HUMAN RIGHTS TRIBUNAL OF ONTARIO

BETWEEN:

John Hazel

Applicant

-and-

Ainsworth Engineered Corp.; Ainsworth Lumber Co. Ltd.; Robin Dennis; Mark Alderson; Jack Beck; Communications, Energy and Paperworkers Union of Canada; Communications, Energy and Paperworkers Union of Canada, Local 324; George Smith; René Lindquist; Denis Ellickson; CaleyWray Labour and Employment Lawyers and William Kaplan

Respondents

INTERIM DECISION

Adjudicator:	Michael Gottheil
Date:	December 15, 2009
File Number:	2009-01701-I
Citation:	2009 HRTO 2180
Indexed as:	**Hazel v. Ainsworth Engineered**

APPEARANCES

John Hazel, Applicant	Theresa Hazel and Tony Morelli, Representatives
Ainsworth Engineered Corp., Ainsworth Lumber Co. Ltd., Robin Dennis, Mark Alderson and Jack Beck, Respondents	Daniel Shields, Counsel
Communications, Energy and Paperworkers Union of Canada; Communications, Energy and Paperworkers Union of Canada, Local 324; George Smith; René Lindquist; Denis Ellickson; and CaleyWray Labour and Employment Lawyers, Respondents	James Nyman, Counsel
William Kaplan, Respondent	David Moore, Counsel

INTRODUCTION

[1] This is an Application filed under section 34 of Part IV of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"), alleging discrimination in employment, contracts and membership in a vocational association on the ground of disability. The Application also alleges reprisal. The Application was filed March 13, 2009.

[2] The applicant claims that he was wrongly denied the opportunity to return to work after a disability-related absence and ultimately was terminated from his employment. He alleges his employer harassed him and treated him differently, in a negative way, because of his disability. The applicant alleges that his union, and its counsel, failed to properly represent his interests as an employee with a disability. Finally, he alleges that the Arbitrator appointed to hear his return to work grievance conducted a mediation and settled the grievance in a way that violated his human rights. As a remedy, the applicant seeks to be permitted to return to work with no loss of pay, benefits and seniority. He also asks that the Arbitrator and the other respondents be reprimanded and required to take training in human rights.

[3] The respondents have all filed Responses and deny they have violated the *Code*. They have also each made formal Requests to have the Application dismissed on a number of grounds. The Arbitrator argues his actions, as alleged by the applicant, do not fall within the scope of the *Code*, and a labour arbitrator, acting as a mediator, is protected by judicial or adjudicative immunity.

[4] Amongst the various Requests made by the other respondents, they all argue that the subject matter of this Application has been dealt with in two other proceedings, both of which resulted in settlements of the applicant's claims. They argue the applicant is simply attempting to re-argue his claims because, in retrospect, he is not happy with the results in the previous proceedings. They allege this amounts to an abuse of process. In addition, they argue that all or parts of the allegations in the Application are untimely. In the alternative, they argue the Application should be deferred pending the

outcome of the applicant's grievance.

[5] The Tribunal held a hearing in Thunder Bay on August 17, 2009, to hear a number of the respondents' Requests. This Interim Decision addresses the following issues:

> a. whether the Application should be dismissed as against the employer and its managers because the substance of the Application has been appropriately dealt with in another proceeding, is untimely, or is an abuse of process and, in the alternative, whether the Application should be deferred pending the resolution of the grievance.
>
> b. whether the Application should be dismissed as against the union and its representatives because, the substance of the Application has been appropriately dealt with in another proceeding, is untimely, or is an abuse of process;
>
> c. whether the Application should be dismissed as against the union, its representatives and its counsel as there is no basis on the facts of this case for finding that the union, its representatives and its counsel violated the *Code*;
>
> d. whether the Application should be dismissed against the arbitrator because it is outside the Tribunal's jurisdiction and/or because the arbitrator is protected by judicial or adjudicative immunity.

[6] At the hearing, counsel for the union pointed out that the respondent Local 324-99 was not a legal entity, but rather an administrative unit within Local 324. On agreement of all parties, Local 324-99 is removed as a respondent and the style of cause is amended.

[7] I make one final introductory note: The Ontario Labour Management Arbitrators Association ("the OLMAA" or "the Association") sought to intervene in this proceeding in order to make submissions in support of the respondent, William Kaplan (the "Arbitrator" or "Arbitrator Kaplan"). The Association's position and submissions were the same as Arbitrator Kaplan's submissions, and both were represented by Mr. Moore. The parties did not spend time addressing the issue of intervention at the hearing. As the positions of Arbitrator Kaplan and the Association are identical, and in view of my findings below, I have not decided the request to intervene.

BACKGROUND

[8] The applicant, John Hazel, is an individual who has been diagnosed with bipolar disorder. Like many individuals in our society with this illness, the applicant has faced great personal challenges in dealing with both the fact of the diagnosis, and the symptoms of the illness. He has also experienced the difficulty of dealing with the negative and sometimes uninformed perceptions and reactions of others to persons living with mental illness.

[9] Since January 1997, the applicant has worked as a machinist for the respondents Ainsworth Engineered Corp. and Ainsworth Lumber Co. Ltd. ("Ainsworth"). Ainsworth operates a wood board manufacturing plant in northwestern Ontario. The personal respondent Mark Alderson is site manager for Ainsworth, Jack Beck is the manager of human resources, and Robin Dennis works in the human resources department. These respondents are sometimes referred to collectively as "the employer."

[10] The applicant is a member of a bargaining unit of employees represented by the Communications, Energy and Paperworkers Union of Canada ("CEP"), Local 324 ("Local 324"). The CEP is the parent union of Local 324. René Lindquist is a national representative of the CEP and is responsible for servicing Local 324. George Smith is the president of Local 324. Dennis Ellickson is a partner in the law firm of CaleyWray Labour and Employment Lawyers, and was retained by Local 324 to handle the applicant's return to work grievance. These respondents are sometimes referred to collectively as the "union respondents."

[11] Local 324 and Ainsworth are parties to a collective agreement covering the terms and conditions of employment of certain non-managerial Ainsworth employees, including the applicant.

[12] In February 2007, the applicant took a disability leave for treatment of his illness. The leave was triggered by a serious incident at work where the applicant exhibited

extremely concerning and disruptive behaviour. After the incident, the applicant immediately apologized to Ainsworth. In his February 4, 2007 letter to Ainsworth, the applicant wrote that "I realize this is unacceptable behaviour and I don't know why I behave this way", and that "it has become obvious by my behaviour in the workplace and elsewhere that further treatment is needed." He requested a leave to pursue in-patient treatment. Ainsworth supported his leave request and his claim for disability benefits.

[13] During the spring of 2007, the applicant did pursue treatment. In the early summer of 2007, on the recommendation of his treating physicians, he requested a return to work. He submitted two medical notes. One was a form letter from a clinic in Duluth, Minnesota. The physician completing the form had marked a checkbox that said: "this is to certify that the above-mentioned individual is under my care and is now released to return to work without restrictions on 6/11/07." The other note, dated July 4, 2007, was from Dr. Zahlun, the applicant's treating psychiatrist in Kenora, and was addressed to Mr. Alderson. The note, in its entirety, read:

> It is my opinion at this time that Mr. Hazel can return to his previous employment routine with no restrictions. I believe that Mr. Hazel will be able to conduct himself properly and he is responsible for his own behaviour.

[14] Ainsworth was not satisfied with the two notes, and required the applicant to provide additional medical confirmation of his fitness to return to work. Ainsworth sent a letter dated July 18, 2007 to Dr. Zahlun seeking a more fulsome report. It asked whether there were:

> ... any medical contraindications which prevent or preclude John from returning to work on a regular basis safely without significantly aggravating his condition, delaying the healing process, or being a safety risk to himself or in particular other employees.
>
> If there are any medical contraindications, what would these restrictions be, and what kind of modifications would be necessary to John's job, in order for him to safely return to work.
>
> ...

> Ainsworth is prepared to support John in his treatment but we will need medical assurance that the type of behaviour John exhibited on February 1, 2007 will not be repeated. We are certainly concerned for John's well being but have an obligation to ensure that the work environment and safety of any other employees at Ainsworth is not adversely affected.

[15] Local 324 attempted to have Ainsworth permit the applicant to return to work, but was unable to secure an agreement. As a result, on August 1, 2007, Local 324 filed a grievance alleging the applicant was unjustly denied the right to return to work.

[16] Dr. Zahlun wrote Ainsworth on September 14, 2007. In the letter, Dr. Zahlun confirmed his previous opinion that the applicant was fit to return to work without restrictions. In response to Ainsworth's letter of July 18, 2007, he stated:

> I do understand the concerns that are raised by the company and the dispute as a result. I myself am not prepared to argue on his behaviour about the specific concern that is raised in this letter. I would suggest however that in circumstances as such, that a referral for an independent medical evaluation by a psychiatrist or a neuropsychological [sic] is most reasonable to pursue. The unbiased opinion of the independent medical evaluator may ease the concern and address the specific questions you have raised in order to consider his reemployment.

[17] The August 1, 2007 grievance was scheduled for hearing before Arbitrator Kaplan on December 14, 2007. At the hearing, the parties entered into settlement discussions facilitated by the Arbitrator. The parties reached a settlement which provided that the applicant would attend an independent medical evaluation ("IME"), the cost of which would be borne jointly by Ainsworth and Local 324. In addition, the claim for lost wages was abandoned, but it was agreed that Ainsworth would support the applicant's claim for disability benefits. Finally, the arbitration was adjourned, and the Arbitrator remained seized of the grievance. The union, the employer, and the applicant all signed the Memorandum of Agreement.

[18] The IME was scheduled for February 14, 2008. Prior to this date, the applicant had been in contact with Local 324 and Mr. Ellickson to express concerns with the settlement. The applicant felt the settlement was unfair, and wanted it rescinded. He

did not agree that he should have to undergo an IME when he had submitted two medical notes that stated he was fit to return to work without restrictions. He was upset that he was required to forfeit his claim to lost wages. He also felt it was wrong that he should collect disability benefits, when he was declared fit to return to work by his physicians.

[19] Mr. Ellickson indicated that, in his view, the settlement was an extremely favourable outcome in the circumstances. He pointed out that the wage loss claim that had been forfeited under the settlement was minimal, since the applicant had been working at a temporary job in Winnipeg for some time. Also, the settlement permitted the applicant to give up the temporary job and return home, an objective the applicant had stated was a priority for him and his family. Mr. Ellickson also indicated that it was not possible to unilaterally rescind a valid agreement.

[20] On February 13, 2008, the applicant wrote Local 324, Ainsworth and the Arbitrator explaining why he felt the settlement was unfair and "unconscionable", and that he was "railroaded and bullied" into signing the Memorandum. He stated that he would not be attending the IME on February 14, 2008 unless the Memorandum of Agreement was rescinded. He further stated that if the Memorandum of Agreement was not rescinded, he would file a Duty of Fair Representation complaint ("DFR complaint") at the Ontario Labour Relations Board ("OLRB").

[21] The applicant did not attend the IME on February 14, 2008. On March 13, 2008, he filed a DFR complaint with the OLRB. The complaint alleged that Local 324 failed to properly represent the applicant in his efforts to return to work, that the settlement reached on December 14, 2007 was unfair, and that he had been coerced by the Union and Mr. Ellickson into signing the Memorandum of Agreement.

[22] The OLRB held a settlement meeting to deal with the complaint on June 5, 2008. At the meeting, the applicant, Local 324 and Ainsworth entered into a settlement which provided:

a. Local 324 and Ainsworth would agree on a physician to conduct an IME;

b. Mr. Hazel would attend the IME;

c. Ainsworth agreed that Mr. Hazel would return to work if the IME indicated he was fit to return;

d. Ainsworth would pay Mr. Hazel the equivalent of disability benefits commencing June 5, 2008;

e. The December 14, 2007 Memorandum of Agreement remained in effect, except as modified by the June 5, 2008 settlement.

[23] The applicant does not challenge the voluntariness of the June 5, 2008 settlement agreement. He does not allege that he was coerced, or that he entered into the agreement under duress.

[24] Following the settlement of the DFR complaint, Ainsworth and Local 324 agreed that Dr. Yaren, a psychiatrist in Winnipeg, would conduct the IME. The arrangements for the IME appointment were made by Ainsworth in consultation with the applicant. The union and its counsel were not involved in the scheduling, and as a result, Local 324 and its counsel were not aware of the precise date of the IME. The IME was originally scheduled for July 30, 2008, but was rescheduled at the applicant's request for August 1, 2008.

[25] On July 21, 2008, counsel for Ainsworth sent a fax to Mr. Ellickson. The fax cover sheet referred to an enclosed letter from Mr. Alderson addressed to Dr. Yaren. The enclosure was not attached to the fax cover sheet. On July 25, 2008 counsel for Ainsworth re-sent the fax and enclosed Mr. Alderson's letter to Dr. Yaren.

[26] Mr. Alderson's letter purported to assist Dr. Yaren in his assessment. The letter began with the statement that "I wanted to write this letter to help ensure my personal concerns about Mr. Hazel are expressed to you." The letter then goes on to provide information which is highly subjective and potentially inflammatory.

[27] The applicant attended the IME on August 1, 2008. After some discussion with Dr. Yaren, including being told that Mr. Alderson had sent a letter to Dr. Yaren, he refused to sign the consent to release personal medical information. As a result, the IME could not proceed.

[28] Ms. Hazel contacted Mr. Ellickson to explain what had occurred at the IME. In a letter dated August 5, 2008, she raised concerns as to why Ainsworth had sent the letter to Dr. Yaren, and why the union had permitted Mr. Alderson to do so. It criticised the union for its "inaction."

[29] On the same date, Mr. Ellickson wrote the applicant on behalf of Local 324 indicating that Mr. Alderson's letter had only come to his attention the previous week, and he (Mr. Ellickson) had sought instructions from Local 324. He indicated that he shared many of the applicant's concerns about the letter. Mr. Ellickson also wrote counsel for Ainsworth, objecting to Mr. Alderson's letter, and indicating the union had strong concerns that the letter had the potential of creating a bias in Dr. Yaren, who was supposed to be providing an objective evaluation of the applicant's fitness to return to work.

[30] On August 28, 2008, Ainsworth terminated the applicant's employment. In a letter dated September 14, 2008, Local 324 requested the Arbitrator reconvene the hearing into the grievance that had been adjourned December 14, 2007. Local 324 took the position that by sending the Alderson letter to Dr. Yaren, and in terminating the applicant's employment, Ainsworth had breached the terms of the Memorandum of Agreement.

[31] A hearing was scheduled by the Arbitrator for May 14, 2009. On March 13, 2009, the applicant filed this human rights Application. On April 17, 2009 Arbitrator Kaplan wrote the parties advising that, in view of the human rights Application, the May 14, 2009 hearing was adjourned, *sine die*.

[32] There is no dispute that the Arbitrator is prepared to resume the arbitration

process once this Application is resolved as against him. Local 324 states it is fully prepared to pursue the grievance and represent the applicant, once the Application is resolved against it.

DECISION AND ANALYSIS

[33] For the reasons that follow, I find that this Application should be dismissed as against Arbitrator Kaplan, Local 324, the CEP, its representatives, and Mr. Ellickson and CaleyWray. The Application against Ainsworth, Mr. Beck, Mr. Alderson and Ms. Dennis will be deferred pending the outcome of the grievance currently before the Arbitrator.

Should the Application be Dismissed as Against Ainsworth, Beck, Alderson, and Dennis? If Not, Should it be Deferred?

[34] The dispute that lies at the root of this Application is a claim against Ainsworth that the applicant was denied the opportunity to return to work following his disability-related absence. That dispute is the subject of the ongoing grievance which is before the Arbitrator. Since the grievance was filed, other events have occurred that both the applicant and Local 324 consider to be violations of the collective agreement, the interim settlement of December 14, 2007, and the *Code*. Those claims are also before the Arbitrator in the grievance arbitration process.

[35] Arbitrators appointed under a collective agreement have the authority and responsibility to interpret and apply the *Code* (See *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42 (CanLII)). The Tribunal has said that where a human rights claim alleging discrimination in employment is before a labour arbitrator in the context of an ongoing grievance, it will normally defer an Application relating to the same claim, pending the conclusion of the grievance-arbitration matter (See *Blackman v. Ontario (Community Safety and Correctional Services*, 2009 HRTO 970 (CanLII)). This approach avoids concurrent proceedings which address the same or similar claims.

[36] The respondents Ainsworth, Beck, Alderson and Dennis argue that I should not

defer this Application, but should find, under section 45.1, that the substance of the Application has been appropriately dealt with, and therefore dismiss the Application. Section 45.1 of the *Code* provides as follows:

> The Tribunal may dismiss an application, in whole or in part, in accordance with its rules if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application

[37] They claim that the December 14, 2007 settlement, which was confirmed (with modifications) by the June 5, 2008 settlement agreement, was a full and final resolution of the claims, subject only to enforcement by the Arbitrator. They argue that to permit Mr. Hazel to proceed with his claims against the employer in this Application would be to permit him to resile from two settlements. That would be an abuse of process, and contrary to the Tribunal's jurisprudence under s. 45.1.

[38] Based on the facts in this case, I cannot accept Ainsworth's position. The December 14, 2007 settlement clearly provides that the grievance is adjourned, rather than being fully and finally resolved. In addition, since the December 14, 2007 and June 5, 2008 settlements, other events have transpired, specifically Mr. Alderson's letter and the termination of the applicant's employment. I understand the concern that the applicant may be seeking to resile from the settlements, and achieve a different outcome, but that is a matter that can be addressed if and when the Application comes before the Tribunal for final determination, once Arbitrator Kaplan has dealt with the grievance.

[39] The grievance proceedings have not concluded. There is no final resolution of the claims. I cannot find, as Ainsworth argues, that the claim has been fully and finally resolved and all that remains is the implementation of the settlement agreement. As a result, I find that it is appropriate to defer the Application as against Ainsworth, Beck, Alderson and Dennis.

[40] My decision does not limit the parties from making any argument about what should happen once the grievance arbitration process is concluded. Nor does it limit

the respondents from pursuing other jurisdictional or procedural arguments such as the timeliness of the Application, or the appropriateness of naming Messrs. Beck and Alderson and Ms. Dennis as personal respondents.

Should the Application be Dismissed as Against Local 324, CEP, Lindquist, Smith, Ellickson and CaleyWray?

[41] In considering this question, it is necessary to distinguish the facts that pre-date the May 13, 2008 DFR complaint from those that occurred after.

[42] In regards to the pre-May 13, 2008 allegations, I find that part of the Application has been finally and appropriately dealt with in the DFR proceeding. The allegations that the union respondents did not properly represent the applicant and coerced him into signing the December 14, 2007 settlement were part of the DFR proceeding. Indeed, the narrative of facts (to May 13, 2008), as set out in this Application, is near-identical to the narrative of facts set out in the DFR complaint. There is nothing that is alleged in the human rights Application that was not raised the DFR complaint.

[43] The applicant entered into a settlement of the DFR complaint. He does not allege that the settlement was coerced. He accepts that it is a voluntary resolution of the claims he brought against the union and its representatives. He cannot now raise the same issues in a human rights application because he is unhappy with the settlement or wants a different outcome.

[44] In *Dunn v. Sault Ste. Marie (City)*, 2008 HRTO 149 (CanLII), the Tribunal found that a settlement of a Duty of Fair Representation complaint can form the basis of a decision to dismiss an application under section 45.1. In that case, the Tribunal noted the importance of finality in judicial and administrative proceedings. It held that absent evidence of duress or coercion, the Tribunal will not look behind a settlement entered into at the OLRB which resolves the human rights claim. An applicant cannot come before the Tribunal and ask that a previous, voluntary settlement be reopened or rescinded. Once a matter has been settled, the parties are entitled to treat the litigation (at least to that point), as having been resolved. They are bound by the agreement they

entered into, and are obliged to govern themselves in accordance with their agreement. Any allegation that the settlement has been breached should be dealt with as a breach of settlement claim at the OLRB. Parties are not entitled to start the claim a fresh in another forum. (See *Dunn* at paras. 42-46)

[45] I also find that it would be an abuse of process to permit the applicant to litigate the pre-May 13, 2008 allegations before the Tribunal. I accept the union respondents' position that in bringing this Application, the applicant is seeking to achieve a different result, and additional remedies, from what was agreed to in the June 5, 2008 settlement.

[46] In *Campbell v. Toronto District School Board,* 2008 HRTO 62 (CanLII), the Tribunal discussed the principle of abuse of process, in the context of an attempt to relitgate a claim that had been determined in another forum. At paragraphs 36 – 38 the Tribunal explained:

> [Abuse of process] can also apply to an attempt to re-litigate a claim, as described by the Supreme Court of Canada in *CUPE*:
>
> > ... Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (para.37).
>
> The Court went on to state that the "policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel", referring to the following excerpt from a legal text:
>
> > The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice. [Donald J. Lange, *The Doctrine of Res*

> *Judicata in Canada*, Markham, Ontario: Butterworths, 2000 (at pp. 347-48), cited in *CUPE* at para.38].
>
> The Supreme Court emphasized that the focus of the abuse of process doctrine is less on the private interests of the parties, and more on the integrity of the adjudicative process. Therefore, the motive of the party seeking to re-litigate an issue is not a decisive factor in the application of the doctrine (see *CUPE*, paras. 43-46). This point is worth noting here. There may be various reasons why an individual may seek to conduct litigation of the same or similar issues in different forums, or to challenge a prior adjudicative finding through another proceeding. In the case before me, it is apparent that the complainant's mother is deeply concerned for her son's education and life opportunities. Presented with the challenges of her son's disability, it is perhaps no surprise that she would seek relief wherever she may find an opportunity. To call her Endeavour an "abuse of process" is not to conclude that she has acted oppressively or abusively, or that she is driven by malice or bad faith. As I have indicated, abuse of process is a legal doctrine whose focus is the integrity and coherence of the adjudicative process.

[47] While I conclude that it would be an abuse of process to permit the applicant to litigate the pre-May 13, 2008 allegations, I find the final portion of the excerpt from *Campbell* is applicable in this case. I do not impugn bad faith or malice to the applicant.

[48] I find that pursuant to section 45.1, the subject of the Application as it relates to claims against the CEP, its representatives, and its counsel to May 13, 2008, the date of the DFR complaint, was appropriately dealt with in the proceedings before the OLRB. I also find it would be an abuse of process to permit those matters to be relitigated in this Application.

[49] The post-May 13, 2008 claim against Local 324, the CEP, its representatives, and its counsel is based on the allegation they were complicit in Mr. Alderson's July 21, 2008 letter to Dr. Yaren. The applicant alleges that the union conspired with Ainsworth in sending the letter, and/or did not act appropriately when the letter came to its attention. This, he says, was a reprisal for his filing the DFR complaint.

[50] At the hearing, I heard from both the union and the applicant about what happened in and around the end of July and beginning of August 2008. Based on those

submissions, and the documentary evidence, I am satisfied that the union respondents did not commit a reprisal against the applicant because of the complaint he had filed with the OLRB.

[51] I understand the applicant was taken aback and felt dismayed when he attended Dr. Yaren's office and learned Mr. Alderson had sent a letter directly to Dr. Yaren. Central to the dispute between the parties was how to ensure the medical evaluation would be fair and impartial. The parties had engaged in two separate mediation sessions, and neither settlement provided, on its face, that Mr. Alderson was entitled to send his personal concerns directly to the independent medical evaluator. I accept the applicant was extremely upset, and questioned why the union or Mr. Ellickson had not told him about the letter.

[52] But I also find that the applicant was mistaken in thinking the union had set him up, or was reprising against him. There is no basis to conclude Local 324, CEP, its representatives or Mr. Ellickson had anything to do with the drafting or sending of Mr. Alderson's letter. Moreover, the union was not involved with the scheduling of the IME. Neither the union nor Mr. Ellickson was aware when the IME was to occur. There is no basis to find that the union respondents withheld information about the letter. Finally, Mr. Ellickson acted promptly to address the concerns about the Alderson letter. The union wrote Ainsworth objecting to the letter, it claimed, and claims the letter is a violation of the December 14, 2007 settlement, and has actively sought to have the claim brought back to arbitration. There is no foundation for the allegation that the CEP, Local 324, its representatives or its counsel discriminated against the applicant because of his disability or engaged in a reprisal.

[53] Finally, the applicant alleges CEP, Local 324, its representatives and Mr. Ellickson violated the *Code* because they failed to "protect" his human rights. In this regard, the applicant claims the union respondents violated the *Code* because they did not achieve an outcome in the grievance, or attempt to achieve an outcome, that he felt was consistent with his human rights. I cannot accept this assertion.

[54] Ainsworth refused to permit the applicant to return to work after his disability-related leave unless he provided medical information with a level of detail satisfactory to Ainsworth. The applicant provided medical notes, but Ainsworth was not satisfied. Local 324 filed a grievance and scheduled the matter for arbitration.

[55] As is usual in arbitration, and in legal disputes generally, prior to the start of the hearing the parties had settlement discussions. Arbitrator Kaplan facilitated those discussions. The parties reached an agreement. It is noteworthy that, at least in respect of getting the applicant back to work, the settlement was what his treating physician suggested.

[56] Regardless of whether Ainsworth's conditions for permitting the applicant to return to work were, or are, contrary to the *Code* (and I make no comment on that matter), there is nothing the union did in negotiating the December 14, 2007 settlement, or in how it subsequently dealt with the applicant's employment claims, which infringed the *Code*. It was true the applicant felt the settlement is unfair, but the parties were (and continue to be) engaged in a legal dispute. The union may have an obligation to represent an employee in a human rights grievance, but is not the guarantor of the outcome. A union, its representatives and its counsel are not themselves in violation of the *Code* simply because a decision or settlement in a grievance with a human rights component does not achieve the result the employee is seeking or thinks is consistent with the *Code*. (See *Arias v. Centre for Spanish Speaking Peoples*, 2009 HRTO 1025 (CanLII))

[57] Further, I understand the applicant believes the union respondents failed to protect his human rights, and violated the *Code*, in that they did not follow his instructions throughout the ongoing litigation process. Again, on the facts of this case, I do not accept this assertion.

[58] Section 74 of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A, as amended, places a duty on a union to represent employees in a bargaining unit fairly and without discrimination. There is a considerable body of jurisprudence, both from

labour boards and the courts, that defines the union's duty. The cases establish that, for example, a union is not required to press any or all claims to arbitration. In most collective bargaining relationships a grievor does not have "carriage" of a grievance, and a union is entitled to settle a grievance even though a grievor does not agree with the settlement. A union, in making a decision, cannot act in a manner which is arbitrary, discriminatory or in bad faith. See *Canadian Merchant Services Guild v. Gagnon*, [1984] 1 S.C.R. 509; *Dunn*, *supra*, paras. 26 - 32, and the cases cited in that decision.)

[59] Section 6 of the *Code* provides that all persons are entitled to be treated equally with respect to membership in a trade union. While the *Code* is quasi-constitutional legislation, and has paramountcy over the *Labour Relations Act*, it does not supplant the entire scheme of labour relations. There is no support for the proposition that where a union is dealing with a grievance that has a human rights component, the union's discretion, and its obligation to consider its duty to other members of the bargaining unit, are ousted. Certainly, it may be that the standard of care and consideration is higher where a critical right is at play. But in my view, it is not correct, and there is no foundation in the jurisprudence, to say that an employee has ultimate authority to instruct the union and its counsel about how the grievance should be handled, failing which the union will be found to have violated the employee's rights under the *Code*. In this case the union filed and processed a grievance on the applicant's behalf. It entered into a settlement which it felt was a favourable outcome in the circumstances, and in fact, was consistent with what the applicant's physician had suggested. While it encouraged the applicant to accept the settlement, and refused his later request to argue the settlement was invalid, the union, its representatives and its counsel did not violate the *Code*.

[60] For all of the above reasons, the Application is dismissed as against CEP, Local 324, Messrs. Lindquist, Smith and Ellickson, and CaleyWray.

Liability of the Arbitrator: Adjudicative Immunity and Whether the Claim Against the Arbitrator/Mediator Falls within the Scope of the Code

[61] The applicant alleges that Arbitrator Kaplan, acting as a mediator, violated his

rights under the *Code*. He alleges that:

> The arbitrator who was appointed to mediate a resolution, prepared an agreement that was fraudulent, misrepresented and unconscionable. I believe Mr. Kaplan failed in his duty to ensure my human rights were protected.
>
> All parties used my vulnerability in order to manipulate and bully me into signing an agreement to forfeit my rights.

[62] The applicant has identified the social areas of discrimination as: employment, contracts and membership in a vocational association. None of these areas apply to Arbitrator Kaplan. In other Tribunal cases, applicants have identified the area of services when making claims against tribunals and adjudicative decision-makers. Arbitrator Kaplan did not raise any jurisdictional or technical objection because the area of services was not listed in the Application, and all parties argued the issues on the basis of that ground. I will address the claim against Arbitrator Kaplan on the basis of the social area of services.

[63] Arbitrator Kaplan makes two principal arguments that the Application should be dismissed against him. He argues that the Tribunal's jurisprudence, holding that a decision of an adjudicator does not constitute a service within the meaning of the *Code*, should apply equally to settlements reached through mediation. He also argues that labour arbitrators and mediators are protected by the principle of judicial or adjudicative immunity.

Services

[64] Section 1 of the *Code* provides:

> Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.

[65] In my view, part of the difficulty with the claim against Arbitrator Kaplan in this case, at least in respect of the allegation that he was responsible for the agreement

which the applicant feels is unfair and violates the *Code*, arises from a misunderstanding of the role of a mediator in labour arbitration. This is not meant to be critical of the applicant, as he was unfamiliar with the legal framework of grievance-arbitration.

[66] A labour arbitrator or mediator plays a neutral role in resolving disputes between parties. An arbitrator makes a decision after hearing the evidence and submissions of the parties. A mediator attempts to assist the parties in reaching an agreement.

[67] The applicant has referred to the December 14, 2007 settlement as the "Kaplan settlement" and says that the Arbitrator "prepared an agreement" that was unfair and was in violation of his human rights. While Arbitrator Kaplan facilitated the settlement discussions, and may have written up the agreement, it was not his agreement. It was the parties' agreement. A labour mediator is not personally liable under the *Code* for the terms of a settlement.

[68] In a number of cases, the Tribunal has held that the "content, reasons and result" of an adjudicator's decision does not constitute a service within the meaning of the *Code* (See: *Dann v. Wallace*, 2009 HRTO 392 (CanLII); *Lindberg v. Workplace Safety and Insurance Board*, 2009 HRTO 463 (CanLII), *Christianson v. Ontario (Information and Privacy Commissioner)*, 2009 HRTO 203 (CanLII); *Barker v. Service Employees International Union*, 2009 HRTO 1253 (CanLII), *Zaki v. Ontario (Community and Social Services*, 2009 HRTO 1595 (CanLII).) The Tribunal has explained that, where an applicant alleges an adjudicator in a proceeding did not uphold a claim that the *Code* was violated, the adjudicator has not violated the applicant's right to equal treatment with respect to services. The Tribunal has not had the opportunity to consider the issue in regards to a settlement reached following a mediation, but in my view, the same principles should apply.

[69] Mediation is a form of dispute resolution where, rather than having a third party determine the dispute, the parties attempt to reach a settlement. The mediator does not require the parties to agree to any particular term of settlement, nor does the mediator

require the parties to agree to settle the dispute. As an individual with expertise and knowledge in the subject area of the dispute, the mediator may provide information or even opinions about what might be an appropriate resolution, and what terms of settlement the parties ought to consider. The mediator may also provide an opinion to the parties about the relative strengths and weaknesses of their respective positions, so the parties may evaluate the risks of adjudicating, and make informed decisions about how to proceed. The memorandum of settlement, if one is reached, is an expression of the parties' agreement. It cannot be said that the content of the memorandum of agreement, is a "service" provided by the mediator.

[70] Further, and particularly in labour relations, the scheme of dispute resolution is not "either mediation or adjudication." Dispute resolution procedures may incorporate elements of both mediation and adjudication, and a proceeding can have the arbitrator switching roles. Section 50 of the *Labour Relations Act* provides for mediation-arbitration, which permits an arbitrator appointed by the parties to assist them in reaching a settlement, and then to adjudicate outstanding issues if no settlement is reached. Thus, the outcome in a dispute may be in part a settlement agreement between the parties, and in part a decision by the arbitrator. In neither case can an applicant claim that the person appointed to resolve the dispute has failed to provide a service without discrimination, because the applicant believes, rightly or wrongly, the outcome is contrary to the *Code*. If a party wishes to challenge an outcome because they feel it is wrong in law, they must pursue whatever rights of appeal or review that may be available.

[71] Having said this, I do accept that tribunals and courts provide services within the meaning of the *Code*. I also accept that labour arbitration is a service, though I do not find it necessary in this case to determine precisely who is responsible under the *Code* for providing any particular element of the service. A labour arbitration is established under the terms of a collective agreement to which the employer and the union are parties. It may be argued that the parties play a role in providing the service. For the purposes of this decision, I will assume the arbitrator or mediator has at least some

responsibility in providing the service, without discrimination, in accordance with the *Code*.

[72] The "service" is the dispute resolution process. Where an individual has a dispute, and pursuant to a statute or contract, that dispute may be referred to dispute resolution, the process is a service within the meaning of the *Code*. The requirement in section 1 of the *Code* is that every person should have a right of equal access to the dispute resolution process, and be able to participate in an effective, meaningful way, without discrimination and regardless of a proscribed ground.

[73] In relation to disability, the obligation placed on the service provider may include, for example, the requirement to provide an accessible built environment or a hearing or mediation facility which is physically accessible, subject to the defence of undue hardship. The right to equality in the provision of services may also mean accommodation in the way materials (including decisions) are provided, and the proceeding is conducted, so as to enable a party, counsel or witness to effectively participate in the hearing or mediation process.

[74] The right under section 1 to equal treatment in the provision of services relates to access to the decision-making or mediation process, not the outcome. An arbitrator does not discriminate on the basis of age in the provision of services under the Code because she upholds a mandatory retirement clause. A mediator does not discriminate on the basis of disability in the provision of services because a settlement provides that the grievor will attend an IME. No claim lies against Arbitrator Kaplan under section 1 on the basis that the settlement agreement is alleged to be contrary to the *Code*. A claim against an arbitrator or mediator which alleges the outcome in a decision or settlement is contrary to, or not in accordance with the *Code*, is not a claim that falls within the scope of section 1, and is not a claim over which the Tribunal has jurisdiction.

[75] The applicant has also alleged that all parties took advantage of his vulnerability, and forced him to accept an agreement to forfeit his rights. In this regard, I understand his claim to be that the mediation was conducted in a manner which did not

accommodate his disability-related needs.

[76] As discussed above in the section dealing with the claim against the union respondents, beyond the general allegation that the parties took advantage of the applicant's "vulnerability", there is nothing in the Application which sets out what his particular disability-related needs were, explains how the conduct of the mediation created a barrier to his participation because of his disability, or that he identified any accommodation needs at the mediation. While I am not determining what would be required to establish a claim of a failure to accommodate in any particular circumstance, in this case, there was nothing presented to the Arbitrator which supports a finding that he (Arbitrator Kaplan) failed to respond appropriately or to consider accommodation. From Arbitrator Kaplan's perspective, he was dealing with a grievor who was represented by experienced counsel, and who claimed he was fully fit to return to work without restrictions. There was no accommodation request raised prior to, or at the mediation. I cannot find, even accepting Arbitrator Kaplan had a duty under section 1 of the *Code*, that Arbitrator Kaplan violated the applicant's rights to equal treatment in relation to services on the ground of disability.

Immunity

[77] I also find the Application should be dismissed as against the Arbitrator based on the principle of judicial or adjudicative immunity.

[78] The principle of judicial immunity finds its origins in the English common law, in cases dating to the beginning of the 17th century. Under the principle, judges are held to be immune from any legal action brought against them personally for acts or decisions arising from the judicial proceeding. Throughout the development of the jurisprudence, courts have made clear that the rationale for the principle is not to provide judges with a special protection because of their status *per se*, but to guarantee judicial independence. It is said that if judges were concerned that they might be sued by a party in a dispute, they would not focus their minds on the relevant facts and law in the case. Rather, they might be improperly swayed in their decision-making, thinking

about which party might sue them if they decided in a particular way. Judicial immunity is necessary to protect the public's interest in a fair, impartial and independent justice system.

[79] The leading Canadian case on judicial immunity is *Morier and Boily v. Rivard* [1985] 2 S.C.R. 716. At paragraph 87, the Court, quoting from the English case of *Garnett v. Ferrand* (1827), 6 B. & C. 611, summarized the principle as follows:

> This freedom from action and question at the suit of an individual is given by the law to the Judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions they may be free in thought and independent in judgment, as all who are to administer justice ought to be.

[80] In *Taylor v. Canada (Attorney General)* [2000] 3 F.C. 298, 2000 CanLII 17120, the Federal Court of Appeal had occasion to consider the application of judicial immunity in relation to a complaint against a judge brought under the *Canadian Human Rights Act*. The question was whether the immunity prevented the Canadian Human Rights Commission from inquiring into the complaint. Mr. Justice Sexton noted that judicial immunity promotes the principle of finality of legal proceedings, as well as judicial independence (at paras. 25-29):

> Litigants turn to courts and judges to resolve difficult problems where all other means of resolving the dispute have failed. Consequently, as the United States Supreme Court held in *Bradley v. Fisher*, courts are often asked to decide cases "involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings." As that Court also noted, such litigation inevitably produces at least one losing party, who is likely to be disappointed with the result.
>
> Consider what might happen if judges could be regularly sued for decisions that stirred such disappointment. One potential consequence is that a certain end to disputes, one of the primary advantages of resolving disputes by resort to the courts, would never occur. (...)
>
> Finally, the most serious consequence of permitting judges to be sued for their decisions is that judicial independence would be severely compromised. If judges recognized that they could be brought to account for their decisions, their decisions might not be based on a dispassionate

> appreciation of the facts and law related to the dispute. Rather, they might be tempered by thoughts of which party would be more likely to bring an action if they were disappointed by the result, or by thoughts of whether a ground-breaking but just approach to a difficult legal problem might be later impugned in an action for damages against that judge, all of which would be raised by the mere threat of litigation.
>
> Accordingly, the basis for judicial immunity is rooted in the need to protect the public, not in a need to protect judges. In other words, as Lord Denning explained in *Sirros v. Moore*, judicial immunity does not exist because a "judge has any privilege to make mistakes or do wrong." Rather, he held that judges should be free from actions for damages to permit judges to perform their duty "with complete independence and free from fear."
>
> See also: *Saskatchewan (Provincial Court, Chief Justice) v. Saskatchewan (Human Rights Commission)*, 2003 SKQB 369 (CanLII) (Sask. Q.B.) and *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, per McLachlin J. at para 68.

[81] While the principle of immunity for judges is well-established in Canadian law, the question of whether this common law immunity also applies to other decision-makers, such as administrative tribunal members and arbitrators, does not appear as well-settled. The courts have recognized the fundamental importance of independence and impartiality for persons exercising adjudicative functions, and have extended certain protections, such as deliberation secrecy, to tribunals. (See *Canada (Privacy Commissioner) v. Canada (Labour Relations Board)*, [1996] 3 F.C. 609; *Agnew v. Ontario Association of Architects* (1987), 64 O.R. (2d) 8 (Div. Ct.); *Ermina v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8969 (F.C.))

[82] In both England and the United States, courts have extended judicial immunity to statutory tribunals and arbitrators, on the principle that in discharging their adjudicative functions, they are performing a similar role to that of judges, and require the same protection in order to ensure independence in decision making.

[83] In *Corey v. New York Stock Exchange* (1982), 691 F.2d 1205, the U.S. Court of Appeals for the Sixth Circuit explained the rationale for extending the principle of immunity to arbitrators:

> To the extent that Corey's complaint may be construed to allege wrongdoing by the arbitrators for which the NYSE is liable, we agree with the District Court that the NYSE, acting through its arbitrators, is immune from civil liability for the acts of the arbitrators arising out of contractually agreed upon arbitration proceedings. Our decision to extend immunity to arbitrators and the boards which sponsor arbitration finds support in the case law, the policies behind the doctrines of judicial and quasi-judicial immunity and policies unique to contractually agreed upon arbitration proceedings.
>
> The Supreme Court has long recognized that there are certain persons whose special functions require a full exemption from liability for acts committed within the scope of their duties. The rationale behind the Supreme Court decisions is that the independence necessary for principled and fearless decision- making can best be preserved by protecting these persons from bias or intimidation caused by the fear of a lawsuit arising out of the exercise of official functions within their jurisdiction. *Butz v. Economou*, 438 U.S. 478, 508-11, 57 L. Ed. 2d 895 (1978) ...
>
> The Court said that the relevant consideration in evaluating whether immunity should attach to the acts of persons in certain roles and with certain responsibilities was the "functional comparability" of their judgments to those of a judge.
>
> ...
>
> The functional comparability of the arbitrators' decision-making process and judgments to those of judges and agency hearing examiners generates the same need for independent judgment, free from the threat of lawsuits. Immunity furthers this need. As with judicial and quasi-judicial immunity, arbitral immunity is essential to protect the decision-maker from undue influence and protect the decision-making process from reprisals by dissatisfied litigants.
>
> *See also: Sutcliffe v. Thackrah*, [1974] 1 All E.R. 859 (HL).; *Campbell v. Edwards*, [1976] 1 All E.R. 785; *Palacath Ltd. v. Flanigan*, [1985] 2 All E.R. 161.

[84] In my view, the "functional comparability" analysis discussed in *Corey* is cogent and compelling. In general, there is no good reason why the immunity provided to judges, the purpose of which is to ensure independence in decision-making and finality of process, should not extend to others who exercise quasi-judicial adjudicative functions. Administrative tribunals and labour arbitrators play a critical role within the

justice system. They are called upon to determine serious disputes between parties, and adjudicate fundamental rights of citizens. Independence in thought and decision-making is no less important for a member of a quasi-judicial tribunal or an arbitrator than for a judge. Finality of the decisions (subject to rights of appeal or review) is no less important for the parties.

[85] Balanced against this important general principle is whether it is appropriate to find that arbitrators and mediators should be immune from claims under the *Code* for any decision, or action, taken within the sphere of the dispute resolution process. If it is appropriate to hold that immunity should apply, are there limits to the types of decisions that are protected? Are there circumstances where immunity is not necessary to protect the integrity of the administrative justice system?

[86] It is trite law, but bears repeating, that the purpose of human rights legislation is remedial, not punitive. One of its objects is to ensure all persons have access to services and facilities, regardless of a proscribed ground of discrimination. The *Code* aims to remove barriers to equal access. In so doing, it places responsibilities on those who provide services to take steps and institute accommodation measures, to ensure full and equal participation. If arbitration and mediation is a service within the meaning of the *Code*, and I have found that it is, one must proceed cautiously before finding there should be a broad and absolute immunity granted to arbitrators and mediators, who play an important role in that service. Immunity, in that it is an exemption to the application of the *Code*, should be given no larger an application than is necessary to protect the countervailing interest at stake, in this case, independence of decision-making.

[87] The applicant argues that immunity means that arbitrators and mediators will not be accountable and will be able to avoid responsibility for addressing issues of accessibility and the accommodation needs of parties. He says there must be a "check and balance". He argues that individuals with disabilities should be able to participate effectively in a mediation or arbitration, and make informed choices about their legal rights. I agree these are important and legally relevant issues.

[88] Mr. Moore argues that there are avenues to ensure accountability. He points out that the jurisprudence on immunity holds that parties who feel a judge or adjudicator has acted improperly in some way can appeal the decision, but may not bring an action against the decision-maker personally. He says that in the labour arbitration context, the appropriate avenue of redress is judicial review. He also argues that arbitrators are consensual appointees; an arbitrator or mediator who acts in violation of the Code risks not being re-appointed. This, he says, is a potent "check and balance."

[89] The problem with this approach is that it is not clear a grievor has any independent standing to bring a judicial review of an arbitrator's decision. In any particular case, a grievor's individual human rights interests, and the broader collective interests which may determine a union's actions, may not be aligned. There may be a variety of legally permissible reasons (at least under existing labour board jurisprudence) why a union may not wish to pursue a judicial review, notwithstanding the grievor's human rights having been violated in the hearing or mediation process.

[90] In addition, I do not think the supposed risk of not being reappointed is a satisfactory substitute for responsibility under the *Code* to provide accessible services. In my view, an economic model of enforcement is not sufficient to protect quasi-constitutional rights.

[91] There are other features of labour arbitration which warrant pause before accepting that immunity applies to all decisions and actions of arbitrators or mediators. In *Taylor, supra*, the Court acknowledged that accountability of judges was an important consideration, but noted that there were other avenues available to parties to address concerns of improper conduct.

[92] Mr. Moore advised that the OLMAA did have a Code of Conduct, but acknowledged it was voluntary. He also acknowledged that labour arbitrators were not a regulated profession, and there was no body similar to the Canadian Judicial Council which could entertain complaints, and take action where appropriate.

[93] The final distinction, I would note, between labour arbitrators and judges or tribunal adjudicators is that a labour arbitrator, in addition to adjudicating or mediating, generally performs a number of administrative tasks associated with providing the service, such as setting up hearings and sending out notices. In a tribunal or court, such functions are generally carried out by the institution, which arguably would have no claim to judicial or adjudicative immunity.

[94] Courts and other public adjudicative bodies, whether because of obligations under the *Code* or otherwise, have recognized the necessity of ensuring that their facilities and processes are accessible and barrier-free. They have engaged in a number of initiatives, such as consultations, the development and publication of accessibility and accommodation policies, and have required training for staff and adjudicators. As institutional service providers, they have taken steps to ensure that parties, counsel and witnesses can fully and effectively participate in the dispute resolution processes, regardless of disability. Applying the principle of immunity to individual adjudicators in this context does not completely negate responsibility and accountability for accessible service provisions under the *Code*.

[95] Having considered the arguments and jurisprudence, I accept that arbitrators and mediators are entitled to immunity from human rights claims, at least with respect to the exercise of their decision-making and dispute resolution functions. Regarding arbitrators, I accept that in considering evidence and submissions, and making decisions, they are exercising a quasi-judicial function comparable to that of judges, and are therefore entitled to immunity.

[96] With respect to mediators, I find that immunity extends to protect the mediator from claims arising from the exercise of his or her functions in assisting the parties in reaching a resolution of the dispute, and in facilitating the settlement discussions. I would also note that further support for immunity for labour mediators is found in section 120(2) of the *Labour Relations Act*:

> The following persons are not competent or compellable witnesses before a court or tribunal respecting any information or material furnished to or received by them while acting within the scope of their employment under this Act:
>
> (...)
>
> 2. A person appointed by the Minister under this Act or under a collective agreement to effect the settlement of a dispute or the mediation of a matter

[97] I need not determine in this case whether immunity would apply to an arbitrator or mediator in exercising administrative tasks associated with labour arbitration. Neither do I have to determine whether immunity would apply in cases where an action or statement by an arbitrator or mediator is such that it could not be properly considered part of their dispute resolution functions.

[98] The touchstone for the application of immunity is to ensure independence of the decision-making and dispute resolution process. Immunity applies to those functions that can legitimately be said to be integral to that process, and to the effective exercise of the duties of the arbitrator or mediator.

[99] In this case, the claim against the Arbitrator is two-fold. First, it is alleged that the outcome of the mediation was contrary to the *Code*. That claim is barred by immunity. Second, it is alleged that how Arbitrator Kaplan conducted the mediation violated the applicant's rights to equal service because of disability. I find that claim is also barred by immunity. The basis for the latter claim is entirely about how Arbitrator Kaplan exercised his dispute resolution functions. There is nothing alleged in relation to the Arbitrator's actions or statements which can possibly be said to fall outside the scope of his activities as a mediator engaged in the mediation process. He is protected by immunity.

[100] For the above reasons I find:

- the Application against the respondents Ainsworth, Dennis, Alderson and Beck is deferred pending the completion of the grievance arbitration.

The parties are directed to Rules 14.3 and 14.4 which set out how a request to proceed with the Application must be made following completion of the other proceeding;

- the Application is dismissed as against the respondents CEP, Local 324, Lindquist, Smith, Ellickson and CaleyWray;
- The Application is dismissed as against the respondent Kaplan.

Dated at Toronto, this 15th day of December, 2009.

Michael Gottheil
Former Chair