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Questions, Questions: Has Weber Had an Impact on Unions' Representational Responsibilities in Workplace Human Rights Disputes?

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CHAPTER EIGHT

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INTRODUCTION

Union representation in Canada is premised on strength in numbers — the collective makes each member stronger. But collective representation, by its nature, can also produce tension between collective and individual rights and interests. A recurring theme of Bernie Adell's scholarship was a concern for how best to balance this tension.[1] He was, in particular, critical of the union's veto over access to labour arbitration,

* My sincere thanks to the organizers and participants in the CLCW's *Weber* Conference for a great few days of conversation, and useful comments on this essay. Thanks in particular to anonymous reviewers for some very helpful nuances, to Renée-Claude Drouin for providing me with a better sense of the legal context in Quebec, to Aaron Bhogossian and Tori-Lee Jenkins for helpful research assistance, and to Elizabeth Shilton for her ongoing support and intellectual engagement.

1 BL Adell, "The Duty of Fair Representation — Effective Protection for Individual Rights in Collective Agreements?" (1970) 25:3 *Relations industrielles/Industrial Relations* 602; Bernard Adell, "Collective Agreements and Individual Rights: A Note on the Duty of Fair Representation" (1986) 11:2 *Queen's Law Journal* 251 [Adell, "Collective Agreements"]; Bernard Adell, "Jurisdictional Overlap Between Arbitration and Other Forums: An Update" (2000) 8 *Canadian Labour and Employment Law Journal* 179 [Adell, "Jurisdictional Overlap"]; Bernard Adell, "The Duty of Fair Representation: 'a form of words . . .'?," (PowerPoint delivered at *Adjudicating Human Rights in the Workplace After the Pinto Report, Where Do We Go Next?*, CLCW Workshop, Queen's University, 10 November 2012)) [unpublished].

suggesting in 1985 that the veto provided unions with too much power over important personal rights.[2] For this reason, he suggested, members ought to have the right to bring forward a grievance to arbitration at their own cost if the union refused to do so. Adell reiterated that concern after the Supreme Court of Canada's 1995 decision in *Weber* which, he thought, served to compound the tensions unions must manage between individual and collective rights.[3]

There has been much commentary on *Weber,* and on the Supreme Court's subsequent 2004 decision in *Parry Sound (District) Welfare Administration Board v Ontario Public Service Employees Union Local 324*.[4] Concerns raised include the impact of these decisions on the institution of labour arbitration, the more general implications of merging legal regimes focused on individual rights into a system premised on collective representation, the potential for diminution of the individual rights of unionized employees, and the costs to unions associated with expanded arbitral jurisdiction.[5] Human rights issues have been at the centre of

2 Adell, "Collective Agreements" at 255–58.

3 Adell, "Jurisdictional Overlap," above note 1 at 224–29; *Weber v Ontario Hydro* [1995] 2 SCR 929 [*Weber*].

4 2003 SCC 42 [*Parry Sound*].

5 Some of these issues are discussed in other chapters in this volume. *See also* Ronald Pink & DC Wallbridge, "The Future of Labour Arbitration" (Paper delivered at The 2010 Administrative, Labour and Employment and Privacy and Access Conference, Ottawa, 26–27 November 2010) (2010) *Canadian Bar Association*; Fay Faraday, "The Expanding Scope of Arbitration: Mainstreaming Human Rights Values and Remedies" (2005) 12 *Canadian Labour and Employment Law Journal* 355; Andrew K Lokan & Maryth Yachnin, "From *Weber* to *Parry Sound:* The Expanded Scope of Arbitration" (2004) 11 *Canadian Labour and Employment Law Journal* 1; John-Paul Alexandrowicz, "Restoring the Role of Grievance Arbitration: A New Approach to *Weber*" (2003) 10 *Canadian Labour and Employment Law Journal* 269; Adell, "Jurisdictional Overlap," above note 1; Richard MacDowell, "Labour Arbitration — The New Labour Court?" (2000) 8 *Canadian Labour and Employment Law Journal* 121; Brian Etherington, "Promises, Promises: Notes on Diversity and Access to Justice" (2000) 26:1 *Queen's Law Journal* 43; Donald Carter, "Looking at *Weber* Five Years Later: Is it Time for a New Approach?" (2000) 8 *Canadian Labour and Employment Law Journal* 231; Michel G Picher, "Defining the Scope of Arbitration: The Impact of *Weber*: An Arbitrator's Perspective" in Kevin Whitaker et al, eds, (1999–2000) 1 *Labour Arbitration Year Book* (Toronto: Lancaster House, 2000) 99; Raymond Brown & Brian Etherington. "*Weber v Ontario Hydro*: A Denial of Access to Justice for the Organized Employee" (1996) 4 *Canadian Labour and Employment Law Journal* 183. For a defence of exclusive arbitral jurisdiction, see Peter Gall, Andrea Zwack and Katie Bayne, "Determining Human Rights Issues in the Unionized Workplace: The

much of both the debate and the jurisprudence concerning expanded arbitral jurisdiction. But one problem that has received less attention is the impact of *Weber* and *Parry Sound* on the nature and extent of unions' human rights *representational* obligations in the administration of the collective bargaining agreement.[6] Examining how unions are handling their representational role in regards to members' human rights requires, for the most part, answering a series of empirical questions — questions that are not easily resolved through a study of caselaw.

This essay attempts to put forward a research agenda for properly evaluating the changing nature of unions' human rights representational obligations since *Weber*. I begin by investigating two legal questions: first, whether unions are held to a more stringent duty of fair representation (DFR) standard in regards to members' discrimination grievances than prior to *Weber* and *Parry Sound*, and second, whether there has been a broadening of the concept of union discrimination under human rights codes, such that unions may be held liable for failing to bring forward discrimination grievances. With the legal picture in place, I then set out a series of empirical questions that need further research to properly assess whether, and to what extent, *Weber* and *Parry Sound* have altered unions' human rights obligations in the administration of collective agreements, and more generally, their approaches to dealing with human rights issues in the workplace. The essay intentionally raises more questions than it answers, with the objective of provoking further research on important issues regarding labour law in action.

Case for Exclusive Jurisdiction" (2005) 12 *Canadian Labour and Employment Law Journal* 381.

6 For one notable exception, see Yves-Christian Ménard, *La discrimination en milieu de travail et le devoir juridique de représentation syndicale: une analyse socio-juridique* (LLM Thesis, Université de Montréal Faculté des études supiérieures, 2011) [unpublished]. *See also* Elizabeth Shilton, " 'Everybody's Business': Human Rights Enforcement and the Union's Duty to Accommodate" (2014) 18:1 *Canadian Labour and Employment Law Journal* 209, which touches upon unions' human rights responsibilities in the negotiation of collective agreements, an issue I do not examine here.

A. THE IMPACT OF *WEBER* AND *PARRY SOUND* ON THE BALANCE BETWEEN INDIVIDUAL AND COLLECTIVE RIGHTS OF UNIONIZED WORKERS

The details of the SCC's decisions in *Weber* and *Parry Sound* are addressed elsewhere in this volume,[7] and will not be repeated here. Much of the early discussion on the significance of *Weber* focused on the practical strains placed on unions and on the labour arbitration process by the expansion of exclusive arbitral jurisdiction.[8] The concerns triggered by *Weber* were magnified after the SCC's decision in *Parry Sound*, which, for a time at least, seemed to significantly expand arbitrators' exclusive jurisdiction as regards statutory employment rights, and in particular human rights claims.[9]

Weber and *Parry Sound* provided clear benefits to employers. Expanded exclusive arbitral jurisdiction reduced the number of fora in which an employer could be sued. And because the principle of exclusivity endows unions with control over access to labour arbitration, the employer could now deal with only one party (the union) to negotiate settlements over a broader swath of legal claims. Moreover, the union would likely exercise a disciplining force in deciding which grievances were brought forward, thereby reducing the number of weak and frivolous claims faced by the employer.

For employees, *Weber* was a mixed bag. On the one hand, a single decision-maker could now resolve most of their work-related claims. Moreover, workers would now have the benefit of union representation and cost-free

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7 *See e.g.*, Brian Etherington, "*Weber,* and Almost Everything After, 20 Years Later: Its Impact on Individual *Charter*, Common Law and Statutory Rights Claims," Chapter 2.

8 See sources above note 5.

9 The outcome in *Parry Sound* itself can be explained relatively uncontroversially as a simple application of s 48(12)(j) of the Ontario *Labour Relations Act, 1995,* SO 1995, c 1, Schedule A [*OLRA*], which grants arbitrators the power "to interpret and apply human rights and other employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement." But the Court went farther to hold that statutory human rights obligations are effectively incorporated as terms of the collective agreement. Combined with the Supreme Court's expansive understanding in *Weber* of what constitutes matters that "in their essential character, arise from the interpretation, application, administration or violation of the collective agreement" (*Weber*, above note 3 at para 57), *Parry Sound* appeared to significantly increase the scope of exclusive arbitral jurisdiction over employment-related statutes that had previously been enforceable in other forums.

(at least to individuals) legal proceedings rather than paying for the costs of legal action and legal representation themselves. They would also have the strength of the collective at their backs. On the other hand, because the union decides which grievances to bring forward to arbitration, unionized employees would now not have carriage over important individual rights claims, with the potential that those claims would not be resolved at all. For commentators such as Adell, this last concern was particularly acute as regards workplace discrimination issues.

The impact of *Weber* on unions differed depending on their size and individual histories. Long before *Weber* and *Parry Sound*, some unions had bargained human rights provisions into their collective agreements. And it was clear since *McLeod v Egan*[10] that employment-related statutes could be applied at arbitration to the interpretation of collective bargaining agreements, a principle further solidified in Ontario by the addition of section 48(12)(j) to the *Labour Relations Act* in 1995.[11] What *Weber* and *Parry Sound* changed was the scope of what would be considered a matter arising out of a collective bargaining agreement, and therefore subject to exclusive arbitral jurisdiction. This mattered, amongst other reasons, because the twin principles of majoritarianism and exclusivity serve to appoint unions as the exclusive representative of the bargaining unit, with control over access to the grievance process and arbitration.[12] To the extent that labour arbitration now appeared to be the exclusive forum for adjudicating an increasing number of members' individual rights claims, scholars wondered whether unions would now face heightened scrutiny under the DFR, and thus face pressure to account more stringently for the ways they determined the appropriate balance between individual and collective interests.[13]

To be clear, tensions between individual and collective interests were not new. Collective representation requires managing disparate and sometimes conflicting interests amongst members. The new question was whether *Weber* would serve to heighten such tensions, particularly

10 (1974), [1975] 1 SCR 517, 46 DLR (3d) 150 [*McLeod*].

11 *OLRA*, above note 9.

12 How this works is well explained in *Judd v Communications, Energy and Paperworkers Union of Canada Local 2000*, [2003] BCLRBD No 63, 2003 CLLC 220-055 [*Judd*].

13 Bernard Adell, "The Union's Duty of Fair Representation in Discrimination Cases: The New Obligation to be Proactive" in Kevin Whitaker et al, eds, (2000–2001) 1 *Labour Arbitration Year Book* (Toronto: Lancaster House, 2002) 263 at 264 [Adell, "The Union's DFR"].

for smaller, less well-funded unions, by directing an increasing number of disputes concerning statutory and common law workplace rights to labour arbitration, access to which was determined by the union. Would the union now face greater scrutiny in regards to its duty of fair representation when, for instance, the only way to accommodate a member with a disability was to disregard the seniority list, thereby displacing the rights of other members? Would it change the way unions dealt with situations where one member accused another of discrimination, and the union had to represent the interests of both? And what would be the cost implications of the expanding zone of member rights to be resolved at labour arbitration? In an article on *Weber* penned in 2000, Adell noted:

> The increasingly frequent links between anti-discrimination rights, which are vested in individuals, and the collective agreement administration process, which privileges collective rights, threaten to put very heavy pressure on the DFR both in theory and in practice. Those pressures are further aggravated by the various lines of jurisprudence stemming from *Weber v. Ontario Hydro* . . . [T]hat jurisprudence is giving unions and the grievance arbitration process an as yet ill-defined range of new responsibilities for enforcing employee rights (and duties) previously enforced in other forums . . . .[14]

Weber addressed itself to the jurisdictional relationship between common law courts and statutory tribunals. The issue of competing jurisdiction between statutory tribunals was addressed a few years later in *Québec (Commission des droits de la personne et des droits de la jeunesse) v Québec (Procureur général)*.[15] There the majority of the Court modified the *Weber* analysis in the context of competing statutory tribunals, holding that it was first necessary to examine the nature of the jurisdictional grant of authority to each tribunal to determine whether one or other held exclusive jurisdiction, or whether their jurisdiction was concurrent. If jurisdiction was concurrent, one should then determine which tribunal was the best fit in the circumstances. The *Morin* majority was attracted to this more flexible approach at least in part from a concern that unions may, in some circumstances, be opposed in interest to some of their members.[16] The decision implied (although it did not decide) that where the union deter-

14 Adell, "Jurisdictional Overlap," above note 1 at 223.

15 2004 SCC 39 [*Morin*].

16 *Ibid* at para 28.

mined that the balance tipped in favour of collective rather than individual interests, a path to adjudication other than labour arbitration should be available to individual employees.

Two years after *Morin,* the Supreme Court of Canada held in *Tranchemontagne v Ontario (Director, Disability Support Program)* that all statutory decision-makers endowed with the power to decide questions of fact and law have the authority to interpret and apply human rights codes.[17] Although *Morin* still formally controls, after *Tranchemontagne 1* most decision-makers no longer engage in the second step of the *Morin* analysis, concluding *a priori* that labour arbitrators and human rights tribunals share concurrent jurisdiction over the human rights claims of unionized employees. Instead, most decision-makers focus on attempting to control multiple proceedings before concurrent tribunals through issue estoppel and *res judicata* principles.[18]

One might have thought that the adoption of a concurrency model would lessen the weight of unions' representational obligations. In theory, the concurrency model allows for a unionized employee either to pursue a grievance through the union to arbitration, or to bring her claim independently to a human rights commission or tribunal. In practice, in Ontario at least, that choice has been realizable since the abolition of the Ontario Human Rights Commission's gatekeeping function, and the institution of direct access to the Human Rights Tribunal in 2006.[19] But as Elizabeth Shilton has convincingly argued, there are strong pressures

17 2006 SCC 14 [*Tranchemontagne 1*].

18 The Supreme Court issued two recent decisions on the application of issue estoppel in the context of competing statutory tribunals; *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52, and *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19. There continues to be uncertainty in the caselaw, and within the Court, about how to balance the principles of fairness and of finality when dealing with overlapping tribunal jurisdiction. For a short but interesting analysis of the relationship between these two decisions, see Paul Daly, "Does *Penner* Overrule *Figliola*? What's the Canadian Law on Issue Estoppel?" (11 April 2013) *Administrative Law Matters* (blog), online, www.administrativelawmatters.com/blog/2013/04/11/does-penner-overrule-figliola-whats-the-canadian-law-on-issue-estoppel. For an analysis of *Figliola*'s labour impact see Shilton, above note 6 at 236–239. For a consideration of *Figliola* from a human rights perspective, *see* Laverne Jacobs, "*Figliola*: Competing Jurisdiction, Shared Governance, and Protecting Human Rights in the Canadian Administrative State," online: (2013) *Social Science Research Network* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2184585.

19 Shilton, above note 6 at 234–35; Etherington, above note 5 at 51–62.

that push unionized employees to arbitration rather than human rights tribunals.[20] In many instances collective bargaining agreements may offer greater rights and protections than human rights codes. For example, the collective agreement may provide stronger accommodation language than the undue hardship standard imbedded in the human rights code. Or the agreement's "just cause" and progressive discipline requirements may impose greater obligations on the employer than provided by the code. Or there may be issues at play in addition to the discrimination claim which would be resolvable at arbitration, but over which a human rights tribunal does not have jurisdiction. For a host of reasons, therefore, it may be more beneficial for a unionized employee to proceed to arbitration than to bring a human rights claim to a tribunal.[21] The benefits of arbitration are attested to by the fact that the number of discrimination grievances decided by arbitrators does not appear to have diminished since *Morin* and *Tranchemontagne 1*.[22] What, then, are the legal principles that animate unions' obligations towards their members' human rights disputes?

B. UNIONS' POST-*WEBER* LEGAL OBLIGATIONS REGARDING WORKPLACE DISCRIMINATION

As already mentioned, it was clear prior to *Weber* that unions had important human rights obligations in the workplace. Since *McLeod*, arbitrators have been required to consider human rights principles in their interpretation of collective bargaining agreements.[23] In Ontario, this power was given explicit statutory support in 1994 with the addition of section 48(12)(j) of the *OLRA*.[24] And in 1992, in *Central Okanagan District School No 23 v Renaud,* the Supreme Court held that in addition to employers, unions

20 Shilton, *ibid* at 235–40.

21 *See* Shilton, *ibid,* for a discussion of a unionized employee's options and their differing consequences under a system of concurrency between labour arbitration and human rights tribunals. Of course employees' decision-making in such instances is not always well informed, and there is always a risk of making forum choices without the benefit of a clear sense of the consequences.

22 Bernie Adell observed at the Inaugural Innis Christie Symposium at Dalhousie University in 2010 that the 4th Series of the LACs should be known as the "human rights series." *See* Pink & Wallbridge, above note 5 at 5.

23 *McLeod*, above note 10.

24 *OLRA,* above note 9.

also owe a duty to accommodate workers in the workplace under human rights legislation.[25] Although it is the employer that is primarily responsible for ensuring a discrimination-free workplace, the Court in *Renaud* held that in limited circumstances a union could also be directly liable for discrimination under human rights codes. This could occur where the union participated with the employer in negotiating discriminatory collective bargaining provisions, or where the union impeded employers' legitimate attempts to accommodate a union member. Finally, through the duty of fair representation, unions were required to represent all members in good faith, and in a non-arbitrary and non-discriminatory manner.[26]

The first question then is whether, since *Weber* and *Parry Sound*, unions have faced greater scrutiny of their duty of fair representation when deciding not to bring forward, or to settle, a human rights grievance. The second is whether there has been greater scope for unions' direct liability under human rights codes in such situations.

1) The Post-*Weber* DFR Standard

At the time *Weber* was decided, the Supreme Court's most current statements on the DFR were contained in two cases decided in 1990, *Gendron v Supply & Services Union of Public Service Alliance of Canada, Local 50057*,[27] and *Centre hospitalier Régina Ltée v Québec (Tribunal du travail)*.[28] Since then, the Court has issued only one decision on the DFR, and the principles have remained constant.[29]

The duty of fair representation acts as a check on the principle of exclusivity. The union's role as the exclusive representative of the employees in the bargaining unit endows it with the discretion to determine which matters to take forward to arbitration, and to determine when and on what terms to settle disputes with the employer. But that discretion must be exercised in good faith, without discrimination or arbitrariness. In *Gendron* the Court explained that "while the union's status as exclusive bargaining agent operates to counteract the economic power of the employer, and therefore works to the benefit of those represented, it was

25 [1992] 2 SCR 970, 95 DLR (4th) 577 [*Renaud*].
26 *OLRA,* above note 9, s 74.
27 [1990] 1 SCR 1298, 21 ACWS (3d) 289 [*Gendron*]
28 [1990] 1 SCR 1330, 69 DLR (4th) 609 [*Centre Hospitalier*].
29 *Noël v Société d'énergie de la Baie James*, 2001 SCC 39 [*Noel*].

nevertheless necessary to ensure that unions wielded their power fairly."[30] The DFR is therefore a protective legal mechanism afforded to individual members to hold unions accountable for the ways in which they determine the needs of the collective, and when to pursue matters on behalf of individual members.

Bad faith arises where there is hostility or animus towards the employee.[31] Arbitrariness arises where unions' decisions are not based on a thorough study of the facts and the content of the agreement, where the significance of the grievance and of the consequence for the employee are not taken into consideration, and/or where serious negligence mars the decision-making process.[32] Discrimination is defined as differential treatment without a legitimate labour relations purpose; for the purposes of the DFR, discrimination therefore encompasses both grounds prohibited by human rights statutes and other types of non-justifiable differential treatment.[33] The DFR, however, does not impose a standard of perfection, or even of reasonableness. The Boards and the courts acknowledge that when they are balancing the interests of many, unions cannot function with constant scrutiny over every decision. They have the right to be wrong and to make mistakes, so long as their decisions are reasoned, not arbitrary, in bad faith or discriminatory.[34]

The DFR principles have remained relatively unchanged since *Rayonier*, and the SCC's approval of the *Rayonier* principles in *Gagnon* in 1984.[35] Nonetheless, in 2001 Adell identified some decisions suggesting that labour boards had begun to assess the DFR standard more stringently in regards to unions' decisions not to bring forward discrimination grievances. He suggested that there was an increasing jurisprudential move

30 *Gendron*, above note 27 at para 28.

31 *Rayonier Canada (BC) Ltd v International Woodworkers of America, Local 1-217,* [1975] BCLRBD no 42, [1975] 2 Can LRBR 196 at paras 15–17 [*Rayonier*].

32 *Judd,* above note 12 at paras 58–70.

33 *Rayonier*, above note 31 at para 17.

34 *Ibid* at para 24. In *Chrysler Canada Ltd*, [1999] OLRB Rep July/August 757, [1999] OLRD No 2454 [*Switzer Grievance*] the Ontario Labour Relations Board, discussing the DFR standard, stated, "So long as it acts honestly, objectively and gives due consideration to matters which fall within the ambit of its responsibility as exclusive bargaining agent, a union will not be held to account if it makes a mistake or a simple error in judgment. A union has a sort of limited 'right to be wrong'." *Ibid* at para 21.

35 *Canadian Merchant Service Guild v Gagnon*, [1984] 1 SCR 509, 9 DLR (4th) 641.

towards requiring unions to be more proactive in their representation when a member raised a human rights issue in the workplace.[36]

In a number of DFR proceedings in the late 1990s, labour boards suggested that unions may have a duty to be more proactive in their representation of members with psychological disabilities. The first such case, as Adell noted, was *H(K) v Communications, Energy and Paperworkers Union, Local 1-S,*[37] a decision issued by the Saskatchewan Labour Relations Board in 1997. There a grievor was subject to escalating discipline for a series of incidents that were the product of a depression from which he suffered. There were serious disagreements between his physician and that of the employer, which led the employer to request an independent third examination. The Board noted that while there was no provision in the collective bargaining agreement requiring a third party examination in this type of situation, the union had nevertheless agreed to the employer's request and pushed the grievor to submit despite his doctor's concerns. The Board also found problematic the union's failure to challenge the appropriateness of a progressive discipline framework for dealing with the grievor's situation. The Board ultimately concluded that while the union's approach might have been acceptable in general, by not taking into account the specific circumstances of the grievor's disability the union discriminated against him in violation of its duty of fair representation.

The Board's concern in *H(K)* was that the union failed to recognize the effects of the psychological disability on the grievor, and the disability's relationship both to the alleged misconduct, and to the grievor's interactions with the union or employer. In other words, the union's obligation to be more proactive in its representation arose because of the nature of the grievor's illness, and not because his dispute with the employer involved a discrimination claim or other "critical job interest." However, other cases have applied a duty to be proactive in cases simply on the basis that the dispute involved a disability.[38] Most notably, in 2004 in *Bingley v Teamsters, Local 91*,[39] the Canadian Industrial Relations Board (CIRB) imposed an obligation on the union to be proactive in a case involving a courier who suffered from a form of skin cancer, and who sought a reduction in the hours of her shift as a temporary accommodation to minimize sun

36 Adell, "The Union's DFR," above note 13.

37 [1997] Sask LRBR 476, 98 CCLC 220-020 [*H(K)*].

38 *Haggith v Canadian Union of Public Employees, Local 401,* [2001] BCLRBD No 273, [2001] LVI 3212-6 [*Haggith*].

39 [2004] CIRB No 291, [2004] CIRBD No 32 [*Bingley*].

exposure. When she was denied the accommodation, her union filed a grievance that was ultimately resolved prior to arbitration. Bingley thereafter sought to bring a second grievance to secure back pay for wages lost during the period without accommodation. The union refused to bring forward the second grievance, and she brought a DFR claim against the union.

The CIRB began its analysis by noting that the duty of fair representation and the human rights duty to accommodate are related but distinct duties. It then examined a number of cases, including *H(K)*, which suggested that where a DFR complaint arises from a union's failure to bring forward an accommodation grievance, a more searching analysis of the union's decision-making is appropriate:

> Due to the sensitive and important issues associated with the accommodation of disabled workers in the workplace, labour boards also look to see whether unions have given disabled employees' grievances greater scrutiny. The cases generally concur that the usual procedure applied to other members of the bargaining unit may be insufficient in representing a grievor with a disability, mainly because the member's situation will require a different approach.[40]

The union must not, therefore handle a disability grievance in the "ordinary" manner. "[I]t must be proactive and more attentive in its approach."[41] The CIRB effectively assessed the union's actions and decisions on a standard of reasonableness, a standard labour boards have assiduously avoided in applying the DFR more generally.[42] So long as the union was "reasonably careful and reasonably assertive," the Board stated, it would not "worry about whether [its] decision not to pursue a grievance is correct on the language of the collective agreement, or even on the language of the applicable human rights statute."[43] The CIRB then went on to list a number of criteria to consider when assessing the DFR in disability discrimination cases: (a) whether the union's intervention was reasonable where the employer failed to implement appropriate accommodation measures; (b) whether the quality of the process that allowed the union to come to its conclusion was reasonable; (c) whether the union went beyond its "usual" procedures and applied an extra measure of

40 *Ibid* at para 64.

41 *Ibid* at para 74.

42 *Rayonnier,* above note 31.

43 *Bingley*, above note 39 at para 83.

care in representing the employee; and (d) whether the union applied an extra measure of assertiveness in dealing with the employer. These criteria seem to combine concern that grievors with both physical and psychological disabilities might suffer specific difficulties in undertaking the grievance process itself, and concern about the serious nature of discrimination-related claims. Applying this approach, the CIRB concluded that the union had not been sufficiently proactive or assertive. Accordingly, it had discriminated against Bingley and thus violated its duty of fair representation. The CIRB ordered the union to pay the employee's costs. It also ordered the parties to attempt to settle the matter, remaining seized if no settlement was reached.

In general, the CIRB attempted to preserve the distinction between the DFR (over which it has jurisdiction) and the union's duty to accommodate (over which it does not). However, in discussing the principles applicable to the duty to accommodate, it arguably expanded on the principles enunciated by the Supreme Court of Canada in *Renaud* by suggesting that unions could be directly liable simply for failing to bring forward a discrimination grievance. As previously noted, the Court in *Renaud* identified two scenarios in which a union could be liable for discrimination under human rights codes: where the union has agreed to a discriminatory practice or where it unreasonably impedes employer accommodation. As the Court explained, the "union's responsibility is engaged when it causes or takes part in the work policy that is the source of the discriminatory act against the employee, such as a provision contained in the collective agreement."[44] In *Bingley*, however, the Board appeared to contemplate a third scenario in which unions may be liable: "The union's responsibility may also be engaged when it does not address the discrimination even though it did not cause or take part in the discriminatory work policy. . . . A union may be held responsible for the discriminatory effects of an employment policy decision by not seeking to put an end to the discrimination."[45] This observation was clearly obiter in *Bingley*, and to date, does not appear to have been embraced either federally or in any province; indeed, as discussed below, it has been specifically disavowed in Ontario.[46]

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44 *Renaud*, above note 25.

45 *Bingley,* above note 39 at para 59, 61.

46 See the discussion of *Gungor v Canadian Auto Workers Local 88*, 2011 HRTO 1760 (CanLII) [*Gungor*], below.

Bingley has been discussed in a number of DFR cases since it was issued, but only rarely applied.[47] The principles enunciated in *Bingley* have received the most thorough treatment in a 2010 decision called *Schwartzmann v Manitoba Government and General Employees' Union*.[48] In *Schwartzmann,* the Manitoba Labour Board expressed approval of the principles set out in *Bingley*, and went on to refine them. It linked human rights issues with the existing DFR jurisprudence regarding "critical job interests," and added discrimination disputes to the existing categories of issues, such as terminations, which deserve special attention because of their particular significance to employee interests: "[i]n the circumstance of a disabled employee alleging a violation of statutory anti-discrimination rights, the employment interests are serious and any associated grievance may have enormous consequences for the employee."[49] Because human rights issues are critical job interests, the Board held, unions need to take a more proactive role in assisting employees to understand their rights and responsibilities, and in obtaining the necessary medical reports, particularly where their disability makes doing so more difficult.[50] On the facts before it, however, the Board found that the union had met this more exacting standard, and thus lived up to its duty of fair representation.

Drawing upon the Supreme Court of Canada's decision in *Parry Sound,* the Commission des Relations du Travail of Quebec has also held that unions must undertake a more proactive approach in assisting members with human rights issues in the workplace.[51] In *Chuuon c Association des*

47 *Oliver and Nape, Re,* [2012] LRBD No 10; *Schwartzman v Manitoba Government and General Employees' Union,* [2010] MLBD No 49, 190 CLRBR (2d) 184 [*Schwartzman*]; *Gough v United Steelworkers of America, Local 1976,* 2010 CIRB 534, [2010] CIRBD No 39; *Pepper v Teamsters, Local 879,* 2009 CIRB 453, [2010] CIRBD No 22; *Jakutavicius v Public Service Alliance of Canada*, 2005 PSLRB 70; *Mallet v Canadian Brotherhood of Railway, Transport and General Workers*, 2014 CIRB 730, 259 CLRBR (2d) 257 [*Mallet*]; *Phillips & Temro Co (Re),* [2013] MLBD No 31, 235 CLRBR (2d) 195 [*Phillips*].

48 *Schwartzman*, *ibid*.

49 *Ibid* at para 117.

50 *Ibid* at para 119. *See also Gendron,* above note 27, for a discussion of the role of critical job interests in assessing the union's DFR; and *Banks v Canadian Union of Public Employees, Local 4828*, [2013] SLRBD No 20, where the employee unsuccessfully argued that harassment (not based on a prohibited ground) constitutes a critical interest.

51 Nancy Martel & Pierre E Moreau, *Le devoir de juste représentation* (Montréal: LexisNexis Canada, 2009) at 87–88. On January 1, 2016, the Commission des relations du travail of Quebec was renamed the Tribunal administratif du travail.

employés du Groupe Holiday Inc the Commission held that when a grievance concerns a members' discrimination claim, the union is obliged to intervene, to be proactive, to deploy additional efforts and to be particularly sensitive in the manner of representation.[52]

Ontario, however, has not experimented with a heightened DFR standard in regards to human rights claims. As Adell noted in 2001, the Ontario Labour Relations Board issued two decisions around the same time as *H(K)* suggesting that unions had a right to be wrong in regards to discrimination grievances, just as with any other grievance. In *Gen-Auto Shippers* the Board held that the union did not violate the DFR when it refused to grieve the application of a rule that placed workers at the bottom of a seniority list when they temporarily moved job classifications. The employee in this case had moved to another classification because of an injury that interfered with his ability to perform the duties of his assigned classification. The Board found that the union was justified in deciding in favour of the interests of the collective that benefited from the rule, because it was not plainly obvious that the rule violated the *Human Rights Code*.[53] The Board applied the same reasoning in the same year in *Thunder Bay Hydro*, in which it upheld a union's decision not to challenge a "last chance" agreement on human rights grounds, again because it was not clear on its face that the agreement violated the code.[54] The issue of whether or not there is a higher DFR standard in discrimination cases has not received significant treatment in Ontario since the late 1990s.[55]

There is therefore some general support for the idea that unions must be particularly proactive in dealing with members' disability-related grievances. Manitoba and Quebec appear to recognize such an obligation,

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52 2005 QCCRT 115 at para 46. *See also Maltais c Section locale 22 du syndicat canadien des communications, de l'énergie et du papier (SCEP)*, 2006 QCCRT 316; *Syndicat des fonctionnaires municipaux de Montréal (SCFP) c Commission des relations du travail,* 2009 QCCS 4456.

53 *Mason v Gen-Auto Shippers &Teamsters, Local 938*, [1999] OLRB 242, [1999] OLRD No 664 [*Mason*].

54 *Creed v International Brotherhood of Electrical Workers, Local 339*, [1999] OLRD No 3422 [*Creed*].

55 Both *Mason* and *Creed* were recently cited in *Sysco Food Services of Toronto*, [2016] OLRD No 465. However, in that case the OLRB concluded that even if a duty to be proactive applied, the union had met the higher standard applicable in termination scenarios of providing a "persuasive account" of its reasoning, based on the well-founded nature of the legal opinion and the union's careful review of the merits of the case.

and *Bingley* has received some positive treatment elsewhere,[56] but Ontario has not followed suit. Outside of Quebec, the duty to be proactive, where it is accepted, is recognized only in disability cases, although some of its analysis is arguably applicable to other grounds of discrimination. At a general level, then, a higher standard of investigation may be required in regards to disability discrimination, but no overall change has otherwise occurred in the DFR caselaw since *Weber* and *Parry Sound* in the standards applied to union handling of human rights issues.

2) Human Rights Claims against Unions before Human Rights Tribunals

The abolition of "gatekeeper" human rights commissions in a number of provinces since the early 2000s, and the adoption of direct access models, has opened a wider door to claims made by employees against unions before human rights tribunals (HRTs).[57] In theory, claims of union discrimination could have proceeded through the human rights system prior to the adoption of direct access models. In practice, however, Commissions typically deferred or dismissed applications from unionized workers, such that very few claims of union discrimination reached human rights tribunals.[58] The implementation of direct access tribunals has thus increased the possibility of overlapping discrimination claims against a union, before both a labour board (LRB) and an HRT.

Discrimination claims come before an LRB through a DFR claim that the union discriminated against the claimant, often in tandem with additional arguments that the union acted arbitrarily or in bad faith. Because LRB jurisdiction is broader than that of HRTs, there is some scope for parallel proceedings. Where there is overlap, however, it has typically been recognized as a zone of concurrent jurisdiction, dealt with through principles of *res judicata* and its legislative equivalents.[59] LRBs and HRTs

56 See cases above note 47.

57 In Ontario, British Columbia and Nunavut, claimants may file claims directly with human rights tribunals. In other jurisdictions, claimants must first bring a claim to a human rights commission, which usually investigates the matter and decides whether to bring the claim forward to adjudication before the tribunal. The Commissions in those jurisdictions thus act as gatekeepers.

58 Etherington, above note 5 at 51–62.

59 In Ontario the HRTO approaches multiple proceedings through s 45 of the *Human Rights Code*, which empowers the Tribunal to defer applications, and s 45.1, which permits it to dismiss applications where the underlying substance has been appro-

also recognize, however, that each has a core of expertise and often defer to each other in those areas.

In *Gungor*, the Human Rights Tribunal of Ontario (HRTO) explained the differences in jurisdiction and role between LRBs and HRTs. LRBs have "direct and immediate jurisdiction" to assess the adequacy of a union's representation regarding member's potential grievances, including discrimination grievances.[60] LRBs rule only on the process of union conduct and decision-making as regards particular grievances, and can order that grievances be taken to arbitration for conclusive analysis of their merits. But they do not rule on the issue of whether union conduct contravened the human rights code. By contrast, HRTs are capable of dealing directly with underlying human rights code-related issues raised by both the conduct of the employer, and by the conduct of the union in providing or failing to provide representation.[61]

The Saskatchewan LRB has adopted similar descriptions of its jurisdiction in comparison with the Saskatchewan Human Rights Commission and Tribunal.[62] In *Metz* the Board identified questions such as whether the employer's efforts to accommodate the grievor, and whether the settlement of a grievance complied with the human rights code as matters within the primary jurisdiction of the Human Rights Commission. The Board retained jurisdiction, however, over the procedural issues relating to the quality of the union's representation in dealing with the accommodation issues.[63]

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priately dealt with by another proceeding. See Jo-Anne Pickel, "Statutory Tribunals and the Challenges of Managing Parallel Claims," Chapter 6, this volume. The Tribunal considers DFR proceedings, and the settlement of DFR claims, to be "another proceeding" for the purposes of s 45.1. *See Human Rights Code,* RSO 1990, c H 19, s 45.1; *Dunn v Sault Ste Marie (City)*, 2008 HRTO 149 (CanLII).

60 *Gungor,* above note 46 at para 53.

61 *Ibid* at paras 54–55.

62 Although there are numerous DFR cases that refer to parallel human rights claims by the employee, there are only a few in which the human rights claim is still under way or has been completed by the time of the DFR hearing, and thus very few in which the Board needs to undertake a *res judicata* and/or jurisdictional analysis. *See e.g.*, *O'Flaherty v Vancouver Community College Faculty Association*, [2011] BCLRBD No 7, [2011] BCWLD 2372; *DM (Re),* [2006] SLRBD No 30, 130 CLRBR (2d) 132 [*DM*]; *Metz (Re),* [2003] SLRBD No 5 [*Metz*].

63 *Metz, ibid* at paras 38–63 The Board followed a similar process in *DM, ibid*, but deferred both the substantive and procedural issues to the Tribunal, on the basis that an evaluation of the union's processes required a determination as to whether the employee suffered from a disability and the nature of that disability, which the

Employees may, of course, opt to by-pass the LRB altogether and bring a claim regarding discrimination by their union solely to the HRT. There are two types of human rights claims that can be made against unions. The first is that the union discriminated against an employee "in employment" (in Ontario, a violation of section 5 of the *Code*), or "in membership" (in Ontario, a violation of section 6). In *Gungor* the HRTO explained that in claims involving union representation, a union can be found to have violated section 5 only if the impugned conduct falls within the two scenarios outlined in *Renaud*.[64] In other words, unless a union has participated in the creation of a discriminatory term in a collective agreement, or has failed to accommodate by impeding an employer's legitimate accommodation efforts, its conduct is not governed by section 5. However, claims that the union has represented a member in a discriminatory fashion may constitute a violation of section 6, which prohibits discrimination in respect of membership in a trade union.

The HRTO has been very clear, however, that mere failure to bring forward a grievance is not in itself sufficient to find a violation of the *Code*, even where the matter at issue is an allegation of discrimination. To make out a prima facie case of discrimination, the employee must demonstrate that the union's decision not to act was at least in part based on a prohibited ground of discrimination. In *Traversy* the HRTO put it this way: "[A] claim that the union violates the *Code* must be based on an assertion of differential treatment, and not simply a failure to act. The failure or refusal to take forward a human rights issue such as accommodation of a disability in the workplace is not, in and of itself, a breach of the *Code*. . . .There must be a claim, and a factual foundation for the claim, that the failure to act was based on discriminatory factors."[65]

Commission was better suited to provide. In *DM* the Board observed that since the employee's complaints were deferred rather than dismissed, the employee could return to the Board if any of the DFR issues were not addressed by the Commission (but noted that it may be bound by the Commission's findings if this occurred). In *Mallet,* above note 47, the CIRB similarly deferred a complaint to the Canadian Human Rights Commission, but re-opened it after the Commission had closed the file because the applicant did not return calls.

64 *Traversy v Mississauga Professional Firefighters' Association*, 2009 HRTO 996 (CanLII) [*Traversy*]. *See also Baylet v Universal Workers Union*, 2009 HRTO 700 (CanLII); *Gungor,* above note 46; *Holowka v Ontario Nurses Association*, 2010 HRTO 2171 (CanLII); *Crosby v United Food and Commercial Workers Canada,* 2012 HRTO 1158 (CanLII).

65 *Traversy*, *ibid* at para 33.

In *Gungor* the Tribunal was urged to adopt the standards for union conduct outlined by the CIRB in *Bingley*. The HRTO emphatically declined to do so. Vice-Chair Mark Hart explained that *Bingley* concerned the nature of a union's representation, not the validity of the underlying discrimination grievance sought by the employee. Vice-Chair Hart went further to expressly distance the HRTO from the comments made in *Bingley* which suggested that unions may be liable under human rights codes simply for failure to challenge employer discrimination.[66] In his view, the decision of the Supreme Court of Canada in *Renaud* clearly limited a union's duty to accommodate to situations in which it had participated in the creation of a discriminatory workplace rule or term of the collective agreement, or impeded the implementation of a reasonable accommodation; the Court did *not* hold that unions could be held liable for failing to take steps to address discrimination in which they did not participate in one of these ways.

Thus preliminary examination of the caselaw suggests that employees are no more successful before HRTs than they are before LRBs in arguing that their union has discriminated against them. The cases heard by HRTs are usually simply claims of unfairness in union decision-making, and do not identify a prohibited ground of decision-making. Accordingly, they are usually dismissed as being outside the Tribunal's jurisdiction.

C. FURTHER EMPIRICAL RESEARCH IS NEEDED

The previous analysis barely scratches the surface of the questions that arise in considering unions' representational responsibility for human rights in the workplace. Although legal principles regarding the DFR (except as regards disability) and unions' direct liability for discrimination do not appear to have changed significantly since *Weber* and *Parry Sound*, there is the general sense that unions have become increasingly sensitized to their human rights obligations over the last few decades. How unions approach their representational responsibilities regarding workplace discrimination, and whether their behaviour has changed since *Weber* and *Parry Sound,* are questions that cannot be answered except by a series of empirical inquiries which I outline in more detail below.

66 *Gungor*, above note 46.

1) The Effects of Concurrency

a) Finality

There are two general justifications for the union veto. The first arises from the union's position as exclusive bargaining representative. The veto allows the union control over which issues to negotiate and which issues to grieve, giving the union authority to make final decisions in the interest of the collective. It also provides the employer with a single party capable of making settlements over all workplace disputes, thus allowing the parties to circumscribe the scope of, and bring final resolution to their differences. One question that therefore arises under a concurrency model is whether, in practice, the concept of finality has become effectively illusory.

Where multiple tribunals have concurrent jurisdiction, courts must balance values of finality and fairness. Conflicts between these values are typically addressed through the doctrines of *res judicata* and issue estoppel, and/or their statutory counter-parts. [67] The caselaw reveals numerous situations in which a union has brought forward but then settled a member's human rights grievance with the employer. The member then brings both a DFR claim against the union to an LRB, and a human rights claim against the employer, the union, or both, to an HRT. In other cases, the union carries the grievance to arbitration, but the affected employee nonetheless brings a simultaneous DFR claim against the union, and a human rights claim against both the union and the employer, on the basis of the same or related issues.[68] In many DFR cases the employer is considered an interested party, and may make submissions. Similarly, unions or employers are often invited to make submissions as intervenors in claims at the HRTO in which they have not been named as respondents. Where a grievance or DFR case is ongoing, the HRTO may defer the application until the other proceeding is concluded, and vice versa. However, the existence of concurrent jurisdiction among these tribunals means that the three parties — the employee, the union and the employer — are forced to deal with a number of different decision-makers over the same series of issues.

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67 *See* sources above note 18.

68 *See e.g.*, *Ontario Public Service Employees Union v Ontario (Ministry of Community Safety and Correctional Services) (Therrien Grievance)* (2008), 173 LAC (4th) 193 (Arbitrator: Lynk).

Even though issue estoppel and *res judicata* principles act to curb the full re-litigation of a claim before a second decision-maker, all three parties are often required to make argument in a number of fora. In this situation, is finality in decision-making still effective? Does it therefore continue to be a strong justification for the union veto over the filing and processing of grievances? Do unions benefit, or are they harmed by the pressures put on them by the union veto in the context of concurrency? Would unions instead benefit from simply allowing individual employees to bring forward certain types of grievances to arbitration at their own cost, as Adell advocated, and let an arbitrator resolve them as between the employee and the employer? As discussed, employees can often proceed directly to human rights decision-makers where the union refuses to take forward their discrimination grievance.[69] However, in doing so, they may forego other collective bargaining entitlements. Examining the parties' experiences in the federal public sector may be instructive here, as the *Public Sector Labour Relations Act* currently permits employees to bring certain types of grievances forward to arbitration without their union's assistance.[70] A preliminary review suggests that cases brought forward by individuals without the support of the union are rarely successful.[71] But the success rate may ultimately not be the sole criteria to assess. Individual employees may also derive intangible benefits from being given the agency to act on their own behalf where the union chooses not to do so. DFR and human rights claims against the union might thereby be reduced, with a consequent improvement in feelings of satisfaction with the union's representation.

Further empirical research is required in order to determine whether the potential for harm in depriving unions of control, and introducing further volatility into relationships with the employer, outweighs the po-

69 This is true in most provinces, although Quebec is an exception. *See* Renée-Claude Drouin, "Some Unique Features of *Weber*'s Application in Quebec: The Treatment of Statutory Labour Rights and Human Rights Claims," Chapter 9, this volume.

70 *See Public Sector Labour Relations Act*, SC 2003, c 22, s 2, s 209 [*PSLRA*].

71 Actual tabulation is somewhat difficult because the decisions are not always clear as to whether the union declined to support the grievance, or whether the employee was not unionized at all. The *PSLRA* permits non-unionized workers access to the arbitration process under ss 209(b)–(d). In the federal public sector there is a standing tribunal that adjudicates grievances, and employees are therefore not required to pay half of the arbitrator's fee. In the private sector, a requirement to contribute to arbitrators' fees would almost certainly be a significant deterrent to individual employees proceeding without union support.

tential benefits achieved by allowing individuals to bring forward grievances on their own. Assessing the potential of such a reform would require a qualitative study of union, employer and employee experiences to assess whether and to what extent finality in decision-making has been weakened by concurrency, what impact any potential weakening has on the parties' relationships, what benefits might flow to individual employees, and what effects direct access to arbitration for human rights grievances might have on the institution of arbitration, and those involved in it.

b) Union Choices Regarding Adjudication Fora

Decisions in human rights cases brought before HRTs by unionized employees against employers sometimes imply that unions have been involved at least in a background capacity. Sometimes the union brings the claim itself. In other cases it acts as an intervenor on questions related to the impact of the decision on the rest of the bargaining unit. Union activity may also be visible in cases where, for example, there is an attempt to split a claim, where the union brings a grievance to arbitration which does not raise a human rights issue, and the worker then brings a separate human rights claim to the Tribunal. (At least in Ontario, such strategies have not been successful.[72]) But in other cases the union's role is less clear, because the decision does not address whether the employee is proceeding to the Tribunal against the union's wishes, or with its tacit and/or financial support.

Another topic for study is therefore the question of when and why unions might suggest that a member forego arbitration and instead proceed directly to the Tribunal. On what basis would a union decide to take a claim on a member's behalf to the Tribunal? Does it do so primarily in regards to systemic discrimination claims? Do unions simply act as a facilitating resource? Or do they pay for counsel to represent employees before the Tribunal? If so, when and how often do they do so? Finally, is there a difference in the number of claims brought against unions to the HRTs in direct access-model provinces, as compared to those where commissions play a gatekeeping function?

72 *Paterno v Salvation Army*, 2011 HRTO 2298 (CanLII). *See also* Shilton, above note 6 at 236.

2) The DFR

As described above, the predicted heightening of the DFR standard post-*Weber* has occurred only in regard to disability discrimination claims, and only in some provinces. But questions still remain. Are there more DFR claims now than prior to *Weber*? And if so, is any causal relationship discernible between expanded arbitral jurisdiction and a rise in DFR claims? Even if the legal standards by which union decision-making are judged have not greatly changed post-*Weber* and *Parry Sound,* have unions changed the ways in which they make decisions about whether to bring discrimination grievances? Do they, in fact, treat discrimination claims as critical job interests, and subject them to a more searching analysis than in other types of claims? Have unions placed a higher standard on themselves as regards their representational obligations for members' human rights issues over the years? If they do so now, did they also do so prior to *Weber* and *Parry Sound*? What factors do they consider? And if they do, how does this affect their ability to balance the individual rights of members and the collective interests of the bargaining unit?

3) Unions' Obligations in Intra-member Discrimination Scenarios

Finally, how are unions dealing with their representational responsibilities where the discrimination alleged arises between and among union members? What do unions do, and what should they do, when one member accuses another of sexual harassment, or racism? These problems have been under-studied, but pose grave difficulties for unions who are obliged to represent members with directly conflicting individual interests,[73] and sharply highlight the difficulties unions face in determining what is in the collective interest when significant individual rights issues are involved.

Here the issue is not the union veto per se; both the "accuser" and the "accused" may have access to a decision-making forum. The issue is the nature of the union's representational obligations during the process of investigation and any subsequent adjudication. In most cases the accuser will bring a complaint of discrimination by another employee to her employer (although she may also seek the union's aid in convincing the

73 Lori Park has written the only study I have located on this issue. *See* Lori L Park, "Fair Representation and Conflict of Interest: Sexual Harassment Complaints Between Co-Workers" (1997) 6 *Dalhousie Journal of Legal Studies* 121.

employer to take appropriate action). Because it is the employer's legal responsibility to provide a discrimination-free workplace, the employer should investigate, and may then take disciplinary action against the accused employee. If disciplinary action is taken, the union must then determine how to apportion its representational duties to both the accuser and accused. If no disciplinary action is taken, it must then determine whether it will launch a human rights grievance on behalf of the accuser, and how it will represent the accused in that scenario.

Practices seem to vary widely among unions and within collective agreements. Some unions have processes in place to appoint a representative for each employee, with a firewall between the representatives to ensure confidentiality. In some instances, unions will pay for one party to secure independent counsel, while directly representing the other. Other unions have negotiated for the creation of joint union-management investigation processes, in which each party appoints an external representative to investigate the allegations. In some situations, however, the union will represent only the disciplined member, on the assumption that the accuser's interests are aligned with the employer's. This last approach has serious pitfalls, since the employer's interest is ultimately to avoid liability. Unless specific policies or contract terms so provide, the employer is not obliged to keep employees informed of more than the very broad outlines of the progress of the complaint. If the union does not provide representational services, the employee who has lodged the complaint will have no mechanism to contest the process of the investigation, and will be beholden solely to the employer for information about who is appointed to investigate, who is contacted for information, what material has been provided to the accused, etc. — all information the employer may not wish to share. She may find therefore find herself effectively in the dark, as a process unfolds that directly affects her. In addition, given that discrimination claims are usually brought by members with lesser socioeconomic power — women, racialized workers, sexual minority employees, etc. — the union may be perceived as disinterested in the experiences of its more vulnerable members, which may in turn give rise to serious morale issues within the bargaining unit.

Very little research has been done investigating union practices in intra-member discrimination claims, and these practices are rarely visible in the caselaw. Given the potential difficulties in such cases, however, further investigation of unions' experiences with different models would

be highly instructive in determining what practices are currently used, and what "best practices" should be promoted and developed.

CONCLUDING THOUGHTS

This essay has raised questions for further study of the ways in which unions undertake their representational obligations in regards to human rights disputes in the workplace since *Weber* was issued. As the preceding discussion suggests, the relevant caselaw is not greatly instructive. At a general level, it arguably establishes a higher standard for applying the DFR in regards to disability discrimination, but not beyond. And the human rights tribunals have remained faithful to the limited scope of union liability elaborated in *Renaud*.

The reported decisions of LRBs and HRTs suggest little reason for concern that unions are not doing their job in connection with enforcement of employee human rights. Most claims filed against unions appear unmeritorious. Their facts usually reflect employees who are frustrated and unhappy with all parties in the workplace, but do not usually reveal any inappropriate action (or inaction) by the union. In these cases, unions appear to take seriously their obligations to investigate and assess the merits of a grievance, and its effects on the collective. But we know little about the underlying reasons why the caselaw reflects this picture. It may simply be that unions have, by and large, internalized and expanded their human rights obligations and are properly representing their members as regards workplace discrimination issues. Or it may be that where a union has acted arbitrarily or discriminatorily in refusing to bring forward a discrimination grievance, the case settles prior to adjudication, in either forum. Finally, it may also be that unionized workers who experience inappropriate recalcitrance by their unions in regards to a discrimination grievance are too powerless or too disillusioned to bring additional claims.

I suspect all three scenarios have some validity. Most unions are cognizant of the weight of their obligations in regards to important individual rights held by their members, and have been so at least since *Weber*, if not before. Most unions try to balance individual human rights interests against the needs of the collective. When meritorious claims arise, it is likely that the parties often settle prior to adjudication, wheth-

er the claims are framed as DFR claims or human rights claims. But there are also likely to be some workplaces that continue to be characterized by a culture of systemic discrimination. We simply do not know from the caselaw how well employees in those workplaces have been served by expanded arbitral jurisdiction.

It remains to be assessed, however, whether concurrent jurisdiction among arbitrators, LRBs and HRTs is the answer. If parallel cases are permitted in multiple forums on essentially the same issue, we need further empirical study on whether finality continues to have meaning, whether it continues to have value for workplace parties, and whether it justifies the union veto. Thus a host of questions remain to be answered to discover whether and to what extent *Weber* and *Parry Sound* have had real impact on unions' approaches to their representational obligations regarding workplace discrimination. If, as the Supreme Court of Canada has noted, human rights in the workplace are "everybody's business," there is still much we do not know about the effects of *Weber* and *Parry Sound* on the ways in which unions are managing their part of that business.[74]

74 *Renaud,* above note 25 at para 44. *See also* Shilton, above note 6 for an analysis of *Renaud* and its impact on unions.