁶³ but have nevertheless recognized and taken account of the reality that the choices unions may face at the bargaining table are Hobson’s choices, forcing unions to accept what is offered by the employer or nothing at all (as in *Starzynski*, where the union’s refusal to accept the employer’s flawed proposal would have left members of the bargaining unit worse off than if the proposal was accepted). This contextual approach to assigning legal responsibility for co-discrimination may allow unions to escape liability altogether, as in the *Université Laval* case, or it may result in unions having to pay a smaller percentage of the damages than the employer.⁶⁴ However, unions do not easily escape co-liability. They must do more than point to the fundamental inequality between employers and unions; they must produce persuasive evidence of genuine efforts to resist discrimination.⁶⁵ This might include evidence of “excessive bargaining constraints,” or evidence that the union made sincere efforts to have discriminatory provisions to which it had previously agreed amended (or, presumably, not enforced).⁶⁶ The test is not easy to meet, as several Quebec unions have discovered in cases ranging from the negotiation of two-tier wage grids designed to implement public sector

63 *Ibid* at paras 114-118. For a discussion of the tensions and intersections in Quebec between a union’s duty of fair representation under the labour code and its obligation under human rights legislation, see Denis Nadeau, “Monopole de représentation syndicale et droits individuels des salariés: l’incontournable défi de la diversité” (2012) 53 C de D 139; Marie-Josée Legault & Philippe Bergeron, “La Promotion des droits de la personne influe-t-elle sur l’évolution des plaintes portant sur le devoir syndical de juste représentation au Québec (1978-2005)?” (2007) 48:1-2 C de D 249.

64 See *Commission des droits de la personne et des droits de la jeunesse c Syndicat des constables spéciaux*, 2010 QCTDP 3 at para 273 (available on CanLII), where the HRT apportioned the damages payable by the union as only 30 percent. The HRT’s decision was quashed by the Court of Appeal, which found no liability on any party: *Québec (Procureur général c Commission des droits de la personne et des droits de la jeunesse*, 2013 QCCA 141 (available on CanLII).

65 *Laval*, *supra* note 61 at paras 121-133; *Syndicat du transport de Montréal-CSN c Commission des droits de la personne et des droits de la jeunesse*, 2010 QCCA 165 at paras 31-40 (available on CanLII) [*Syndicat du transport*].

66 *Syndicat du transport*, *ibid* at paras 35-40. The case provides few guidelines as to the meaning of “excessive bargaining constraints,” but I would argue that the situation in which the union was placed in *Starzynski* would qualify.

cost-reduction targets⁶⁷ to hospital agreements designating separate positions for male and female personal support workers.⁶⁸

The *Starzynski* case and these Quebec cases can be classified as “negotiation cases.” They focus on whether an agreement is inherently discriminatory, and do not logically turn (as *Renaud* did) on issues of post-agreement accommodation in which unions and employers are in a position to make independent decisions about whether to enforce the agreement in particular cases. Other cases applying the *Renaud* Rules do turn on the duty to accommodate in this more classic, pre-*Meiorin* sense. Like the negotiation cases, these cases have produced results that are sometimes difficult to reconcile with the underlying purposes of the *Renaud* Rules and *Renaud*’s commitment to the representative role of the union.

An example is the *Bubb-Clarke* case, in Ontario.⁶⁹ This case dealt with a recurring theme in accommodation cases — the clash between seniority rules and the duty to accommodate. The decision addressed a claim that departmental seniority rules discriminated against a disabled employee who was no longer able to carry out the duties of his position in the employer’s transportation department, where he had accumulated his seniority.⁷⁰ His employer was agreeable to the accommodation measure he sought: a transfer out of the transportation department to the maintenance department, along with credit in maintenance for all of the seniority he had accumulated in transportation. The union objected, and its role was the focus of the dispute before the HRT.⁷¹

67 See *Commission des droits de la personne et des droits de la jeunesse c Laval (Ville de) (Service de sécurité d’incendie)*, 2009 QCTDP 4, [2009] RJQ 853, rev’d on other grounds 2001 QCCA 2041 (*sub nom Association des pompiers de Laval c Commission des droits de la personne et des droits de la jeunesse*), 2011 RJDT 1025, leave to appeal to SCC denied (File No 34586, 21 December 2011).

68 *Commission des droits de la personne et des droits de la jeunesse c Hôpital général juif Sir Mortimer B Davis*, 2007 QCTDP 29 (available on CanLII), rev’d 2010 QCCA 172, leave to appeal to SCC denied (File No 33631, 31 March 2010). The union did not join in the appeal.

69 *Bubb-Clarke v Toronto Transit Commission*, [2002] OHRBID No 6 (QL).

70 *Ibid* at para 1.

71 The Commission and the employer reached a separate settlement, and the complaint did not proceed against the employer. The HRT rejected the union’s motion to add the employer as a party to the complaint against the union: see *Bubb-Clarke v Toronto Transit Commission*, 2001 CanLII 26237 at para 3 (Ont HR Bd Inq).

Under *Renaud*, an accommodation claim of this sort calls for a balancing of the interests of the disabled employee and the interests of other employees with seniority rights, with the union expected to play an active role in identifying the appropriate balance.⁷² In *Bubb-Clarke*, the union initially opposed the transfer, taking the position that to protect the seniority rights of other employees, accommodation for Bubb-Clarke should be sought within the four corners of the collective agreement. After pushing hard but unsuccessfully for a suitable accommodation within his home department, the union ultimately backed off its initial position that the collective agreement must be respected, and it agreed to the transfer. However, it opposed crediting Bubb-Clarke with his full home department seniority in his new department, and agreed to credit him with only five years.⁷³ Bubb-Clarke was not satisfied. With the support of the Commission, he insisted before the HRT that he was entitled to take *all* of his accumulated seniority with him. Since the evidence did not establish that his lack of full seniority had cost him any concrete work opportunities in the maintenance department, his claim appears to have been entirely based on injury to his dignity.⁷⁴

The HRT upheld Bubb-Clarke’s claim. Ignoring *Renaud*’s mandate that unions should actively engage in the search for accommodation, it was harshly critical of the union’s efforts to locate a suitable accommodation for Bubb-Clarke within the confines of the collective agreement. Perversely, it interpreted *Renaud* as requiring respect for the collectively bargained rights of other employees *only* where an accommodation which violates those rights would create undue hardship.⁷⁵ It found departmental seniority rules *per se* discriminatory as applied to employees who required accommodation on grounds of disability, triggering a duty to accommodate on the part of both employer and union. Furthermore, it held that only a complete waiver of those rules would “cure” that discrimination,⁷⁶ with the result that

72 M Kaye Joachim, “Seniority Rights and the Duty to Accommodate” (1998) 24:1 Queen’s LJ 131.

73 *Bubb-Clarke*, *supra* note 69 at para 21.

74 *Ibid* at para 24.

75 *Ibid* at para 58.

76 *Ibid* at paras 39, 42-43. The remedy included a broad order “that the Union and Employer grant to any employee, who is disabled and who transfers out of his earlier position to another because of the disability, full seniority for all time employed by the TTC” (at para 86).

Bubb-Clarke was granted more departmental seniority than he needed for what would have been an effective accommodation. Because the HRT could not see why altering seniority rankings within a department would have *any* significant impact on more senior employees,⁷⁷ it found the union's concerns about employee seniority to be irrelevant to the issue of undue hardship.⁷⁸

Fortunately for unionized employees who rely on seniority rights, indifference to the importance of seniority rankings is not the norm in Canada.⁷⁹ In the earlier *Roosma* case,⁸⁰ a religious accommodation case involving a scheduling conflict not dissimilar to *Renaud*, the HRT took a much more realistic approach than in *Bubb-Clarke* to the union's representative role in the workplace. Accommodating the complainants in *Roosma* would have required giving them day shift assignments for which they did not have enough seniority. The HRT rejected the Human Rights Commission's submission that the union must abandon the seniority principle when faced with a request to accommodate, and found "disruption [to the] collective agreement" to be a relevant factor for the union to consider.⁸¹ Additionally, in

77 *Ibid.* The HRT opined that "the interference with the rights of other Union members, even theoretically, is minor if it exists at all" (at para 58).

78 See Joachim, *supra* note 72 (detailed discussion of the problem of reconciling seniority rules and the duty to accommodate). See also Lynk & Ellis, *supra* note 6; Etherington, "Human Rights Responsibilities," *supra* note 6; Brian Etherington, "Recent Developments in the Duty to Accommodate Disabilities" in Allen Ponak, Jeffrey Sack & Brian Burkett, eds, *Labour Arbitration Yearbook 2012-2013* (Second Series) (Toronto: Lancaster House, 2012) 403 at 417-423.

79 Etherington, "Recent Developments," *ibid* at 422, arguing that "in practice arbitrators have been reluctant to uphold or approve of an accommodation that could have any kind of significant impact on the seniority rights of other employees." He flagged the result in *Bubb-Clarke* as being out of the mainstream. But see *London Transit Commission and Amalgamated Transit Union, Local 741* (2011), 213 LAC (4th) 29 (Lynk). At paras 14 and 40, Arbitrator Lynk described *Bubb-Clarke* as the leading case on the issue of accommodations which cross seniority boundaries, and found that the departmental and classification seniority provisions in the agreement before him established a *prima facie* case of discrimination.

80 *Roosma v Ford Motor Co of Canada (No 4)* (1995), 24 CHRR D/89 (Ont HR Bd Inq) [*Roosma* HRT], *aff'd Ontario (Human Rights Comm) v Ford Motor Co of Canada (No 3)* (2002), 44 CHRR D/182, 163 OAC 252 (Div Ct) (*sub nom Ontario Human Rights Commission, Roosma and Weller v Ford Motor Co and CAW, Local 707*) [*Roosma* Div Ct].

81 *Roosma* HRT, *ibid* at paras 367-368.

contrast to *Bubb-Clarke*, in which the HRT found such behaviour out of line,⁸² the HRT in *Roosma* found the union’s involvement in the accommodation process and its sustained efforts to find solutions which did not violate the agreement entirely consistent with its duty to accommodate.⁸³ On judicial review, the Divisional Court affirmed that “the Union was entitled to have due regard to the fact that the accommodations would have significantly encroached on the seniority and job security rights of other workers and prejudiced their legitimate interests.”⁸⁴ It upheld the HRT’s decision to dismiss the complaint.⁸⁵

Decisions of the British Columbia Human Rights Tribunal (BCHRT) have applied the *Renaud* Rules to accommodation cases in a way that is more similar to *Roosma* than to *Bubb-Clarke*, leaving room for unions to fulfill their representative role in seeking accommodations that take into account the rights of other employees. Like *Renaud*, the case of *Drager v. IAMAW and Agrifoods*,⁸⁶ involved the discharge of an employee for refusing to work on his sabbath. The BCHRT held that applying the seniority-based shift scheduling system in the collective agreement to the complainant was a *prima facie* violation of the code,⁸⁷ and that the employer had failed to accommodate. However, it exonerated the union for refusing to waive employee seniority rights, reasoning that those seniority rights “are highly valued and should attract considerable weight in the balancing of individual and collective rights.”⁸⁸ It held that the union’s willingness to waive provisions of the collective agreement that did not disrupt the rights of other employees, and its active participation in the accommodation process, fulfilled its duty to accommodate.⁸⁹ In the relatively few other cases where the BCHRT has directly addressed

82 *Ibid* at para 366.

83 *Ibid*.

84 *Roosma* Div Ct, *supra* note 80 at para 153.

85 See also *Hamilton Police Assn v Hamilton (Regional Municipality of)* (2005), 200 OAC 7 (Div Ct).

86 *Drager v International Association of Machinists and Aerospace Workers, Automotive Lodge 1857 and Agrifoods (Dairyland Foods Ltd.)* (1994), 20 CHRR D/119 (BCCHR).

87 *Ibid* at para 107.

88 *Ibid* at para 146.

89 *Ibid* at paras 138-141. See also *Sauvé v Coast Mountain Bus Co*, 2006 BCHRT 81 (available on QL).

issues of union accommodation, it has been slow to shift responsibility from employers to unions, demanding a high standard of proof that unions “actually have blocked or impeded the employer’s efforts” to accommodate before co-liability will be found.⁹⁰

In the cases examined to this point, the focus has been on union *action*: on unions agreeing to discriminatory provisions at the bargaining table, or attempting to enforce them. The case law also reflects efforts to apply the *Renaud* Rules to union *inaction*. HRTs have largely resisted these efforts. *Gungor v. Canadian Auto Workers, Local 88*,⁹¹ an Ontario decision, involved a job posting sought by an employee whose medical restrictions would have required accommodation in the position. His application was not considered because the employer took the position that while incumbent employees were entitled to accommodation, at the job posting stage employees must be fully capable of performing the work. Gungor alleged before the Human Rights Tribunal of Ontario (HRTO) that the union’s failure to challenge the employer’s interpretation violated the code.⁹² On the merits, the HRTO rejected Gungor’s argument that the job posting and seniority rules were discriminatory *per se*;⁹³ accordingly, there could be no co-discrimination. Nor was it persuaded that there had been contributory discrimination on the part of the union; since the employer had made no efforts to accommodate, no issue of the union impeding those efforts could logically arise. As the HRTO saw it, failure to challenge employer discrimination is *not* equivalent to participating in that discrimination; the code does not impose an affirmative duty on unions to monitor the workplace for employer

90 *Dow v Summit Logistics and RWU, Local 580*, 2006 BCHRT 158 at para 33 (available on QL). A lower standard will, however, suffice to allow a case to proceed to a hearing on the merits against a union: see, for example, *Taylor v British Columbia (AG) (No 2)*, 2013 BCHRT 173 (available on CanLII).

91 2011 HRTO 1760, 73 CHRR D/208 [*Gungor* 2011].

92 A companion complaint against the employer was settled. The HRTO held that the settlement with the employer did not preclude proceeding against the union: see *Gungor v Canadian Auto Workers, Local 88*, 2010 HRTO 912 at para 2 (available on CanLII) [*Gungor* 2010].

93 *Gungor* 2011, *supra* note 91. The complainant relied on *Bubb-Clarke* for this proposition; the HRTO distinguished *Bubb-Clarke*, perhaps wrongly, as a contributory discrimination case (at paras 32, 39-40).

human rights violations.⁹⁴ It was unequivocal that mere union inaction against employer discrimination does not attract liability under the *Renaud* Rules.⁹⁵

The HRTO extended that reasoning to a challenge to a union’s failure to negotiate in *Koroll v. Automodular Corp.*⁹⁶ The allegation was that the union had run afoul of the *Renaud* Rules by failing to seek (or obtain) a provision in the collective agreement which would have permitted Koroll to demand paid leave instead of unpaid leave as an accommodation where conflicts arose between his work schedule and his religious observance. The HRTO held that a union’s failure to negotiate for a particular benefit in a collective agreement would be grounds for a human rights complaint *only* if that failure itself was based on discriminatory factors, and there was no evidence to that effect in this instance.⁹⁷

The results in *Gungor* and *Koroll* ultimately turn on a distinction which has become fundamental to the Ontario approach to *Renaud* Rules claims: the distinction between the union’s obligation not to discriminate under the human rights code and the union’s duty of fair representation (DFR) under labour legislation. While a union’s failure to support a code-based grievance against an employer may violate the DFR, it does not violate the code unless that failure is based on a prohibited ground of discrimination:

[T]his Tribunal has held that, in the absence of evidence that a union’s action or inaction was based on a discriminatory factor, not only is a union’s failure to file or pursue a grievance not in itself discriminatory, but so is a union’s failure to advocate on the applicant’s behalf, its failure to assist an applicant in addressing discrimination or to contest the employer’s actions, or its participation or involvement in an unsuccessful accommodation process.⁹⁸

94 *Ibid* at paras 47-64. See also *Oster* CHRT, *supra* note 57. At para 62, the HRTO distinguished *Oster* on the basis that it involved a hiring hall, which the HRTO likened to an employment agency.

95 *Ibid* at paras 34-37.

96 2011 HRTO 774 (available on CanLII).

97 *Ibid* at paras 76-79. The bulk of the complaint against the employer was likewise dismissed.

98 *Gungor* 2011, *supra* note 91 at para 47. See also *Baylet v Da Silva*, 2009 HRTO 700 (available on CanLII); *Traversy v Mississauga Professional Firefighters’ Assn, Local 1212*, 2009 HRTO 996 (available on CanLII); *Holowka v Ontario Nurses Assn*, 2010 HRTO 2171 (available on CanLII); *Crosby v United Food and Commercial Workers Canada, Locals 175 & 633*, 2012 HRTO 1158 (available on CanLII).

In other words, DFR complaints belong at the labour relations board, not at the HRT.

Tribunals in other jurisdictions have been equally diligent in preserving the distinction between a union's obligations under the *Renaud* Rules and its DFR. For example, the BCHRT has consistently rejected claims that unions attract *Renaud* Rules liability simply by failing to monitor employer compliance with human rights obligations or failing to support employees who have human rights-based employment disputes.⁹⁹ "Failure to support" claims are permitted to proceed only where the failure is alleged to be based on a prohibited ground of discrimination.¹⁰⁰ Such cases are "exceptional,"¹⁰¹ however, and very few have made it to hearing on the merits in British Columbia.

4. THE ENFORCEMENT REVOLUTION: SHIFTING WORKPLACE HUMAN RIGHTS CLAIMS TO ARBITRATION

The mixed results in these cases reflect the mixed messages sent by the Supreme Court in *Renaud*, which have prompted some courts and tribunals to focus only on *Renaud*'s holding that a union signatory to a collective agreement was *prima facie* co-liable with the employer for the discriminatory impact of that agreement. Those courts and tribunals have ignored the context of that holding; in *Renaud*, union

99 *Graham v School District No 38*, 2005 BCHRT 520 (available on QL); *Waters v Coca-Cola Bottling*, 2005 BCHRT 557 (available on QL); *Dow*, *supra* note 90; *Goddard v Dixon*, 2012 BCSC 161 at paras 194-201 (available on CanLII); *Allen*, *supra* note 56 at paras 44-46; *Cox v Victoria Shipyards*, 2010 BCHRT 223 (available on CanLII); *Futcher v Victoria Shipyards*, 2013 BCHRT 70 (available on CanLII).

100 *Ferris v Office and Technical Employees Union, Local 15*, [1999] BCHRTD No 55 (QL). The case involved the union's role in the treatment of a transsexual employee. The HRT found the standard of union representation so egregiously low as to support the inference that the employee's transgendered status was a factor in the union's conduct (at para 103).

101 *Goddard*, *supra* note 99 at paras 189-192. *Ferris*, *ibid*, and *Nidzgorski v Northpointe Construction Co*, 2011 BCHRT 242 (available on CanLII) are two of the rare "exceptions." In *Nidzgorski* the complainant alleged collusion between the company and the union to orchestrate his dismissal because of his disability: at para 45.

co-liability simply triggered a duty to accommodate, which included respect for collectively bargained rights as well as statutory rights. Because the case law is sparse, however, clear jurisprudential patterns have not emerged. Cases are unlikely to become more abundant in the future. To understand why, it is important to note that *Renaud* was the fruit of an older enforcement model, in which HRTs were the logical forum for adjudicating workplace human rights claims. Now, such disputes typically go to arbitration.

In an earlier paper entitled in part, “Choice, but No Choice,”¹⁰² I discussed two key factors which contributed to this shift from HRTs to arbitration for resolving workplace human rights disputes. The first and foundational factor was the radical expansion of the jurisdiction of labour arbitrators, which was definitively affirmed by the Supreme Court in its 1995 decision in *Weber v. Ontario Hydro*.¹⁰³ *Weber* was widely credited with transforming labour arbitrators from shopfloor contract enforcers into a species of “labour court,”¹⁰⁴ with *exclusive* jurisdiction to enforce not only the parties’ collective agreement, but also tort and constitutional claims that could be said in their “essential nature” to arise from the collective agreement. In 2003, in the *Parry Sound* case,¹⁰⁵ the Supreme Court definitively added statutory human rights claims to the ever-growing list of employment-related claims now within the jurisdiction of the arbitrator.

Parry Sound left open the question of whether arbitral jurisdiction to enforce human rights codes was exclusive, as it is with other *Weber* rights, or merely concurrent with the jurisdiction of HRTs.¹⁰⁶ That question has since been answered by the Supreme Court, albeit less conclusively than I would wish, in a triumvirate

102 Shilton, *supra* note 9 at 469-471.

103 [1995] 2 SCR 929, 125 DLR (4th) 583. See also Michel Picher, “Enhancing Access to Justice: Grievance Arbitration and the U.S. Supreme Court’s Decision in *Pyett*” in Allen Ponak, Jeffrey Sack & Brian Burkett, eds, *Labour Arbitration Yearbook 2012-2013* (Second Series) (Toronto: Lancaster House, 2012) 349 at 354-355 for a discussion of foreshadowings of the *Weber* doctrine in earlier case law.

104 See Richard MacDowell, “Labour Arbitration – The New Labour Court?” (2000) 8 CLELJ 121.

105 *Parry Sound (District) Social Services Administration Board v Ontario Public Service Employees Union, Local 324*, 2003 SCC 42, [2003] 2 SCR 157.

106 *Ibid* at para 15.

of cases of which the keystone is the *Morin* case.¹⁰⁷ In “Choice, but No Choice,”¹⁰⁸ I analyzed the Court’s reasoning in those three cases in some detail, and argued that they established a hybrid model for unionized workers consisting of two distinct categories of workplace human rights disputes: disputes that derive their “essential character” from the collective agreement (for which arbitral jurisdiction is exclusive), and disputes that do not (for which arbitral jurisdiction is merely concurrent with that of HRTs). A dispute must be slotted into its proper category on a case-by-case basis, through an analytical exercise conducted within an intricate matrix linking the governing legislation with the facts of the claim and the language of the collective agreement.¹⁰⁹ I acknowledged, however, that although most Canadian courts and tribunals pay lip service to the hybrid model, they do not apply it, opting in fact for a pure concurrency model in which unionized employees with workplace human rights claims may choose between arbitration or HRT adjudication.¹¹⁰

Despite this judicial preference for concurrency, however, for practical purposes HRTs no longer play a central role in adjudicating

107 *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Quebec (Human Rights Tribunal)*, 2004 SCC 39, [2004] 2 SCR 185 [*Morin*]. The other two cases are *Quebec (AG) v Quebec (Human Rights Tribunal)*, 2004 SCC 40, [2004] 2 SCR 223, and *Canada (House of Commons) v Vaid*, 2005 SCC 30, [2005] 1 SCR 667. *Renaud* was not cited or discussed in *Morin*, although potential union co-liability might logically have been a factor in the Court’s ultimate determination that the complaint did not belong within the exclusive jurisdiction of an arbitrator. While it is always hazardous to draw inferences from the Court’s silence, it may be that the Court did not see *Renaud* as relevant because the case did not raise accommodation issues as such.

108 Shilton, *supra* note 9 at 471-483.

109 *Ibid* at 471-479.

110 Québec appears to be the exception here, since courts and tribunals in that province are careful to distinguish between cases which raise issues of interpretation and application of the collective agreement (where arbitrators have exclusive jurisdiction) and those which challenge the validity of a provision of the agreement (where the HRT has concurrent jurisdiction): see *Montréal (Ville de) c Audigé*, 2013 QCCA 171, [2013] JE 327, leave to appeal to SCC denied (File No 35291, 31 October 2013); *Pearson c Montréal (Ville de)* 2013 QCTDP 9, [2013] JE 749. The *Audigé* case, a complaint against both employer and union, raises the very interesting question of where liability lies when the challenged provision in the collective agreement was ordered by an interest arbitrator. The Court of Appeal decision dealt only with jurisdiction, and the case has not yet been decided on the merits.

the workplace human rights disputes of unionized employees. Arbitration now occupies most of that ground.¹¹¹ Contributing to this outcome is the second factor I discussed in “Choice, but No Choice”: recent legislative and judicial efforts to minimize multiple adjudication in human rights cases. In Ontario and British Columbia, where a significant majority of Canadian human rights disputes are litigated, the first decade of the 21st century saw legislatures eliminate the old “gatekeeper” human rights commissions in favour of direct access to HRTs. In order to control duplicative proceedings, however, the legislatures limited that access by providing HRTs with two statutory tools. The first is a procedural power of deferral: the power to adjourn human rights proceedings if other related proceedings are ongoing.¹¹² The second is a substantive power to summarily dismiss a complaint if, in the words of the Ontario statute, “the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application.”¹¹³

These tools have had significant impact on the conditions under which unionized employees can access HRTs. Where unionized employees file both grievances and human rights complaints, HRTs in both British Columbia and Ontario routinely use their deferral power to adjourn their own proceedings pending the outcome of grievance arbitration.¹¹⁴ Once a dispute has been arbitrated, they may then exercise their summary power of dismissal. While HRTs may

111 I am not aware of any quantitative studies supporting this generalization, but its validity is apparent from any “batch” review of arbitral and human rights decisions over the last decade.

112 *Human Rights Code*, RSO 1990, c H.19, s 45; Human Rights Tribunal of Ontario, *Rules of Procedure*, r 14; *Human Rights Code*, RSBC 1996, c 210, s 25(2); British Columbia Human Rights Tribunal, *Rules of Practice and Procedure*, r 15.

113 Ontario *Human Rights Code*, *ibid*, s 45.1; B.C. *Human Rights Code*, *ibid*, s 27(1)(f).

114 Shilton, *supra* note 9 at 491. For a recent consideration of B.C.’s test for deferral to labour arbitration, see *Meldrum v British Columbia (Ministry of Public Safety and Solicitor General)*, 2012 BCHRT 359 (available on CanLII). For an unsuccessful constitutional challenge to Ontario’s approach to deferral to labour arbitration, see *Melville v Toronto (City of)*, 2012 HRTO 22 (available on CanLII) [*Melville*]. Before HRTs will defer, of course, there must a realistic prospect that the grievance will proceed to arbitration: see, for example, *Dickson v General Motors of Canada Ltd*, 2013 HRTO 1347 (available on CanLII).

once have viewed the summary dismissal power as discretionary,¹¹⁵ the Supreme Court of Canada's 2011 decision in the *Figliola* case¹¹⁶ has made it clear that in determining whether another tribunal has dealt "appropriately" with a dispute, HRTs now have no "quality control" function. HRTs must not entertain claims already aired before another adjudicator (as long as the other adjudicator had jurisdiction to address the human rights issues, and the parties or their privies had the opportunity to know and meet the case).¹¹⁷ Grievance arbitration has repeatedly been found to meet the *Figliola* test.¹¹⁸ The tribunal powers of deferral and summary dismissal therefore operate in tandem to keep the overwhelming majority of human rights complaints which arise in unionized workplaces away from HRTs.¹¹⁹

HRTs have also made it clear that unionized employees may not evade the jurisdiction of those tribunals by "splitting" their cases (i.e. by raising collective agreement arguments before an arbitrator and human rights arguments before an HRT). Where a dispute goes to

115 See *MacRae v Interfor (No 2)*, 2005 BCHRT 462 (available on QL); *Barker v Service Employees International Union, Local 1 Ontario*, 2010 HRTO 1921 (available on CanLII).

116 *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52, [2011] 3 SCR 422 [*Figliola*].

117 *Ibid* at para 37.

118 *Gilinsky v Peel District School Board*, 2011 HRTO 2024 (available on CanLII); *Gomez v Sobeys Milton Retail Support Centre*, 2011 HRTO 2297 (available on CanLII); *Paterno v Salvation Army, Centre of Hope*, 2011 HRTO 2298 (available on CanLII); *Melville*, *supra* note 114; *Gammada v Mount Pleasant Group of Cemeteries*, 2012 HRTO 1097 (available on CanLII); *Howell v National Steel Car*, 2012 HRTO 1589 (available on CanLII); *Randhawa v Vancouver Police Department*, 2012 BCHRT 261 (available on CanLII).

119 The extent to which the *Figliola* principles operate in jurisdictions in which duplication is still governed by common law doctrines such as *res judicata*, issue estoppel, and abuse of process is an open question. Post-*Figliola*, some lower courts have applied *Figliola*-type reasoning to the application of the common law doctrines: see *St. John's (City) v Newfoundland and Labrador (Human Rights Commission)* (2011), 308 Nfld & PEIR 292 (NLSC (TD)); *Canada (Human Rights Commission) v Canada (Canadian Transportation Agency)*, 2011 FCA 332 at paras 22-28, 426 NR 113; *Chiasson v Happy Valley-Goose Bay (Town of)* (2011), 316 Nfld & PEIR 95 at paras 24-25 (NLSC (TD)). However, the Supreme Court's most recent pronouncement on issue estoppel suggests some reluctance to reduce the scope of discretion under the common law doctrines: see *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19, 356 DLR (4th) 595.

arbitration, HRTs have held that any related human rights issues must be raised and argued before the arbitrator, or not at all.¹²⁰ Dismissal is also the likely result where a grievance has been settled with the employee’s consent,¹²¹ and possibly even without it.¹²² Only where no grievance has been filed at all, or where it has been abandoned rather than settled, does there remain a realistic possibility in Ontario or British Columbia that the human rights complaint will be allowed to go forward on its merits before an HRT.¹²³ Unionized employees determined to make their human rights arguments before an HRT

120 *Paterno*, *supra* note 118 at paras 3, 29; *Howell*, *supra* note 118 at paras 29-30. *Howell* was a constitutional challenge to the application of section 45.1 of the Ontario *Human Rights Code* (*supra* note 112) to labour arbitration, largely on the ground that the individual employee is not a party to the arbitration. The challenge was dismissed.

121 *Van Barneveld v IOOF Seniors Homes*, 2009 HRTO 448 (available on CanLII); *Holowka*, *supra* note 98; *Vere v Canadian Auto Workers, Local 4207*, 2011 HRTO 748 (available on CanLII); *Shaw v Pepsico Foods*, 2012 HRTO 1152 (available on CanLII). See also *Dunn v Sault Ste Marie (City of)*, 2008 HRTO 149, [2008] CLLC ¶230-041; *Corbiere v University of Sudbury*, 2012 HRTO 309 (available on CanLII); *Teske v Canadian Union of Public Employees, Local 4685*, 2012 HRTO 1450 (available on CanLII); *De Silva v Fraser Health Authority (No 2)*, 2011 BCHRT 195 (available on CanLII).

122 This issue remains controversial at the HRTO: see *Lumley v Trillium Lakelands District School Board*, 2010 HRTO 1117 (available on CanLII); *Lemieux v Guelph General Hospital*, 2010 HRTO 1267 (available on CanLII); *Bhandari v Ontario (Education)*, 2010 HRTO 1676 (available on CanLII); *Healey v McMaster University*, 2010 HRTO 1874 (available on CanLII); *Barry v St. Michael’s Hospital*, 2011 HRTO 387 (available on CanLII); *Melendez v Toronto (City of)*, 2012 HRTO 403 (available on CanLII). For the BCHRT’s approach to this issue, see cases cited *ibid*.

123 *Paterno v Salvation Army*, 2010 HRTO 10 (available on CanLII); *Yakymova v Slovenian Linden Foundation*, 2012 HRTO 1075 (available on CanLII). See also *Shannon v Renfrew (County of)*, 2010 HRTO 930 (available on CanLII); *Poste v Metro Ontario Inc*, 2012 HRTO 2128 (available on CanLII). But see the recent decision in *Beausoleil v Ontario (Community Safety and Correctional Services)*, 2013 HRTO 1553 (available on CanLII), in which the HRTO appears to have reopened this issue by permitting a claimant to proceed where a related grievance had been disposed of through a mediation-arbitration process on the grounds that there was no evidence that the human rights issues had been placed before the adjudicator, and they were not addressed in his brief reasons. There was no complaint against the union in this case.

therefore have only one clear option: not to file a grievance.¹²⁴ There are obviously compelling reasons why they are unlikely to take that route, since by doing so they effectively abandon any rights they may have under the collective agreement, including broad just cause protection.¹²⁵

These enforcement mechanisms effectively prevent a unionized employee from pursuing both a grievance and a related human rights complaint against the *employer*. However, for the purposes of this paper, the more important question is whether they also impede the pursuit of a complaint against the *union*. The answer is that in most cases, resolution of the underlying employment dispute through the grievance and arbitration procedure will preclude any related human rights claim against the union. If an employee brings joint or parallel human rights complaints against the employer and the union, both complaints will normally be deferred pending arbitration of the dispute.¹²⁶ Once the dispute with the employer has been disposed of through arbitration (or settlement), very few human rights claims against unions have been permitted to proceed to a hearing on the merits in either Ontario and in British Columbia. HRTs have not yet had to determine whether the statutory power to dismiss on the ground that the complaint has been appropriately dealt with elsewhere — the provision considered in *Figliola* — has direct application to an employee complaint against a *union* after the underlying dispute has been arbitrated.¹²⁷ However, HRTs in both provinces have

124 *Paterno, supra* note 118 at para 33; *Howell, supra* note 118 at para 120. Even this option might not be available if *Morin* were strictly applied and the case was found to arise in its essence from the collective agreement, notwithstanding that it also raised human rights issues.

125 This issue is discussed in more detail in Shilton, *supra* note 9 at 494-502.

126 Examples in Ontario include *Cox v Ontario (Community Safety and Correctional Services)*, 2010 HRTO 2081 (available on CanLII); *Melville, supra* note 114 (dismissing a constitutional challenge against the deferral practice); *McCoy v National Automobile, Aerospace, Transportation and General Workers Union of Canada*, 2012 HRTO 2190 (available on CanLII). Examples in B.C. include *Taylor v Port Coquitlam (City of)*, 2005 BCHRT 88 (available on QL); *Candida v Canadian Union of Public Employees, Local 338*, 2005 BCHRT 75 (available on QL) (both uncontested).

127 The HRTO has applied section 45.1 to dismiss a complaint where the underlying dispute with the union had been heard by the Ontario Labour Relations Board as a DFR complaint: *Marc-Ali v Graham*, 2013 HRTO 266 (available on CanLII); *Landry v Scapa Tapes North America*, 2013 HRTO 253 (available on CanLII).

exercised their more general summary dismissal powers¹²⁸ to dismiss claims against unions where the underlying dispute has been arbitrated or settled, on the ground that the claim has not made out a *prima facie* case or has no reasonable prospect of success.¹²⁹ Where an employment dispute has been settled in the grievance procedure or at arbitration, related claims against unions have also been dismissed as an abuse of process, even where the settlement formally releases claims only against the employer.¹³⁰ In Ontario, only a handful of *Renaud* Rules claims have been heard on the merits after the underlying dispute was disposed of in the grievance procedure, and none have succeeded.¹³¹ The picture is similar in British Columbia.¹³²

What these outcomes reflect is the reality that in most cases in which *Renaud* Rules claims might logically be raised, the employee’s substantive dispute is fundamentally with the *employer* and could be resolved through a settlement in the grievance procedure or through an arbitration decision. If the outcome against the employer is

128 The BCHRT has explicit statutory authority to dismiss a complaint on the ground that it has no reasonable prospect of success: *Human Rights Code*, *supra* note 112, s 27(1)(c). The HRTO’s Rule 19(a), newly added in 2010, is to the same effect. Tribunals can dismiss for abuse of process under their general power to control their own proceedings. See, for example, *Statutory Powers Procedure Act*, RSO 1990, c S.22, s 23(1).

129 Examples in Ontario include *Davis v United Food and Commercial Workers, Local 333*, 2013 HRTO 711 (available on CanLII); *Matthews v Chrysler Canada Inc*, 2013 HRTO 225 (available on CanLII); *Nespolon v Flex-n-Gate, Veltri Canada – Howard Division*, 2013 HRTO 626 (available on CanLII); *Chao v Canadian Union of Public Employees*, 2013 HRTO 199 (available on CanLII); *Majhi v Fairmount Royal Hotel*, 2012 HRTO 954 (available on CanLII); *Formosi v Halton Catholic District School Board*, 2012 HRTO 237 (available on CanLII); *Pryse v Canadian Union of Public Employees*, 2012 HRTO 2032 (available on CanLII); *Gammada*, *supra* note 118; *Blais v Canadian Union of Public Employees, Local 3902*, 2011 HRTO 2113 (available on CanLII); *Bradt v Metro*, 2010 HRTO 480 (available on CanLII). Examples in B.C. include *Allen*, *supra* note 56; *Cox*, *supra* note 99; *Graham*, *supra* note 99; *Waters*, *supra* note 99 (no arbitration decisions involved).

130 *Holowka*, *supra* note 98. The HRTO does not always do this; in *Gungor* 2011, *supra* note 91, it refused to dismiss the complaint against the union despite the fact that the union was specifically named in the settlement release, because it found that the union had given no consideration for the settlement.

131 See *Gungor* 2010, *supra* note 92; *Vere*, *supra* note 121.

132 My searches uncovered no B.C. cases that proceeded after arbitration or settlement.

satisfactory, continuing to pursue the union at the HRT is not likely to be useful for the employee. Where an employee does try to continue complaints against the union, it is typically because the employee is unhappy with the outcome of the complaint against the employer; the employee has lost the arbitration or is experiencing “settlement remorse.” Under these circumstances, the residual claim against the union is almost invariably a species of DFR claim, alleging that the union has conducted the arbitration incompetently or has “sold out” in the settlement. As noted above, HRTs routinely dismiss such claims on the ground that DFR issues are governed by the labour code rather than the human rights code, unless the union’s conduct raises human rights issues independent of what was alleged against the employer.¹³³

In light of the HRTs’ current approach to multiple proceedings, arbitration is likely to take on an even more important role in the adjudication of workplace human rights claims than it currently does. Employees will not readily give up their collective agreement claims, nor should they. Those claims can only be put before an arbitrator, and the law is now relatively clear (at least in most jurisdictions) that any related human rights claims must also be raised before that arbitrator if they are to be pursued at all. The shift of human rights claims from HRTs to arbitration raises serious questions about the continued application of the *Renaud* Rules. In Part 5, I explore some of those questions.

5. ARBITRATION AND ACCOMMODATION

The factors discussed in Part 4 explain why channels (or, some would say, floodgates) have opened to the arbitration of human rights disputes for unionized employees, and why channels to statutory adjudication have closed for most practical purposes. But those factors do not fully explain why unions, who control access to arbitration, have been so willing to take on the task of arbitrating statutory human rights claims, a task which brings with it considerable trouble and expense. Part of the answer undoubtedly lies in pressure from within the legal framework governing labour relations. Labour boards have traditionally held that the DFR does not require unions to represent

133 See cases cited *supra* notes 100-101. There are several more recent examples.

employees in pursuing statutory rights claims, since handling such a claim is not within a union’s statutory role as bargaining agent.¹³⁴ Now that *Parry Sound* has clearly recognized that the provisions of human rights codes are implicitly incorporated into collective agreements, a persuasive argument can be made that when a union decides whether to grieve and arbitrate, it must apply the same degree of care and consideration to a human rights claim as to any other claim arising out of a collective agreement. This view appears to be reflected in the numerous HRT decisions that summarily dismiss human rights complaints against unions on the ground that the issues raised in such complaints are really DFR issues and therefore fall within the purview of labour relations boards.¹³⁵

However, I would argue that another important part of the answer flows directly from the *Renaud* Rules themselves. Before *Renaud*, disputes between employers and unions about appropriate accommodations for individual employees were likely to produce *Renaud*-type “standoffs,” with no readily available avenue for resolution. Unions that were pressured to defend “the integrity of the collective agreement” became entrenched in unhelpful positions, and employees who could have been accommodated lost their jobs.

Arbitration offers an ideal safety valve. *Re Greater Niagara General Hospital and SEIU, Local 204 (Winter)*¹³⁶ is an excellent early example of arbitration offering both parties a forum in which to test their preferred approach to accommodation without negative consequences for the employee.¹³⁷ In *Greater Niagara*, the employer chose to accommodate a disabled employee by transferring her from the service bargaining unit to the clerical bargaining unit, with full credit for seniority accumulated in the service unit. The union (which

134 See *Lopez v Canadian Union of Public Employees*, [1989] OLRB Rep (May) 464, 2 CLRBR (2d) 183; *Halton Elementary Unit of the Ontario English Catholic Teachers Association (OECTA) v Ontario English Catholic Teachers Association (OECTA)*, [2013] OLRB Rep (Jan/Feb) 109.

135 See cases cited in notes 98-99. This view is also implicit in labour board decisions such as *Re British Columbia Ferry Services Inc*, BCLRB No B176/2011 (available on QL).

136 (1995), 47 LAC (4th) 366 (Brent).

137 See also *London Transit*, *supra* note 79, in which the parties essentially approached the arbitrator for an advisory opinion to be applied to a number of different cases.

held bargaining rights for both units) did not contest the transfer despite the fact that it did not comply with the job posting requirements, but argued that crediting the accommodated employee with full seniority went too far. In form, the grievance challenged the employer's decision to credit the contested seniority. Interestingly, however, the arbitrator framed the issue as "whether or not the union has breached its acknowledged statutory obligation to accommodate [the disabled employee] to the point of undue hardship if her full accumulated seniority from the separate bargaining unit is not transferred to the clerical unit."¹³⁸ The arbitrator sided with the union, holding that the union's opposition to seniority credit was grounded not in an abstract commitment to the integrity of the collective agreement but in a well-founded concern that this form of accommodation would have substantial negative impact on the job security of other members of the bargaining unit.¹³⁹

Arbitration is clearly well adapted to deal with disputes about the application of the collective agreement and the mechanics of the duty to accommodate.¹⁴⁰ It is less obvious that it is well adapted to cope with "negotiation disputes" (direct attacks on the validity of the collective agreement of the type that the Supreme Court in *Morin* found to fall outside the exclusive jurisdiction of an arbitrator.¹⁴¹ Nevertheless, such classic *Morin* scenarios are also represented in the arbitration case law. *Parry Sound* itself falls into this category,¹⁴²

138 *Supra* note 136 at 374.

139 *Ibid* at 378-379. Compare *Bubb-Clarke*, *supra* note 69, which reached the opposite conclusion on the merits of the seniority issue.

140 Accommodation cases are legion among arbitration decisions. For compilations of such cases, see *BC Rail v Industrial Wood and Allied Woodworkers Union of Canada, Local I-424* (2004), 133 LAC (4th) 57 (Hope); *London Transit*, *supra* note 79; Etherington, "Recent Developments," *supra* note 78.

141 *Supra* note 107 at paras 23-25 (a key factor in the Court's decision to uphold the jurisdiction of the HRT to hear the claim was the fact that it involved a challenge to the fundamental validity of the agreement, rather than merely to its application).

142 See also *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 SCR 161. This grievance challenging the discharge of an employee with a disability turned on a human rights-based argument that the arbitrator was not bound by an automatic termination clause in the collective agreement. The Supreme Court of Canada agreed that the clause could not be strictly applied, since human rights principles require that accommodation be tailored to individual needs.

since success on the merits in that case required the union to challenge the validity of a provision in the agreement prohibiting probationary employees from grieving termination of their employment.¹⁴³ Other high-profile examples arbitrated even before *Parry Sound* include *Ontario Nurses’ Association v. Orillia Soldiers Memorial Hospital*,¹⁴⁴ where the union challenged provisions of the nurses’ central hospital agreement which denied seniority accrual, service accrual and employer-paid benefits to employees on disability leave. The union succeeded in persuading the arbitration board that denial of seniority accrual (but not service accrual or paid benefits) contravened the code. The Court of Appeal concurred in what has now become the template decision on seniority accrual issues in accommodation cases.¹⁴⁵

Whether a union can legitimately challenge the provisions of an agreement to which it has at least formally assented at the bargaining table, or whether it should “share the blame” for any discrimination, has been considered in very few of these cases. Usually, it appears that the union is simply assumed to be playing its proper role by taking up the cause of employees challenging workplace discrimination. In effect, arbitration has come to function as a mechanism — and a very effective one — through which unions can fulfill their duty to accommodate, no matter how that duty may have been triggered.

This understanding of the union’s role is clearly illustrated in *Ontario Public Service Employees Union (Pezuk) v. Ontario (Ministry of Health)*,¹⁴⁶ one of the few cases in which an employer has “pushed back” against a union which chose to challenge discriminatory provisions of the agreement through arbitration. In *Pezuk*, the union grieved that the period during which an employee was away from work on long-term disability benefits should be included in his period of continuous service for the purpose of calculating severance pay, despite a provision in the collective agreement explicitly providing for its exclusion. The employer argued that the union should be estopped from challenging the terms of the agreement, or in the alternative, should be held jointly liable for any breach of the code. The arbitrator

143 *Parry Sound*, *supra* note 105 at paras 3-4, 6-7.

144 [1996] OLAA No 56 (QL) (Mitchnick).

145 *Ontario Nurses’ Association v Orillia Soldiers Memorial Hospital* (1999), 42 OR (3d) 692, 169 DLR (4th) 489 (CA), leave to appeal to SCC denied (File No 27176, 15 March 1999).

146 28 February 1994, File No 2550/92 (Ont GSB) [*Pezuk*].

rejected both submissions. He refused to invoke estoppel, reasoning that its application would be tantamount to allowing the parties to contract out of the code. In addition and more pertinent to the issue discussed here, he saw no factual basis for a finding of co-liability, in light of the union's decision to challenge the discriminatory provisions of the agreement.¹⁴⁷ He pointed out that in *Renaud*, the union had insisted on enforcing the discriminatory provision, whereas in the case before him, the union had acknowledged the discrimination and sought to rectify it through the grievance procedure in the face of the employer's insistence that the agreement be enforced to the letter.¹⁴⁸ In effect, then, although the arbitrator in *Pezuk* did not put it precisely in these terms, he found that by challenging the discriminatory provision through the grievance procedure, the union had fulfilled any duty to accommodate which may have been triggered by its co-discrimination.

The *Renaud* Rules therefore provide strong incentives for unions to take human rights issues to arbitration, where they can rid themselves of discriminatory provisions of collective agreements, test the validity of provisions about which there may be genuine doubt, and resolve complex accommodation issues. Win or lose, arbitrating these disputes permits the union to avoid or at least minimize any "political" consequences of choosing accommodation over seniority or vice versa. At the same time, it allows unions to avoid the risk of having to bear a portion of any damage award if their judgment call does not find favour with the HRT. Channelling human rights disputes into arbitration has clear positive consequences for unions.

Are the consequences equally positive for unionized *employees*? The answer may be more equivocal. Arbitration of human rights issues offers individual employees significant advantages over adjudication before HRTs. In the arbitral forum, employees have their statutory and collective agreement rights claims considered as an integrated whole, but if they take their human rights claims to HRTs they must forego their collective agreement claims altogether, at least in jurisdictions where *Figliola* applies. Furthermore, in arbitration

147 *Ibid* at 7. The arbitrator did not discuss the jurisdictional difficulty of making any finding of co-liability against the union through the arbitration procedure.

148 *Ibid* at 7-8.

the union normally provides employees with professional representation at no personal cost to them, whereas many complainants appear before HRTs without such representation.¹⁴⁹

Weighed against these benefits is the fact that in arbitration, employees lose the opportunity to have their union held co-liable for the wrongs they have suffered. This is unlikely to bring any substantive loss to employees, since arbitral orders directed at the employer can restore their workplace rights and sweep away discriminatory rules or practices, thereby providing the employees with full remedial relief. More problematic may be the loss of control over carriage of the case, including control over the framing of arguments, deciding what evidence will be called, and having a veto in the settlement process. We need not consider here the case of employees whose unions simply refuse to deal with their cases, since those employees retain the right to pursue their claims before an HRT.¹⁵⁰ We cannot, however, ignore the obvious potential for a clash of interests when the union does take up an employee’s claim, since grievance handling under the Canadian labour relations model inevitably requires a union to consider the interests of an individual in the context of the interests of the bargaining unit as a whole. This institutional conflict of interest is exacerbated when a particular workplace dispute raises serious *Renaud* Rules issues, and a union’s decision on whether and how to arbitrate will likely buy it immunity from co-liability, whether it wins or loses the case. In that light, there may be reason to fear that a union’s choices might favour its own interests over those of the individual employee.

One way to provide a buffer against such potential conflicts of interest might be to give individual employees standing to protect

149 The Pinto Report found that well over half of complainants before the HRTO are self-represented: see Andrew Pinto, *Report of the Ontario Human Rights Review 2012* (Toronto: Ontario Ministry of the Attorney General, 2012), online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/human_rights/Pinto_human_rights_report_2012-ENG.pdf> at 44-46. This is likely to be true in British Columbia as well.

150 I argue that a proper application of the *Morin* principles would require HRTs to reject jurisdiction over some of these cases, since they arise in their essential nature from the collective agreement. To date, however, HRTs have not taken that approach: see Shilton, *supra* note 9 at 500, particularly cases cited at note 171 of that article, as well as the discussion in Part 4 of this paper.

their own interests in arbitrations involving statutory rights claims. To date, arbitrators have not favoured that approach. The issue was addressed in *Kawartha Pine Ridge District School Board v. Ontario Secondary School Teachers' Federation District 14*.¹⁵¹ The grievance involved a teacher transfer, which raised human rights issues because the employer had explicitly justified the transfer decision on the basis of behaviours "related to the Grievor's disability."¹⁵² With the union's concurrence, the employee sought to split his case, filing a grievance alleging contraventions of the just cause clause and the involuntary transfer provisions of the collective agreement, and also bringing a separate human rights complaint against the employer alleging discrimination on the ground of disability. When the grievance reached arbitration, the employer took the position that the human rights claim should be folded into the arbitration, arguing that the issues could not logically be segregated. The grievor sought individual standing in the arbitration to insist that the boundary between his complaint and his grievance be respected, and in the alternative, to "carry" his own statutory rights claim if the arbitrator insisted on taking jurisdiction over it. The union supported his desire to split his case, but it opposed his request for individual standing, arguing that it would "undermin[e] the [union's] status as the exclusive bargaining agent and with it the system of collective representation upon which our labour relations process is founded."¹⁵³ The employer took a similar position on individual standing for the grievor. The arbitrator ducked the basic issue of whether the human rights claims should be merged with the grievance, ruling that the question was premature.¹⁵⁴ Regardless of the scope of the grievance, however, the arbitrator had no doubt that the grievor was not entitled to individual standing,¹⁵⁵ as

151 (2010) 197 LAC (4th) 83 (Knopf).

152 *Ibid* at 85.

153 *Ibid* at 89.

154 Arbitrators have taken different views of whether they should deal with human rights issues over the opposition of the union. See Shilton, *supra* note 9 at 497, n 160. In Ontario, this question is likely to be less contentious after *Paterno*, *supra* note 118, where the HRTO ruled that it would treat an arbitration decision as having disposed of any human rights issues embedded in the dispute, whether or not those issues were raised in arbitration. But see *Beausoleil*, *supra* note 123.

155 *Kawartha*, *supra* note 151 at 99.

she put it, the presence of individual rights claims with their primary source in statute does not alter “the fundamental framework of labour relations where a union is recognized as the exclusive representative of employees at arbitration.”¹⁵⁶

Another way of limiting conflict of interest might be to ensure that unions have some “skin in the game” — that is, some exposure to co-liability at arbitration in situations where they might have been found co-liable under the *Renaud* Rules. Such a proposal may sound counterintuitive, since the prospect of co-liability might impel unions to side with the employer against the grievor in situations where their real agenda is to preserve the challenged practice or provision of the collective agreement. But it would at least bring more transparency, and would serve to enhance an employee’s prospects of securing individual standing on the conventional ground that his or her stake in the outcome is unlikely to be protected by any party to the agreement. It would also meet employer concerns in situations where the union genuinely shares responsibility for the alleged discrimination, not just *de jure* (in that it signed the agreement) but also *de facto* (in that it sought or supported the discriminatory provision).

Under current law, there is no clear mechanism for “joining” unions as respondents in arbitration proceedings; there are no rules which contemplate formal “third party” applications by employers, as in civil proceedings.¹⁵⁷ But there are other options. Under most

156 *Ibid* at 96. Other arbitrators have taken the same view: see Arbitrator Lynk’s decision in *Ontario Public Service Employees Union v Ontario (Ministry of Community Safety and Correctional Services) (Therrien Grievance)* (2008), 173 LAC (4th) 193 (Ont GSB). In deciding in *Kawartha*, *supra* note 151, that individual employees have no independent role to play in the arbitration of grievances, Arbitrator Knopf invoked the potential for the HRT to deal with any human rights issues that had not been “appropriately dealt with” through the arbitration proceeding. The value of this safeguard has been significantly undermined by *Figliola*, which conclusively eliminated any supervisory role for HRTs over arbitrators’ decisions: see discussion in Part 4.

157 It is not clear that employers can “third party” unions before HRTs either. The BCHRT has held that it will normally not add a union as a respondent on an employer motion unless the complainant supports that motion. *Churchill v Coast Mountain Bus Co (No 3)*, 2008 BCHRT 272 (available on CanLII). However, an employee who chooses not to add the union as a party in a situation where co-responsibility is found may pay for that choice when it comes time to order remedies. *Ibid* at para 25.

collective agreements, employers may file their own grievances, claiming a form of contribution or indemnity; these employer grievances could then be joined at arbitration with parallel union grievances.¹⁵⁸ There are faint but distinct traces of an emerging arbitral jurisprudence on joint damages awards against employers and unions in cases raising human rights issues. The very few decisions which have considered or made such awards do not explain the legal basis for the arbitrator's jurisdiction,¹⁵⁹ and in some cases they show evidence of being consent awards.¹⁶⁰ However, the very fact that parties may consent suggests that there might be a "market" for such awards. It remains to be seen whether arbitration will prove to be flexible enough to satisfy this market.

In the absence of either an independent role for employees in the arbitration of statutory human rights claims or clear mechanisms to make unions accountable at arbitration for their own human rights breaches, it is important to monitor union conduct to ensure that individual employee interests are protected. Within the current legal framework, the primary mechanism for monitoring union conduct is the duty of fair representation. In a 2002 study of how labour boards were assessing union conduct in cases involving statutory human rights claims, Bernard Adell identified "a subtle but significant rise in the standard of representation that unions must meet in order to

158 This solution was proposed by the arbitrator in *Ontario Public Service Employees Union v Ontario (Ministry of Community Safety and Correctional Services) (Ranger Grievance)* (2006), 156 LAC (4th) 282 (Ont GSB). She denied the employer's request for a joint liability order in the course of arbitrating a union grievance, but suggested that the employer could have filed its own grievance.

159 See *University of Ottawa v Association of Professors of the University of Ottawa* (1999), 85 LAC (4th) 214 (Adams). While Arbitrator George Adams expressly "accept[ed] there can be joint liability between an employer and trade union for negotiating discriminatory collective agreement provisions," he noted that "a finding of joint liability will depend on the facts of the case" (at 227). He found that the union "was not the equivalent of a co-conspirator," and directed the employer to pay the top-up parental benefits which the grievor had been denied by a discriminatory provision in the agreement. See also *Pezuk*, *supra* note 146.

160 See, for example, *Seaspan International Ltd v Canadian Merchant Service Guild*, [2009] CarswellNat 4670 (WL Can); see also *Cami Automotive Inc v Canadian Auto Workers, Local 88* (1994), 45 LAC (4th) 71 (Brandt), in which a claim was pursued against the union without success.

comply with the DFR, especially in discrimination cases.”¹⁶¹ Whether standards have risen far enough, particularly in cases where arbitration has effectively insulated a union from potential co-liability before HRTs, is an open question. But to date, there is little trace of any pattern of DFR complaints alleging union misconduct in handling human rights claims, or any evidence that labour boards have failed to grapple with the potential for conflict of interest raised by such complaints.

In sum, it is not entirely clear whether existing mechanisms are adequate to address these legitimate concerns. Whether human rights issues receive enough priority within collective bargaining systems is a question that cannot be definitively answered without a considerable amount of careful and focused research. The jury is still out on the impact of the shift of human rights claims from HRTs to arbitration and on the role played by the *Renaud* Rules in union decision-making on workplace human rights issues. We need to know more about how privileging the arbitration option for enforcement of workplace equality rights affects union behaviour, both at the bargaining table and in the administration of the collective agreement. We also need to know more about the institutional capacity of arbitration to address individual human rights issues: does the venue in which such claims are adjudicated make a difference to substantive outcomes, and if so, who benefits from that difference? Empirical investigation is needed to help answer these questions.¹⁶²

161 Bernard Adell, “The Union’s Duty of Fair Representation in Discrimination Cases: The New Obligation to be Proactive” in Kevin Whitaker *et al*, eds, *Labour Arbitration Yearbook 2001-2002* (Toronto: Lancaster House, 2002) 263 at 266.

162 The only published study in English in Canada addressing the impact of venue on the resolution of workplace human rights is more than a decade old: Guylaine Vallée, Michel Coutu & Marie-Christine Hébert, “Implementing Equality Rights in the Workplace: An Empirical Study” (2002) 9 CLEJLJ 77. For a more extensive report on that study, see Guylaine Vallée, Michel Coutu & Marie-Christine Hébert, “La norme d’égalité en milieu de travail: étude empirique de la mise en oeuvre de la norme d’égalité par le Tribunal des droits de la personne et les tribunaux d’arbitrage” in G Vallée, M Coutu, JD Gagnon, JM Lapierre & G Rocher, eds, *Le droit à l’égalité et les tribunaux d’arbitrage* (Montreal: Édition Thémis, 2001) 19. Other research studies are currently under way, and some work has been done in the U.S. See Ariana R Levinson, “What the Awards Tell Us About Labor Arbitration of Employment-Discrimination Claims” (2013) 46 U Mich JL Ref 789.

6. CONCLUSION

I have argued that the Supreme Court crafted the *Renaud* Rules in order to remove obstacles to accommodation created by the structure of collective bargaining, and to conscript collective labour relations mechanisms to the cause of protecting statutory human rights for individual employees. On the whole, this purpose appears to have been achieved — but paradoxically, that has been done primarily through mechanisms which evade the direct application of the *Renaud* Rules. The shift from statutory adjudication to arbitration as the venue of choice for resolving human rights issues in unionized workplaces has rendered *Renaud* Rules claims before HRTs largely obsolete. That shift has been facilitated by the statutory and jurisprudential changes that expanded the scope of arbitral jurisdiction and made the HRT complaint system significantly less accessible and attractive to unionized employees. But it has also been facilitated by the *Renaud* Rules themselves, which reward unions for taking on a dominant role in pursuing human right claims through the grievance and arbitration procedure. Understood in this way, we can declare the Rules a success, since they have done the job *Renaud* intended them to do.¹⁶³ If arbitrating human rights complaints gives unions immunity from direct *Renaud* Rules claims, it is an immunity they can claim to have earned by making accommodation “their business.”

This immunity is made all the more valuable to unions because the *Renaud* Rules continue to have a darker side. While I argue that the Court’s purpose in *Renaud* was clear, the language by which it chose to convey that purpose was dangerously ambiguous. This has led to formalistic decisions like *Starzynski* which fail to reflect the real power dynamic in the workplace, impose co-managerial liability on unions in a system in which they clearly do not have co-managerial authority, and penalize them for fulfilling their statutory responsibilities as representatives of the entire bargaining unit. Such decisions do not promote workplace equality. Instead, as Campbell J. predicted in *Gohm*, they have “impose[d] on unions a duty with no corresponding right [and have] subject[ed] them to liability with no

163 See also Etherington, “Recent Developments,” *supra* note 78 at 430-431.

corresponding control,”¹⁶⁴ thereby undermining their ability to play their protective role.

Courts and HRTs in other provinces have grasped the Supreme Court’s objectives better than the Alberta courts in *Starzynski*. However, they continue to struggle with the apparent contradictions between the Court’s blunt “assumption” of joint responsibility for the contents of collective agreements and its much more nuanced acknowledgement of differences between the workplace roles of employers and unions that are relevant to human rights claims. We would benefit from clarification by the Supreme Court on the ambiguities to which *Renaud* has given rise, particularly in light of the post-*Meiorin* approach which demands that accommodation be built into work rules and not merely applied *ex post facto*.

Although we are seeing less and less of the *Renaud* Rules, we are far from finished with them, and the Supreme Court should not hesitate to update them at the first available opportunity.¹⁶⁵ They have and will continue to have vitality as operational directives to workplace parties, playing a pivotal role in how arbitrators assess accommodation issues. While their role has been much attenuated, they will continue to surface where employees decline to use the grievance procedure and choose instead to litigate human rights complaints before HRTs against both employers and unions. They may come into play where the union declines to grieve or has withdrawn or abandoned a grievance previously filed. They will apply in *Morin*-type cases in which arbitration is not a realistic option because both employer and union are prepared to defend the fruits of collective bargaining against attacks from individuals or groups of employees.¹⁶⁶ Cases in these categories have been rare in recent years, and there is no reason to believe they will become less rare; the benefits of arbitration are obvious for both employees and their unions, and HRTs have policed the boundary between union human rights obligations and the DFR

164 *Gohm* Div Ct, *supra* note 2 at para 46.

165 It is unfortunate that the Supreme Court of Canada refused leave to appeal in *Starzynski*, *supra* note 43.

166 See *Espey v London (City of)*, 2008 HRTO 412 (available on CanLII); *Bélanger c Syndicat des agents correctionnels du Canada*, 2010 TCDP 30 (available on CanLII). In both these cases, the complaints were dismissed.

as best they can. Nevertheless, *Renaud* Rules cases have not vanished altogether from the dockets of HRTs.

Meanwhile, for most human rights disputes in unionized workplaces, arbitration offers employees with human rights complaints the best chance for a full resolution of the dispute, in a venue which fairly and efficiently aligns legal responsibility with the distribution of workplace power. Arbitrating human rights disputes reverses the “radical redistribution of the rights and obligations of companies and unions”¹⁶⁷ of which Campbell J. complained in *Gohm*, by making employers more answerable for their employment decisions and restoring unions to their proper role as advocates for employee rights. While labour relations boards, as the guardians of the duty of fair representation, have a job to do in policing the potential for conflict of interest between unions and individual employees in cases that involve *Renaud* Rules issues, the eclipse of the *Renaud* Rules themselves is a net gain for workplace equality.

167 *Gohm* Div Ct, *supra* note 2 at para 46.